Observations
to the thirtieth report of the Standing Senate Committee on Legal and Constitutional Affairs
(Bill C-58)

Bill C-58, An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts[1] was introduced in the House of Commons by the then President of the Treasury Board, the Honourable Scott Brison (then Minister Brison), on 19 June 2017. The bill was referred for study to the House of Commons Standing Committee on Access to Information, Privacy and Ethics on 27 September 2017. That committee adopted 13 amendments to the bill on 6 and 8 November 2017[2] and it received third reading on 6 December 2017. Bill C-58 received first reading in the Senate on 7 December 2017. It received second reading in the Senate on 6 June 2018, before being referred that same day to the Standing Senate Committee on Legal and Constitutional Affairs (the committee).

The committee held 20 meetings on this bill (including clause-by-clause consideration) between 3 October 2018 and 11 April 2019.[3] The committee heard from a total of 38 witnesses, including the then President of the Treasury Board and Minister of Digital Government (Scott Brison), the Minister of Democratic Institutions (Minister Gould), the Minister of Justice and Attorney General of Canada (David Lametti); officials from the Treasury Board of Canada Secretariat, the Privy Council Office, the Department of Justice, and the Department of Citizenship and Immigration; the Information Commissioner of Canada, the Privacy Commissioner of Canada and their officials; the Commissioner for Federal Judicial Affairs, the Executive Director of the Canadian Judicial Council, the acting Deputy Law Clerk and Parliamentary Council of the Senate, legal experts, academics, journalists and representatives of Indigenous groups.

This report provides an overview of the key topics addressed by witnesses who appeared before the committee.

Bill C-58

Bill C-58 introduces amendments to modernize the *Access to Information Act* (ATIA).[4] Its introduction came after commitments contained in the 2015 Liberal Party of Canada election platform;[5] a special report tabled by former Information Commissioner Suzanne Legault in 2015 that included 85 recommendations for modernizing the ATIA;[6] a government consultation conducted in 2016;[7] and, a review of the ATIA by the House of Commons Standing Committee on Access to Information, Privacy and Ethics that same

1 Bill C-58, An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts, 1st Session, 42nd Parliament.

2 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Seventh Report*, 1st Session, 42nd Parliament, November 2017.

3 The committee suspended its consideration of Bill C-58 between 21 November and 5 December 2018 for its studies of Bill C-76, The Elections Modernization Act and of the subject matter of those elements contained in Division 20 of Part 4 of Bill C-86, The Budget Implementation Act, 2018, No. 2.

4 *Access to Information Act*, R.S.C., 1985, c. A-1. Treasury Board of Canada Secretariat, *Government of Canada tables the most comprehensive reform of Access to Information in a generation*, News Release, 19 June 2017.

5 Liberal Party of Canada, 2015 Platform, *Access to Information*.

6 Information Commissioner of Canada, *Striking the Right Balance for Transparency – Recommendations to modernize the Access to Information Act*, 2015.

7 The Information Commissioner of Canada and the Privacy Commissioner of Canada indicated that they were not consulted on the drafting of Bill C-58. See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018); Daniel Therrien, Privacy Commissioner of Canada (18 October 2018).

year.[8] The President of the Treasury Board, in collaboration with the Minister of Justice and the Minister of Democratic Institutions, was mandated "to enhance the openness of government, including leading a review of the Access to Information Act to ensure that Canadians have easier access to their own personal information, that the Information Commissioner is empowered to order government information to be released and that the Act applies appropriately to the Prime Minister's and Ministers' Offices, as well as administrative institutions that support Parliament and the courts."[9]

The ATIA came into force in 1983, establishing a quasi-constitutional right of access (s. 4(1))[10] for Canadian citizens, permanent residents, and individuals and corporations present in Canada to information and records under the control of federal government institutions (though not of Parliamentary entities or the courts).[11] Among other things, Bill C-58 would update the provisions in the ATIA that authorize government institutions to decline to act on a request for access to a record, including because it is vexatious or made in bad faith; it authorizes the Information Commissioner to refuse to investigate a complaint that she determines is trivial, frivolous or vexatious, or made in bad faith; it provides new powers for the Information Commissioner to, among other things, order an institution to disclose information; it clarifies the powers of the Information Commissioner and the Privacy Commissioner to examine documents containing information that is subject to solicitor–client privilege; and it creates a new Part providing for the proactive publication of certain information by the Senate, the House of Commons, parliamentary entities, ministers' offices, government institutions and institutions that support superior courts and Superior Court judges.

Access to Information

Several witnesses told the committee that improvements to the ATIA are long overdue and that the Act does not adequately address the changes brought by rapidly advancing technologies.[12] The Government of Canada presented Bill C-58 as the first significant legislative attempt to modernize the ATIA in 35 years.[13] Some witnesses recognized that Bill C-58 takes some positive steps to modernize the ATIA,[14]

8 House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Review of the Access to Information Act*, Report, 1st Session, 42nd Parliament, June 2016.

9 President of the Treasury Board of Canada Mandate Letter (November 12, 2015). See also Minister of Justice and Attorney General of Canada Mandate Letter (November 12, 2015) and Minister of Democratic Institutions Mandate Letter (February 1, 2017).

10 *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, paras. 79-80 (concurring reasons of Justice LeBel): "Access to information legislation embodies values that are fundamental to our democracy. In *Criminal Lawyers' Association*, this Court recognized that where access to government information is essential, it is protected by the right to freedom of expression under s. 2 (*b*) of the *Canadian Charter of Rights and Freedoms* as a derivative right. Statutes that protect *Charter* rights have often been found to have quasi-constitutional status".

11 See the definition of "government institution": ATIA, section 3, Schedule I.

12 See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018). See also Privacy and Access Council of Canada, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 7 November 2018 (received); Canadian Committee on World Press Freedom, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 13 November 2018 (received).

13 See the testimony of Scott Brison, President of the Treasury Board and Minister of Digital Government (3 October 2018); Karina Gould, Minister of Democratic Institutions (18 October 2018).

14 See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018); Daniel Therrien, Privacy Commissioner of Canada (18 October 2018); J. Alexis Kerr, Canadian Bar Association (24 October 2018); Philip Tunley, Canadian Journalists for Free Expression (31 October 2018); Professor Michel W. Drapeau (21 November 2018), among others.

but several noted that further legislative improvements are needed.[15] For example, several witnesses spoke about the fact that the ATIA does not provide for a duty for government institutions to document their decisions.[16] Others discussed whether there should be a fee for making an access to information request. Section 11 of the ATIA requires an application fee not exceeding $25 (currently $5, as prescribed by regulation[17]) and allows for the possibility that the head of a government institution may charge additional fees. Bill C-58 updates these provisions, while maintaining the fee provisions.[18] Several witnesses mentioned their opposition to fees as they have the potential to limit access to information.[19] It was also suggested by witnesses that there should be a specific fee waiver provision and criteria,[20] an option that is available in several provincial jurisdictions.[21]

Delays, Backlog and Resources

Several witnesses underscored the importance of addressing the excessive time it takes for a government institution to answer access to information requests. Under the ATIA, a government institution must respond within 30 days after receiving a request (s. 7), though an extension may be granted for a "reasonable period of time" (s. 9). Several witnesses criticized the fact that neither the ATIA nor the

15 See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018); Daniel Therrien, Privacy Commissioner of Canada (18 October 2018); J. Alexis Kerr, Canadian Bar Association (24 October 2018); Antoine Aylwin, Fasken Martineau DuMoulin (24 October 2018); Monique Dumont, Quebec Federation of Professional Journalists (31 October 2018); Peter Di Gangi, National Claims Research Directors; Bruce McIvor, Indigenous Bar Association; Marlene Poitras, Assembly of First Nations (1 November 2018); Michael A. Geist, University of Ottawa (21 November 2018), among others.

16 See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018); Monique Dumont, Quebec Federation of Professional Journalists (31 October 2018); Michael A. Geist, University of Ottawa; Karl Delwaide, Fasken Martineau DuMoulin (21 November 2018), among others. See also Canadian Environmental Law Association and Ecojustice Canada, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 11 January 2019 (received); Privacy and Access Council of Canada, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 7 November 2018 (received). Francis Bilodeau, Assistant Deputy Minister, Digital Policy and Services, Office of the Chief Information Officer (Treasury Board of Canada Secretariat), noted that the Treasury Board's Policy on Information Management already establishes an obligation to document decisions.

17 *Access to Information Regulations*, SOR/83-507, s. 7(1)(a).

18 See the testimony of Francis Bilodeau, Treasury Board of Canada Secretariat; Ruth Naylor, Treasury Board of Canada Secretariat (3 October 2018).

19 See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018); J. Alexis Kerr, Canadian Bar Association; Antoine Aylwin, Fasken Martineau DuMoulin (24 October 2018); Karyn Pugliese, Canadian Association of Journalists; Philip Tunley, Canadian Journalists for Free Expression (31 October 2018); Ryder Gilliland, Canadian Civil Liberties Association (1 November 2018); Michael A. Geist, University of Ottawa (21 November 2018), among others.

20 See the testimony of J. Alexis Kerr, Canadian Bar Association (24 October 2018). See also Canadian Environmental Law Association and Ecojustice Canada, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 11 January 2019 (received).

21 See the testimony of Ron Kruzeniski, Saskatchewan Information and Privacy Commissioner (6 December 2018). See for example Ontario, *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 57(4); the Quebec, *Act respecting Access to documents held by public bodies and the Protection of personal information*, C. A-2.1 provides for partial waiver of the processing fees (it does not provide for application fees); Alberta, *Freedom of Information and Protection of Privacy Act*, ss. 93(3.1) and s. 93(4)); British Columbia, *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, s. 75(5) and Newfoundland and Labrador, *Access to Information and Protection of Privacy Act, 2015*, SNL2015, c. A-1.2, s. 26.

amendments in Bill C-58 provide for maximum time limits.[22] The Information Commissioner impressed upon the committee that adequate funding as well as additional resources, better processes, training and technology will be necessary to deal with these "endemic" delays across the federal access system.[23]

The committee also reviewed the statistics on access to information for the 2017 to 2018 fiscal year.[24] During that period, 106,255 requests were received, an increase of 15.6% from the previous fiscal year. On top of this, there were 19,074 outstanding requests from the previous fiscal year that had to be handled. Of the total number, 78% were closed in 2017-2018 (compared to 82% in the previous year). This means that 27,624 requests were carried over to the 2018-2019 fiscal year. It should also be noted that ten government institutions received 85.5% of all new requests in the 2017 to 2018 fiscal year.[25]

The ATIA requires the head of every government institution to submit an annual report to Parliament on the administration of the Act (s. 72). The committee met with officials from Immigration, Refugees and Citizenship Canada (IRCC), which receives the highest volume of access to information requests (64,234 in 2017-2018, or 60.5% of all requests).[26] They explained that their access to information and privacy division has approximately 107 staff and a network of 33 liaison officers across the department. In discussing the information in their annual report and noting, in particular, their compliance rate of 71.5% in 2017-18, they explained different initiatives and efforts to improve performance and address their challenges. The committee learned that IRCC has created a task force to determine the reasons for the increasing number of requests. It will also develop an action plan to improve performance, to upgrade their computer systems, and to find ways the IRCC can provide clients the information they require before they feel the need to make access to information requests.

22 See the testimony of Antoine Aylwin, Fasken Martineau DuMoulin; Marc-André Boucher, Fasken Martineau DuMoulin (24 October 2018); Stéphane Giroux, Quebec Federation of Professional Journalists; Monique Dumont, Quebec Federation of Professional Journalists; Philip Tunley, Canadian Journalists for Free Expression (31 October 2018); Peter Di Gangi, National Claims Research Directors; Bruce McIvor, Indigenous Bar Association (1 November 2018); Professor Michel W. Drapeau (21 November 2018), among others.

23 See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018). See also Canadian Committee on World Press Freedom, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 13 November 2018 (received).

24 Treasury Board of Canada Secretariat, *Access to Information and Privacy Statistical Report for the 2017 to 2018 Fiscal Year*.

25 Immigration Refugees and Citizenship Canada (64,234, or 60.5%); Canada Border Services Agency (7,466 or 7%); Royal Canadian Mounted Police (5,203 or 4.9%); Canada Revenue Agency (2,750 or 2.6%); National defence (2,055 or 1.9%); Environment and Climate Change Canada (1,999 or 1.9%); Employment and Social Development Canada (1,942 or 1.8%); Health Canada (1,806 or 1.7%); Innovation Science and Economic Development Canada (1,700 or 1.6%); Global Affairs Canada (1,680 or 1.6%); and other institutions (15,420 or 14.5%).

26 See the testimony of Simon Cardinal Immigration, Refugees and Citizenship Canada; Michael Olsen, Immigration, Refugees and Citizenship Canada (6 December 2018).

Exemptions and New Criteria to Make and to Decline a Request for Information

According to the ATIA, government institutions may refuse to disclose any record that contains specifically listed categories of information (e.g., information obtained in confidence, in relation to federal-provincial affairs, international affairs and defence, economic interests, etc.) (ss. 13-26). Several witnesses said that government institutions overuse the exemptions provided in the ATIA to decline access to information. They emphasized that there is a need to increase transparency in how these exemptions are used and how documents are redacted.[27] A suggestion was put forward that a "public interest override" could be included in the ATIA to require the disclosure of records, even when the requested information would otherwise meet exemption or exclusion criteria.[28]

Several witnesses commented on a proposed amendment to section 6 of the ATIA, which currently provides that a request for information must provide "sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record." Bill C-58 proposes to add specific criteria that must be included with a request, including: the specific subject matter; the type of record; and the period or the date of the record. Several witnesses recommended that these three additional requirements be removed as they would create unnecessary barriers to the right of access, especially for Indigenous groups.[29] Then Minister Brison said that he had listened to these concerns and asked the committee to consider an amendment to "eliminate" these requirements.[30]

The committee also discussed concerns with witnesses about proposed new section 6.1 of the ATIA, which would, under specified circumstances, permit the head of a government institution to decline to act on an access request with the written approval of the Information Commissioner.[31] In brief, the circumstances allowing this would be that: (a) the person has already been given access to an identical record or may reasonably be accessed by other means; (b) the request is for a large number of records or requires too much work to produce; and (c) the request is vexatious or is made in bad faith. The Information Commissioner, Caroline Maynard, indicated her "surprise" at the first two criteria, which she said do not exist in other jurisdictions. She explained that these criteria should be "interpreted very restrictively", given that "the idea is to provide as much access to people as possible." She is of the view

27 See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018); Stéphane Giroux, Quebec Federation of Professional Journalists (31 October 2018); Peter Di Gangi, National Claims Research Directors; Ryder Gilliland, Canadian Civil Liberties Association (1 November 2018); Michael A. Geist, University of Ottawa (21 November 2018), among others. See also Canadian Committee on World Press Freedom, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 13 November 2018 (received).

28 See the testimony of Ryder Gilliland, Canadian Civil Liberties Association (1 November 2018); Michael A. Geist, University of Ottawa (21 November 2018). See also Canadian Environmental Law Association and Ecojustice Canada, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 11 January 2019 (received).

29 See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018); J. Alexis Kerr, Canadian Bar Association (24 October 2018); Stéphane Giroux, Quebec Federation of Professional Journalists (31 October 2018); Marlene Poitras, Assembly of First Nations; Bruce McIvor, Indigenous Bar Association; Peter Di Gangi, National Claims Research Directors; Ryder Gilliland, Canadian Civil Liberties Association (1 November 2018), among others.

30 See the testimony of Scott Brison, President of the Treasury Board and Minister of Digital Government (3 October 2018).

31 This additional requirement was added to Bill C-58 after an amendment was adopted by the House of Commons Standing Committee on Access to Information, Privacy and Ethics.

that new section 6.1(c) should be sufficient to prevent "requests that are not consistent with the purpose of the act, which account for less than 1 per cent of all requests."[32]

Other witnesses expressed their opposition to this new provision because it could create new barriers and opportunities for arbitrary decisions that could dismiss legitimate requests.[33] The Canadian Bar Association recommended the removal of subsections 6.1(1)(a) and (b),[34] adding that generally, the threshold for a request to be considered vexatious is very high.[35] Then Minister Brison noted that while he was supportive of the proposed changes to section 6, he did not appear to see the necessity of amending new section 6.1.[36]

Issues Affecting Indigenous Peoples

The committee had the opportunity to hear from witnesses about the specific concerns of Indigenous groups in relation to Bill C-58 and the federal access to information regime,[37] and the particular challenges they can face in obtaining information were also explained. For instance, Peter Di Gangi from the National Claims Research Directors explained that it can take a very long time to get information from government institutions, particularly when complaints are filed with the Information Commissioner.[38]

The committee was reminded that Indigenous peoples' have a particular right to access information in order to exercise their section 35 rights in the *Constitutional Act of 1982*, but also based on the honour of the Crown principle and the fiduciary obligations owed to them.[39] These rights are particularly important in the context of comprehensive and specific claims, or negotiations, as the vast majority of relevant documents are held by the federal government (e.g., records of treaty councils, annuity pay lists, membership lists, records relating to the administration of reserve lands and trust funds, residential schools, current negotiations and litigation, wills, etc.) Some witnesses expressed the view that there was no "meaningful consultation" with First Nations on Bill C-58.[40]

32 See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018).

33 See the testimony of Stéphane Giroux, Quebec Federation of Professional Journalists; Monique Dumont, Quebec Federation of Professional Journalists (31 October 2018); Bruce McIvor, Indigenous Bar Association; Peter Di Gangi, National Claims Research Directors (1 November 2018).

34 See the testimony of J. Alexis Kerr, Canadian Bar Association (24 October 2018).

35 See the testimony of J. Alexis Kerr, Canadian Bar Association (24 October 2018). See also the testimony of Antoine Aylwin, Fasken Martineau DuMoulin (24 October 2018).

36 See the testimony of Scott Brison, President of the Treasury Board and Minister of Digital Government (3 October 2018).

37 See the testimony of Peter Di Gangi, National Claims Research Directors; Bruce McIvor, Indigenous Bar Association; Marlene Poitras, Assembly of First Nations (1 November 2018); Senator Renée Dupuis (as the former Chief Commissioner of the Indian Specific Claims Commission) (8 November 2018). See also British Columbia Specific Claims Working Group, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 6 December 2018 (received); Privacy and Access Council of Canada, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 7 November 2018 (received).

38 See the testimony of Peter Di Gangi, National Claims Research Directors (1 November 2018).

39 For example, Senator Dupuis explained that comprehensive and specific land claims are two categories created by the federal government in response to the Supreme Court decision in *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

40 See the testimony of Peter Di Gangi, National Claims Research Directors; Bruce McIvor, Indigenous Bar Association; Marlene Poitras, Assembly of First Nations (1 November 2018).

Among the recommendations that were made by individuals representing Indigenous organisations,[41] it was mentioned that the ATIA should include language in its purpose section to specifically recognize the special rights of Indigenous people to access to information.[42] It was also suggested that an independent Indigenous review officer be appointed, with the authority to review decisions, deny access, hear complaints from Indigenous governments, make recommendations, and make court applications for reviews.[43] Finally, it was suggested that the ATIA should recognize all First Nations as governments and that the definition of "aboriginal government" in section 13(3) should be expanded.[44] This provision currently states that records containing information obtained in confidence from an aboriginal government should not be disclosed.

Solicitor-Client Privilege

Several amendments contained in Bill C-58 (e.g., clauses 15 and 50) would allow the Information Commissioner and the Privacy Commissioner to examine any record withheld by the head of a government institution on the basis that it is protected by "solicitor–client privilege or the professional secrecy of advocates and notaries and litigation privilege." Representatives from several legal professional organisations and lawyers raised concerns that the proposed amendments do not meet the criteria established by the Supreme Court of Canada that must be met in order to compel the disclosure of privileged records.[45] The Court had held that legislation compelling disclosure of privileged records must be clear, explicit and unequivocal.[46] These witnesses have recommended that these amendments should be removed from the bill as they do not provide sufficient protection for solicitor-client privilege. In response, the Minister of Justice stated that, in his view, the bill meets the Supreme Court's criteria.[47]

41 See the testimony of Peter Di Gangi, National Claims Research Directors; Bruce McIvor, Indigenous Bar Association; Marlene Poitras, Assembly of First Nations (1 November 2018). See also National Claims Research Directors, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 1 November 2018 (received); Indigenous Bar Association, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 13 November 2018 (received).

42 See the testimony of Bruce McIvor, Indigenous Bar Association (1 November 2018).

43 Ibid.

44 See the testimony of Marlene Poitras, Assembly of First Nations; Peter Di Gangi, National Claims Research Directors (1 November 2018).

45 See the testimony of Darcia Senft, Canadian Bar Association (24 October 2018); Professor Trevor C.W. Farrow, Osgoode Hall Law School, York University (20 February 2019). See also Canadian Bar Association, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 29 October 2018 (received); Barreau du Québec, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 18 October 2018 (received); Federation of Law Societies of Canada, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 18 October 2018 (received).

46 *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53.

47 See the testimony of David Lametti, Minister of Justice and Attorney General of Canada (27 February 2019).

Proactive Publication of Information and Judicial Independence

The committee discussed with various witnesses the proposed new Part 2 to the ATIA, which sets out a new regime requiring the proactive publication of certain information by the Senate, the House of Commons, parliamentary entities, ministers' offices, government institutions and institutions that support superior courts and Superior Court judges. Part 2 is therefore separate from the access to information regime in Part 1. Some witnesses were particularly concerned that clause 38 requires the publication of individualized information regarding judges' expenses, including the judge's name, a description of the expense, the date on which the expense was incurred, and the total amount of the expense. The expenses in question are those reimbursable under four categories set out in the *Judges Act* referred to as allowances.[48] Certain witnesses stated that these expense claims are already carefully and rigorously audited by the Office of the Commissioner for Federal Judicial Affairs.[49]

The judiciary is a separate and independent branch of government and judicial independence is a cornerstone of the Canadian judicial system.[50] While the bill states that information can be withheld from publication if it interferes with judicial independence, several witnesses are concerned that this protection will be insufficient.[51] Their view is also that this regime is unsuitable for judicial expenses, in particular for judges serving on national courts[52] who are required to travel extensively and incur higher expenses. Furthermore, they perceived risks that this information could be used negatively (including in relation to the personal safety of judges[53] or to shame and harass them) and could result in undermining public confidence in the judiciary. Witnesses also stressed that information about judges' expenses should be

48 *Judges Act*, R.S.C., 1985, c. J-1. See the testimony of Marc A. Giroux, Commissioner for Federal Judicial Affairs (7 November 2018).

49 See the testimony of Pierre Bienvenu, Norton Rose Fulbright Canada (Canadian Superior Courts Judges Association); Norman Sabourin, Canadian Judicial Council (31 October 2018); Marc A. Giroux, Commissioner for Federal Judicial Affairs (7 November 2018); Professor Trevor C.W. Farrow, Osgoode Hall Law School, York University (20 February 2019).

50 Judicial independence has three components: security of tenure, financial security and administrative (or institutional) independence (or autonomy). See Department of Justice, *The Judiciary*; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1998] 2 S.C.R. 443. See also the testimony of Professor Karen Eltis, University of Ottawa and Professor Trevor C.W. Farrow, Osgoode Hall Law School, York University (20 February 2019), among others.

51 See the testimony of Darcia Senft and J. Alexis Kerr, Canadian Bar Association; Antoine Aylwin, Fasken Martineau DuMoulin (24 October 2018); Pierre Bienvenu, Norton Rose Fulbright Canada (Canadian Superior Courts Judges Association); Norman Sabourin, Canadian Judicial Council (31 October 2018); Professor Karen Eltis, University of Ottawa; Professor Trevor C.W. Farrow, Osgoode Hall Law School, York University (20 February 2019). See also Canadian Superior Courts Judges Association, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 1 November 2018 (received); Canadian Judicial Council, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 1 November 2018 (received); Canadian Bar Association, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 29 October 2018 (received); Barreau du Québec, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 18 October 2018 (received).

52 The Federal Court, the Federal Court of Appeal and the Tax Court are Canada's national courts with judges who may be required to travel.

53 Concerns about individualized information pertaining to judges were discussed by the committee in relation to the tragic events of the triple murder of retired Chief Justice Alban Garon of the Tax Court of Canada, his wife Raymonde Garon, and their friend and neighbour Marie-Claire Beniskos in Ottawa in 2007. In the sentencing decision, *R. v. Bush*, 2017 ONSC 7627, para. 9, the judge highlighted the hatred of government, politicians, judges, bureaucrats and human rights activists by the perpetrator. The sentencing judge wrote that the perpetrator had "sought revenge on public figures for all the perceived wrongs that he believed that society had caused him and he was going to use his victims to send a message."

handled with care given how it can be misused, decontextualized or distorted when it is published and shared electronically (especially on social media).[54] Moreover, judges are not able to defend themselves publicly because of their duty of reserve. Finally, the committee learned that no comparable disclosure obligations exist in other democratic jurisdictions.[55] The Minister of Justice emphasized that, in his opinion, the provisions in Bill C-58 are reasonable, and that "[w]e must try to find a balance between the transparency and accountability of our government, with judicial independence on the other side of course."[56]

The committee heard that there are alternatives that would be consistent with the transparency and accountability objectives of the bill while supporting the principle of judicial independence. For instance, instead of requiring the disclosure of individualized information for each judge, the information could be published according to the categories of reimbursable allowances and according to each court.[57] In response, the Minister of Justice commented that publishing expenses in aggregate amounts could leave small courts with few judges feeling "exposed", while the information would seem "almost meaningless" for very large courts.[58] If aggregate amounts were to be used, he emphasized that "for complementary measures to make up for the loss of transparency", the specific policies under which claims are processed and administered would need to be published. According to the Minister, "if such requirements were not included in the legislation itself, I would expect that the judiciary, and the commissioner and the registrar, would ensure that parallel accountability measures were in place, as I know they are as concerned as the government about responding to Canadians' legitimate expectations for transparency in the expense of public funds." Moreover, the Minister stated that to the extent the approach shifts from individualized to aggregated expenses, the scope of the proposed exemption concerning judicial independence may need to be adjusted accordingly as the rationale recedes.

Other suggestions were made to invest each Chief Justice or the Canadian Judicial Council (made up of the 39 chief justices and associate chief justices of superior courts in Canada) with the authority to determine the circumstances under which proactive disclosure interferes with judicial independence, instead of an official[59] appointed by the executive branch.[60] At the same time, the Commissioner for Federal Judicial Affairs told the committee that he has created an advisory board to guide him on how to

54 See the testimony of Professor Karen Eltis, University of Ottawa; Professor Trevor C.W. Farrow, Osgoode Hall Law School, York University (20 February 2019).

55 See the testimony of Pierre Bienvenu, Norton Rose Fulbright Canada (Canadian Superior Courts Judges Association); Norman Sabourin, Canadian Judicial Council (31 October 2018); Professor Trevor C.W. Farrow, Osgoode Hall Law School, York University (20 February 2019).

56 See the testimony of David Lametti, Minister of Justice and Attorney General of Canada (27 February 2019).

57 See the testimony of Pierre Bienvenu, Norton Rose Fulbright Canada (Canadian Superior Courts Judges Association); Norman Sabourin, Canadian Judicial Council (31 October 2018). The Commissioner for Federal Judicial Affairs, Marc A. Giroux (7 November 2018), also said that the committee may wish to consider that suggestion, at least for the travel allowance. See also the testimony of Professor Karen Eltis, University of Ottawa and Professor Trevor C.W. Farrow, Osgoode Hall Law School, York University (20 February 2019) who indicated that they considered that this measure would mitigate the risk of interference with judicial independence, but that it would not eliminate it.

58 See the testimony of David Lametti, Minister of Justice and Attorney General of Canada (27 February 2019).

59 I.e., the Registrar of the Supreme Court of Canada, the Chief Administrator of the Courts Administration Service, or the Commissioner for Federal Judicial Affairs.

60 See the testimony of Pierre Bienvenu, Norton Rose Fulbright Canada (Canadian Superior Courts Judges Association); Norman Sabourin, Canadian Judicial Council (31 October 2018); Professor Trevor C.W. Farrow, Osgoode Hall Law School, York University (20 February 2019).

implement the bill in preparation of its application, but that he takes no position on who should apply that exemption.[61] In response, the Minister of Justice stated that the Commissioner for Federal Judicial Affairs is the appropriate person to apply the proposed exemption independently, since he or she has the mandate and expertise to protect judicial independence and "is independent of the judicial system and the executive."[62] He added that this could help protect the judiciary from being seen to have a particular interest in determining how to apply the exemption.

Proactive Publication of Information, Parliamentary Privilege and Scope

The committee also examined the proposed proactive publication of travel expenses, hospitality expenses and certain contracts with respect to senators and members of the House of Commons. Proposed new section 71.12 provides that the proactive publication does not apply if the Speaker of the Senate or the Speaker of the House of Commons determine that it would constitute a breach of parliamentary privilege. That determination would be final (proposed new s. 71.14). Several questions were raised concerning how this would affect the authority of each House of Parliament to determine if a publication would constitute a breach of parliamentary privilege. Concerns have been raised that these provisions may limit the exercise of certain rights and privileges held by parliamentarians. According to then Minister Brison, "nothing in this bill would affect the established procedures in the two chambers for determining questions of privilege".[63]

Committee members were concerned that in making the Speaker of the Senate`s decisions on matters of parliamentary privilege "final", Bill C-58 would vest him or her with a new power. Under the *Rules of the Senate*,[64] rulings by the Speaker are in fact subject to appeal in the Senate (a different procedure than is used in the House of Commons).[65] The committee also heard from the acting Deputy Law Clerk and Parliamentary Counsel of the Senate on this issue.[66] In his opinion, "[t]he role contemplated for the Speaker of the Senate in Bill C-58 is consistent with his or her role as the custodian of the Senate privileges; hence Bill C-58 is not inconsistent with Senate rules, customs and practices."[67]

61 See the testimony of Marc A. Giroux, Commissioner for Federal Judicial Affairs (7 November 2018). He also mentioned that he "would probably be leaning toward applying the judicial independence exemption in terms of travel for sittings of judges so as to provide all of the information required under the bill but perhaps exclude the name of the judge for that allowance particularly."

62 See the testimony of David Lametti, Minister of Justice and Attorney General of Canada (27 February 2019). See also the testimony of Nancy Othmer, Department of Justice (27 February 2019).

63 See the testimony of Scott Brison, President of the Treasury Board and Minister of Digital Government (3 October 2018). See also the testimony of Karina Gould, Minister of Democratic Institutions (18 October 2018).

64 Rule 2-5(3) of the *Rules of the Senate*.

65 See the testimony of Michel Bédard, Deputy Law Clerk and Parliamentary Council (interim), Office of the Law Clerk and Parliamentary Counsel of the Senate (21 February 2019).

66 Ibid.

67 Senate Law Clerk and Parliamentary Counsel, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 28 January 2019.

Some witnesses also criticized the fact that proposed new Part 2 has a limited application to ministers' offices and the Prime Minister's Office[68]and would only cover: mandate letters, briefing packages, titles and tracking numbers of briefing notes, Question Period notes, briefing materials for parliamentary appearances, etc.[69] They recommended that the Prime Minister's Office and the ministers' offices should be covered by Part 1 of the ATIA so that they would also be required to answer requests for information. Finally, it was noted that the Information Commissioner would have no oversight role of institutional compliance with the new proactive publication of information obligation in Part 2.[70]

Information Commissioner and Enforcement of the Act

As noted above, the ATIA establishes a quasi-constitutional right of access that is subject to specific exemptions whereby government institutions can deny access. Decisions taken concerning the disclosure of government information or an institution's failure to reply may be reviewed independently by the Information Commissioner of Canada. The Commissioner is an officer appointed by Parliament and reports directly to it (s. 54). Caroline Maynard has held this position since 1 March 2018. She assists complainants, whether individuals or organizations, who believe that government institutions have not respected their right of access. She also provides oversight of the federal government's access to information practices and policies.

The Office of the Information Commissioner of Canada (OIC) monitors and reviews how government institutions are meeting their obligations under the Act. Among other things, it carries out investigations and undertakes dispute-resolution processes to resolve complaints. It acts as the first level of independent review of decisions taken by government institutions that are subject to the Act, the second being the Federal Court.

Among the ways in which Bill C-58 would impact the operations of the OIC, one of the more significant changes is the new authority the Information Commissioner would have to make orders after investigating a complaint (clause 16, proposed new ss. 36.1, 36.2 and 36.3). These orders could require the head of a government institution to disclose a record (or part thereof) or to reconsider a previous decision not to do so. The Commissioner could also attach conditions that she considers appropriate and may publish the orders and the results of her investigations.

Then Minister Brison described this power as "the most impactful change we are making in this legislation" as it would create "an agent of Parliament with real, meaningful enforcement power, one that can order the government to release documents."[71] Both he and an official from the Privy Council Office emphasized that the orders would be "legally binding" and therefore would be expected to be acted upon by

68 See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018); J. Alexis Kerr, Canadian Bar Association (24 October 2018); Ryder Gilliland, Canadian Civil Liberties Association (1 November 2018); Michael A. Geist, University of Ottawa (21 November 2018), among others. See also Canadian Committee on World Press Freedom, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 13 November 2018 (received).

69 See the testimony of Ruth Naylor, Treasury Board of Canada Secretariat (3 October 2018).

70 See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018); J. Alexis Kerr, Canadian Bar Association (24 October 2018), among others.

71 See the testimony of Scott Brison, President of the Treasury Board and Minister of Digital Government (3 October 2018).

government institutions accordingly.[72] He added that "in the unlikely event that a government institution neither challenged nor complied with an order, the commissioner could enforce the order through *mandamus* proceedings in Federal Court." Officials from the Treasury Board Secretariat added that any government institution would have to follow the Commissioner's orders, unless they ask a court to review the matter within 30 days. The failure by a government institution to comply with a *mandamus* order from the court would trigger a finding of contempt of court.[73]

The Information Commissioner recommended to the committee that any order of the Information Commissioner should be able to be certified as an order of the Federal Court, so that her decisions could more easily be enforced, just as a court order could be. In her view, this would be a simpler and more efficient approach to "address situations where an institution simply decides not to comply with an order."[74] Her concern is that a *mandamus* application is not "an easy process" and it can take six to seven months to obtain a court order. Also, in such an application, the Federal Court would conduct a *de novo* review of the institution's decision (i.e., a new proceeding), rather than a judicial review of the Commissioner's order.[75] Her explanation of how the process would transpire indicated that she does not believe that the procedures envisioned in the bill would encourage compliance with the Act by government institutions.[76] While her preference is for a judicial review model, she acknowledged that such a change would involve greater legislative reform. She hopes that further discussion on her recommendations will take place when the Act is reviewed (in accordance with new section 93, as discussed below).[77]

Then Minister Brison disagreed with the Information Commissioner's recommendation to make orders certifiable by the Federal Court, stating that the amendments proposed in Bill C-58 represent a "simpler, single-step process". He also stated that "no department or agency is going to frivolously challenge an enforceable order by the Information Commissioner."[78] According to the Minister of Justice, in most cases, he expects that the orders would be respected by federal institutions.[79] In cases where they are not, it would be possible to obtain a *mandamus* order. According to the Department of Justice, *de novo* reviews provide an opportunity to reconsider any concerns about procedural fairness that may have arisen during the course of an investigation for the benefit of third parties, applicants and the Commissioner.[80]

Other witnesses explained their various opinions on this matter to the committee. Antoine Aylwin, a lawyer, saw the power to make orders as "a good step forward" that will "have a significant impact in the future".[81]

[72] See the testimony of Scott Brison, President of the Treasury Board and Minister of Digital Government (3 October 2018); and, Riri Shen, Privy Council Office (18 October 2018).

[73] See the testimony of Francis Bilodeau, Treasury Board of Canada Secretariat (3 October 2018); and, Ruth Naylor, Treasury Board of Canada Secretariat (3 October 2018).

[74] See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018).

[75] According to the testimony of Nancy Othmer of the Department of Justice, under the current regime, reviews of the Information Commissioner's recommendations before the Federal Court are *de novo* reviews.

[76] Ibid.

[77] See the testimony of Caroline Maynard, Information Commissioner of Canada (3 April 2019).

[78] See the testimony of Scott Brison, President of the Treasury Board and Minister of Digital Government (3 October 2018).

[79] See the testimony of David Lametti, Minister of Justice and Attorney General of Canada (27 February 2019).

[80] See testimony of Nancy Othmer, Department of Justice (27 February 2019).

[81] See the testimony of Antoine Aylwin, Fasken Martineau DuMoulin (24 October 2018).

Another lawyer, Marc-André Boucher, noted that he anticipates that most institutions will agree on the state of the law regarding access to information rights and that "at the very least" they will have "some form of respect" for an order of the Commissioner.[82]

Phillip Tunley, the President of the Canadian Journalists for Free Expression, considered the proposed order-making provisions to be well-worded, but that they would be undermined by the *de novo* nature of the Federal Court's review, which would allow for an institution to submit new arguments and evidence. This would discourage "parties from putting their best evidence and arguments forward at first instance."[83] He added it would not create an expeditious process or timely access to information as the procedures involved could add weeks to getting to a result. He welcomed the recommendation to have the Commissioner's order certified by the court as a great improvement, especially if it would give the Commissioner the power to require an institution to act more expeditiously.

Other witnesses questioned the appropriateness of adding an order-making authority for the Commissioner in the ATIA. Karl Delwaide, also a lawyer, questioned whether the traditional ombudsman role of the Information Commissioner is compatible with the authority to make orders. Also, his interpretation of the drafting of these amendments is that the orders would not in fact be effectively binding on institutions. He recommended a broader review of the ATIA to ensure it is structured to better ensure respect for access rights. Professor Michael Geist, however, supported the order-making power and thought it might help the Commissioner to be effective in applying and interpreting the ATIA.[84]

Lastly, Professor Michel W. Drapeau expressed strong concerns about granting the Commissioner order-making power. In his view, "this would effectively strip the OIC of her status as an Officer of Parliament because with the assumption of quasi-judicial functions, the Commissioner would become duty-bound to "act judicially" instead of carrying out her work under the guidance and direction of Parliament and report to a Parliamentary Committee."[85] He believed it would in fact add to delays and the current backlog of complaints. The best solution in his view is a broader review of the ATIA and a systems audit to "provide an objective assessment of the operations, governance, resources and information systems deployed within the access/privacy regime."[86]

82 See the testimony of Marc-André Boucher, Fasken Martineau DuMoulin (24 October 2018).

83 See the testimony of Philip Tunley, Canadian Journalists for Free Expression (31 October 2018).

84 See the testimony of Karl Delwaide, Fasken Martineau DuMoulin (21 November 2018).

85 See the testimony of Professor Michel W. Drapeau (21 November 2018).

86 Ibid.

Transitional provisions

The Information Commissioner requested changes to the transitional provisions for the coming into force of Bill C-58 due to concerns that they currently are too complicated and will create the possibility of three separate regimes being in operation for a period of time.[87] The ability of government institutions to seek permission to refuse a request and for the OIC to decline a complaint would come into force upon Royal Assent, but the ability of the Information Commissioner to make orders would only come into force one year after Royal Assent. According to the Information Commissioner, "[f]ailure to implement this recommendation would create a scenario where my office would have to administer concurrent investigation systems, which I anticipate would result in unnecessary costs, complications and potential delays."[88] Minister Gould explained that this transition period is to provide the Government of Canada with time to get the necessary infrastructure ready to implement the new provisions of the Act.[89] Then Minister Brison encouraged the committee to consider an amendment that would address the Information Commissioner's concern.[90]

Privacy Commissioner and Privacy Issues

The ATIA already contains provisions to protect personal information from being disclosed (s. 19). The Office of the Privacy Commissioner of Canada provides advice and information for individuals about protecting such information, while also enforcing federal privacy laws. Daniel Therrien has been the Privacy Commissioner of Canada since 5 June 2014. Bill C-58 makes various amendments that impact the role of the Privacy Commissioner, including changes to the provisions pertaining to personal information in the ATIA and also in the *Privacy Act*.[91]

At the very start of the committee's study, we learned from then Minister Brison that the Information Commissioner and the Privacy Commissioner were together requesting changes to Bill C-58[92] in order to ensure that the values of personal privacy and access to information are properly balanced. Minister Brison indicated that amendments should be considered to address this.

Under the version of Bill C-58 referred to the committee, government institutions can notify the Privacy Commissioner once an access complaint has been received. The Information Commissioner would then have to give the Privacy Commissioner a reasonable opportunity to make representations regarding the complaint. The Information Commissioner may also decide to consult with the Privacy Commissioner when she intends to issue an order that personal information be disclosed. This is at her discretion, however.

87 See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018). See also Information Commissioner of Canada, *Letter to the Hon. Scott Brison,* 22 March 2018.

88 See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018).

89 See the testimony of Karina Gould, Minister of Democratic Institutions (18 October 2018).

90 See the testimony of Scott Brison, President of the Treasury Board and Minister of Digital Government (3 October 2018).

91 *Privacy Act,* R.S.C., 1985, c. P-21.

92 See the testimony of Scott Brison, President of the Treasury Board and Minister of Digital Government (3 October 2018). See also Information Commissioner of Canada and Privacy Commissioner of Canada, *Letter to the Hon. Scott Brison,* 20 March 2018.

The Privacy Commissioner said that "this has an impact on the balance recognized by the Supreme Court between two quasi-constitutional rights."[93]

The Privacy Commissioner further explained that "citizens are entitled to protection of the confidentiality of information that the government possesses concerning them."[94] He discussed with the committee how personal information can be divulged during requests for access to information. This can sometimes occur inadvertently when seemingly anonymous information can be linked to someone, perhaps a third party of some sort. He noted that there could be times during an investigation when the two commissioners disagree on what should be considered as "personal information" or what is the acceptable "risk of re-identification."[95] The Privacy Commissioner's concern is that under Bill C-58, there may be instances where a determination is made by a government institution or the Information Commissioner on what constitutes "personal information". Furthermore, as the Information Commissioner would be granted order-making powers, this would affect the balance of privacy and openness. The Privacy Commissioner explained that his recommendations are aimed at ensuring "there's an opportunity for [him] to be consulted before information that could be detrimental to the privacy of an individual is actually released." If there is disagreement, then ultimately, the court will decide on the appropriate determination.

In seeking to maintain the balance between their two offices, the two commissioners jointly submitted that there should be "a mandatory requirement for the Information Commissioner to consult the Privacy Commissioner whenever she intends to make an order to disclose information that has been exempted under the personal information exemption."[96] Also, they recommended that the Information Commissioner should "have a discretionary ability to consult the Privacy Commissioner at any stage during her investigation of an access complaint, in circumstances that the Information Commissioner deems necessary or advisable."[97] They accordingly requested amendments to the bill (clauses 14 and 16). They also suggested an amendment to require the Information Commissioner to provide a final report to the Privacy Commissioner regarding the results of an investigation and where the Commissioner are not in agreement over the application of Act's personal information criteria (s. 19). They indicated they would prepare a memorandum of understanding regarding when consultation is advisable during the course of their work.[98]

The Privacy Commissioner also informed the committee that the best way to ensure a balance between access to information and privacy rights would be to grant him order-making powers for those seeking access to their own personal information.

93 See the testimony of Daniel Therrien, Privacy Commissioner of Canada (18 October 2018).

94 Ibid.

95 Ibid.

96 Information Commissioner of Canada and Privacy Commissioner of Canada, *Letter to the Hon. Scott Brison*, 20 March 2018.

97 Ibid.

98 Ibid.

Third Party Interests

The committee also discussed the rights of third parties under the ATIA with witnesses and the amendments that would affect them.[99] For instance, an order from the Information Commissioner could require the disclosure of information for which a third party may have an interest (e.g., trade secrets or confidential information) and in the course of a review before the Federal Court. These witnesses said that in general, managing third party rights under the ATIA is a significant issue. They mentioned that third parties are not always notified when documents involving them are requested, even though they might have an interest worth a significant amount of money. Moreover, they mentioned that a person who has not been notified cannot challenge a decision.

Review of the *Access to Information Act*

Then Minister Brison stated that Bill C-58 is the first phase of the federal government's access to information modernization plan. New section 93 would also require that one year after Bill C-58 has received Royal Assent and every five years thereafter, a report be tabled in Parliament by the designated Minister providing a review of the operation of the Act. He added that at that time, if further changes are needed to the ATIA, they can be done.[100]

The Information Commissioner underscored that this review is one of the most important elements of the bill, adding that: "[t]hese reviews will provide stakeholders with the opportunity to take a closer look at the act and make further recommendations to improve the many other areas of the act that are left untouched by Bill C-58 but are greatly in need of updating." She also agreed with the suggestion that a parliamentary review could potentially have better results in getting the government to make changes than a ministerial review.[101] Other witnesses agreed that a parliamentary review would be preferable.[102]

Minister Gould added that if Parliament wanted to conduct a closer review of the ministerial report it receives, then the intent of the bill is to allow that opportunity for further engagement.[103]

After studying the points addressed above, the committee made the following observations:

1. The committee takes note of the government's commitments as expressed in the letter received on February 25th, 2019 from the President of the Treasury Board and Minister of Digital Government to the Chair of the committee. The committee takes note of the following specific commitments regarding the Indigenous peoples in response to the concerns raised by some witnesses before the committee:

99 See the testimony of Antoine Aylwin and Marc-André Boucher, Fasken Martineau DuMoulin (24 October 2018); Karl Delwaide, Fasken Martineau DuMoulin (21 November 2018).

100 See the testimony of Scott Brison, President of the Treasury Board and Minister of Digital Government (3 October 2018).

101 See the testimony of Caroline Maynard, Information Commissioner of Canada (17 October 2018).

102 See the testimony of Monique Dumont, Quebec Federation of Professional Journalists; Philip Tunley, Canadian Journalists for Free Expression (31 October 2018); Peter Di Gangi, National Claims Research Directors; Ryder Gilliland, Canadian Civil Liberties Association; and Bruce McIvor, Indigenous Bar Association (1 November 2018).

103 See the testimony of Karina Gould, Minister of Democratic Institutions (18 October 2018).

a) A commitment to amend Treasury Board policies to provide guidance to institutions and to give them “direction that the provisions could not be used to impede requests that are consistent with the spirit of the Act- for example, requests from First Nations researchers seeking access to historical records to substantiate Indigenous claims.” (p. 4 of the letter)

b) A commitment to consult Indigenous representatives: First Nations, Metis and Inuit people, “in the development of policy guidance so that their needs and concerns are reflected.” (p. 4 of the letter)

c) A commitment to continue to meet regularly with First Nations’ representatives and to “engage Indigenous organizations in the development of guidance to government institutions so that the Act is applied in a manner that is responsive to First Nations efforts to further their claims.” (p. 7 of the letter)

d) A commitment to support various Indigenous organizations “in the analysis of Bill C-58 to identify implications for First Nations.” (p. 8 of the letter)

e) A commitment to “continue to engage with Indigenous organizations and with key departments… to ensure access to information processes are responsive to Indigenous peoples’ needs.” (p. 8 of the letter)

f) A commitment to consult “with all stakeholders about the feasibility of transferring additional Crown-Indigenous Relations and Northern Affairs Canada records that are of historical or archival value to archival institutions.” (p. 8 of the letter)

g) A commitment to report to Parliament on the preceding commitment “in the context of the first full review of the Act that will follow coming-into-force of Bill C-58.” (p. 8 of the letter)

The committee will make sure to include in its work, in the context of the review of the Act when it takes place, the extent to which these specific commitments have been implemented.

2. Some members of the committee take issue with the fact that the bill does not fully implement the Prime Minister’s mandate letter to the Minister of Justice.

3. The committee regrets that it did not have the opportunity to hear from the former Minister of Justice earlier in its study in order to fully understand the objectives of the bill, but the committee notes that the current Minister of Justice appeared shortly after his appointment.

4. Some members of the committee were concerned that the proactive publication provisions in Part 2 do not cover amounts for severance pay and the relocation costs of employees in ministers’ offices and the Office of the Prime Minister.

5. The committee recommends that the Government of Canada work with the Information Commissioner to further consider her predecessor’ 2015 report; to bring the ATIA in line with best practices as they are recognized internationally; and, to ensure that both human, financial and technological resources are sufficiently in place to guarantee the exercise of the quasi-constitutional right of access to information.

6. The committee agrees with the Information Commissioner's recommendation that when the ATIA is reviewed in one year in accordance with new section 93, the Government of Canada should study and report on how the Act can be reformed to allow the Information Commissioner's orders to be subject to judicial review by the Federal Court.

7. (Minority Observation) Some members of the committee are concerned that certain key documents could be destroyed, especially when a public office holder could face a criminal investigation; and expressed surprise that there are no longer guidelines for conserving and producing documents with regard to certain categories of information.

8. (Minority Observation) Some members of the committee are concerned about recent developments in the Norman case as high-ranking Canadian military officers allegedly used codes to circumvent the application of the *Access to Information Act*. They are concerned that the bill will not address the problematic use of codes to avoid the application of the *Access to Information Act*.

APPENDIX A – LIST OF WITNESSES

Wednesday, 3 October 2018

- The Honourable Scott Brison, P.C., M.P., President of the Treasury Board and Minister of Digital Government (Treasury Board of Canada Secretariat)
- Francis Bilodeau, Assistant Deputy Minister, Digital Policy and Services, Office of the Chief Information Officer (Treasury Board of Canada Secretariat)
- Ruth Naylor, Executive Director, Information and Privacy Policy Division, Office of the Chief Information Officer (Treasury Board of Canada Secretariat)

Wednesday, 17 October 2018

- Caroline Maynard, Information Commissioner of Canada (Office of the Information Commissioner of Canada)
- Allison Knight, Senior Director of Investigations (Office of the Information Commissioner of Canada)
- Jacqueline Strandberg, Manager of Policy and Parliamentary Affairs (Office of the Information Commissioner of Canada)

Thursday, 18 October 2018

- The Honourable Karina Gould, P.C., M.P., Minister of Democratic Institutions (Democratic Institutions)
- Riri Shen, Director of Operations (Privy Council Office)
- Daniel Therrien, Privacy Commissioner (Office of the Privacy Commissioner of Canada)
- Julia Barss, General Counsel and Head of Legal Services (Office of the Privacy Commissioner of Canada)
- Sue Lajoie, Executive Director, Privacy Act Compliance Directorate (Office of the Privacy Commissioner of Canada)

Wednesday, 24 October 2018

- Antoine Aylwin, Partner, Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l. (As an Individual)
- Marc-André Boucher, Associate, Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l. (As an Individual)
- J. Alexis Kerr, Vice-Chair, Privacy and Access to Information Law Section (Canadian Bar Association)
- Darcia Senft, Chair, Ethics Committee (Canadian Bar Association)

Wednesday, 31 October 2018

- Philip Tunley, President (Canadian Journalists for Free Expression)
- Karyn Pugliese, National Director (Canadian Association of Journalists)
- Stéphane Giroux, President (Quebec Federation of Professional Journalists)
- Monique Dumont, Consultant, Access to Information Expert (Quebec Federation of Professional Journalists)
- Pierre Bienvenu, Senior Partner, Norton Rose Fulbright Canada (Canadian Superior Courts Judges Association)

- Norman Sabourin, Executive Director and Senior General Counsel (Canadian Judicial Council)

Thursday, 1 November 2018

- Peter Di Gangi, Director, Policy and Research, Algonquin Nation Secretariat (National Claims Research Directors)
- Bruce McIvor, Member at Large (Indigenous Bar Association)
- Marlene Poitras, Regional Chief for Alberta (Assembly of First Nations)
- Ryder Gilliland, Counsel (Canadian Civil Liberties Association)

Wednesday, 7 November 2018

- Marc A. Giroux, Commissioner (Office of the Commissioner for Federal Judicial Affairs)

Thursday, 8 November 2018

- The Honourable Senator Renée Dupuis

Wednesday, 21 November 2018

- Michael A. Geist, Canada Research Chair in Internet and E-commerce Law, Faculty of Law, University of Ottawa (As an Individual)
- Karl Delwaide, Partner, Fasken Martineau DuMoulin S.E.N.C.R.L., s.r.l. (As an Individual)
- Michel W. Drapeau, Professor, Faculty of Law, University of Ottawa (As an Individual)

Thursday, 6 December 2018

- Simon Cardinal, Director General, Corporate Secretariat (Immigration, Refugees and Citizenship Canada)
- Michael Olsen, Director General, Corporate Affairs (Immigration, Refugees and Citizenship Canada)
- Ron Kruzeniski, Saskatchewan Information and Privacy Commissioner (Office of the Saskatchewan Information and Privacy Commissioner)

Wednesday, 20 February 2019

- Karen Eltis, Full Professor, Faculty of Law, University of Ottawa
- Trevor C.W. Farrow, Professor and Associate Dean (Academic), Osgoode Hall Law School, York University

Thursday, 21 February 2019

- Michel Bédard, Deputy Law Clerk and Parliamentary Council (interim), Office of the Law Clerk and Parliamentary Counsel

Wednesday, 27 February 2019

- The Honourable David Lametti, P.C., M.P., Minister of Justice and Attorney General of Canada
- Nancy Othmer, Assistant Deputy Minister, Public Law and Legislative Services Sector (Department of Justice Canada)

APPENDIX B – LIST OF BRIEFS

Minister of Justice and Attorney General of Canada
Minister of Justice and Attorney General of Canada, *Letter Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 13 March 2019 (received).

President of the Treasury Board and Minister of Digital Government
President of the Treasury Board and Minister of Digital Government, *Letter Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 25 February 2019 (received).

Ken Rubin, Investigative Researcher
Ken Rubin, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 18 February 2019 (received).

Canadian Environmental Law Association and Ecojustice Canada
Canadian Environmental Law Association and Ecojustice Canada, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 11 January 2019 (received).

British Columbia Specific Claims Working Group
British Columbia Specific Claims Working Group, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 6 December 2018 (received).

Canadian Journalists for Free Expression
Canadian Journalists for Free Expression, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 6 December 2018 (received).

Office of the Privacy Commissioner of Canada
Office of the Privacy Commissioner of Canada, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 23 November 2018 (received).

Michel W. Drapeau, Professor, Faculty of Law, University of Ottawa
Michel W. Drapeau, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 22 November 2018 (received).

Canadian Bar Association
Canadian Bar Association, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 20 November 2018 (received).

Ken Rubin, Investigative Researcher
Ken Rubin, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 20 November 2018 (received).

Fédération professionnelle des journalistes du Québec
Fédération professionnelle des journalistes du Québec, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 19 November 2018 (received).

Democracy Watch and Open Government Coalition
Democracy Watch and Open Government Coalition, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 19 November 2018 (received).

Indigenous Bar Association
Indigenous Bar Association, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 13 November 2018 (received).

Canadian Committee on World Press Freedom

Canadian Committee on World Press Freedom, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 13 November 2018 (received).

Privacy and Access Council of Canada
Privacy and Access Council of Canada, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 7 November 2018 (received).

Office of the Information Commissioner of Canada
Office of the Information Commissioner of Canada, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 2 November 2018 (received).

National Claims Research Directors
National Claims Research Directors, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 1 November 2018 (received).

Canadian Superior Courts Judges Association
Canadian Superior Courts Judges Association, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 1 November 2018 (received).

Canadian Judicial Council
Canadian Judicial Council, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 1 November 2018 (received).

Canadian Bar Association
Canadian Bar Association, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 29 October 2018 (received).

Office of the Information Commissioner of Canada and Office of the Privacy Commissioner of Canada
Office of the Information Commissioner of Canada and Office of the Privacy Commissioner of Canada, *Joint Letter sent to the Honourable Scott Brison,* 18 October 2018 (received).

Office of the Information Commissioner of Canada
Office of the Information Commissioner of Canada, *Letter sent to the Honourable Scott Brison,* 18 October 2018 (received).

Barreau du Québec
Barreau du Québec, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 18 October 2018 (received).

Ken Rubin, Investigative Researcher
Ken Rubin, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 18 October 2018 (received).

Federation of Law Societies of Canada
Federation of Law Societies of Canada, *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 18 October 2018 (received).