

Executive Summary

Accountable AI

June 2022



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

About the LCO

The Law Commission of Ontario (LCO) is Ontario's leading law reform agency. The LCO provides independent, balanced and authoritative advice on complex and important legal policy issues. Through this work, the LCO promotes access to justice, evidence-based law reform and public debate.

The LCO evaluates laws impartially, transparently and broadly. The LCO's analysis is informed by legal analysis; multi-disciplinary research; contemporary social, demographic and economic conditions; and the impact of technology.

LCO reports are a practical and principled long-term resource for policymakers, stakeholders, academics and the general public. LCO's reports have led to legislative amendments and changes in policy and practice. They are also frequently cited in judicial decisions, academic articles, government reports and the media.

This report is part of the LCO's ongoing AI, ADM and the Justice System project. The project brings together policymakers, legal professionals, technologists, NGOs and community members to discuss the impact of AI and algorithms on access to justice, human rights and due process. The LCO's current AI initiatives include *Accountable AI*, *AI and Human Rights* (with the Ontario and Canada Human Rights Commissions) and *AI in the Criminal Justice System*. Earlier LCO AI-related projects are listed on the next page.

The LCO is also undertaking projects addressing the Indigenous Last Stages of Life, consumer protection, protection orders, and environmental accountability.

The LCO is located at Osgoode Hall Law School, York University, Toronto.

More information about the LCO is available at www.lco-cdo.org.

Law Commission of Ontario Reports

Indigenous Legal Issues in the Last Stages of Life (Forthcoming 2022)

Comparing European and Canadian AI Regulation (November 2021)

Legal Issues in the Last Stages of Life (October 2021)

Regulating AI: Critical Issues and Choices (April 2021)

The Rise and Fall of AI and Algorithms in American Criminal Justice: Lessons for Canada (October 2020)

Defamation Law in the Internet Age (March 2020)

Class Actions Objectives, Experiences and Reforms (July 2019)

Legal Capacity, Decision-making, and Guardianship (March 2017)

Simplified Procedures for Small Estates (August 2015)

Capacity and Legal Representation for the Federal RDSP (June 2014)

Review of the Forestry Workers Lien for Wages Act (September 2013)

Increasing Access to Family Justice (February 2013)

Vulnerable Workers and Precarious Work (December 2012)

A Framework for the Law as It Affects Persons with Disabilities (September 2012)

A Framework for Teaching about Violence Against Women (August 2012)

A Framework for the Law as It Affects Older Adults (April 2012)

Modernization of the Provincial Offences Act (August 2011)

Joint and Several Liability Under the Ontario Business Corporations Act (February 2011)

Division of Pensions Upon Marriage Breakdown (December 2008)

Fees for Cashing Government Cheques (November 2008)

LCO AI, ADM and the Justice System Project: Notable Reports and Activities

Comparing European and Canadian AI Regulation (November 2021)

AI Case Study: Probabilistic Genotyping DNA Tools in Canadian Criminal Courts
(June 2021)

Regulating AI: Critical Issues and Choices (April 2021)

Legal Issues and Government AI Development (March 2021)

LCO/Ontario Digital Service Workshop (November/December 2020)

The Rise and Fall of Algorithms in the American Justice System: Lessons for Canada
(October 2020)

LCO Forum on AI and ADM in the Civil and Administrative Justice System
(December 2019)

**LCO Forum on AI in Ontario's Criminal Justice System with The Citizen Lab, Criminal
Lawyers Association and the International Human Rights Program, Faculty of Law,
University of Toronto** (March 2019)

AI, Automated Decision-Making: Impact on Access to Justice and Legal Aid (June 2019)

**AI for Lawyers: A Primer on Artificial Intelligence in Ontario's Justice System with
Element AI and Osgoode Hall Law School** (May 2019)

Roundtable on Digital Rights and Digital Society with the Mozilla Foundation (March 2018)

Contacting the LCO

The LCO believes that successful law reform depends on broad and accessible consultations with individuals, communities and organizations across Ontario. As a result, the LCO is seeking comments and advice on this report. As such, the LCO welcomes comments and advice on this report.

There are many ways to get involved. The LCO can be contacted at:

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Law Commission of Ontario, *Executive Summary, Accountable AI*, (Toronto: June 2022).

Accountable AI

Introduction

This is the Executive Summary of the Law Commission of Ontario's *Accountable AI* report. This report is latest in a series of LCO reports considering the use of artificial intelligence (AI), automated decision-making (ADM) and algorithms in the Canadian justice system.

The LCO's *Accountable AI* paper considers how to ensure legal accountability when governments and public agencies use AI to make or assist decision-making in the civil and administrative justice systems.¹

The context for this analysis is the extraordinary growth in the use of AI and ADM by governments across the world. The breadth and pace of government AI systems reflects the perceived potential of AI to improve the accuracy, speed, and consistency of government decision-making.

Notwithstanding AI's potential, government use of AI is controversial. There are many examples of government AI systems that have proven to be biased, illegal, secretive, or ineffective. As a result, many governments – including the Government of Ontario – are adopting “Trustworthy AI” frameworks to assure the public and stakeholders that government AI systems will be transparent, legal, and beneficial.

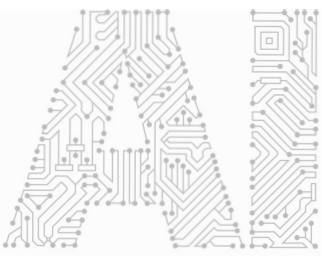
The LCO has concluded that “accountable AI” depends on a mix of law reform tools and strategies, including front end regulation, substantive law reform, enhanced due process protections, and innovative initiatives to improve access to justice. The LCO has also concluded that many tools and strategies are available to policymakers today. Others will depend on policymakers and stakeholders coming together to address a complex series of legal accountability challenges that often combine legal and technical analysis, a combination that itself raises new questions and difficulties.

Canadian governments have an opportunity to become leaders in successful AI deployment by applying hard-learned lessons and taking proactive measures to ensure trustworthy and accountable AI. Absent these measures, government ministries, agencies, tribunals, and courts will likely need to address important legal and technical issues on a case-by-case basis, resulting in poorer public services, biased and inconsistent government decision-making, diminished rights protection, delays, and unnecessary costs and litigation.

Accountable AI is the latest in a series of LCO reports addressing AI and ADM in the Canadian justice system. Earlier papers address the use of AI and ADM in the criminal justice system,² government AI systems development,³ how to regulate AI,⁴ and the use of AI to generate evidence in criminal proceedings.⁵

This report is part of the LCO's ongoing AI, ADM, and the Justice System project. Information about this project is available [here](#). More information about the LCO is available [here](#).

A complete list of the LCO's 19 recommendations is included in **Appendix A**.



Why and How Are Governments Using AI?

AI and ADM systems offer significant potential benefits to governments and the public. Many commentators believe that “AI might finally help crack the code of mass adjudication, improving accuracy, reducing inconsistency, and cutting down on rampant backlogs that plague [government] agencies.”⁶ Many also believe that government AI systems have the potential to reduce discrimination and enhance democratic and legal accountability.⁷ Accordingly, many believe that AI has the potential to significantly improve the administrative state.⁸

Governments around the world are using AI across a broad range of areas, services, and functions. Some of the notable uses of AI in government to date include:

- Natural language processing tools to improve the quality of adjudicative decision-writing.⁹
- Child risk assessment tools that predict the potential for child neglect and abuse.¹⁰
- Immigration detention tools that evaluate whether to detain a person.¹¹
- Biometric surveillance systems, including facial recognition.
- Teacher evaluation systems that measure a teacher’s impact on educational achievement.¹²
- Public benefit fraud detection algorithms.¹³
- Predictive policing systems that predict the potential location of crimes or potential offenders.¹⁴
- Bail and sentencing algorithms that predict the potential for recidivism.¹⁵
- Regulatory compliance algorithms.¹⁶
- Tax compliance algorithms.¹⁷

Transposed to the Canadian context, the applications currently in use internationally would affect some of Canadian’s most important government services and the jurisdiction and workload of many Superior Courts, provincial courts, administrative tribunals, government ministries, agencies, and municipalities.

Importantly, these applications are the tip of the iceberg of potential government AI applications. Government use of AI will expand and accelerate as AI, machine learning and natural language processing continue to develop.

Risks and Harms of AI

Governments must respond to the well-documented risks and harms of AI and ADM systems. Experience with government AI and ADM systems across North America, Europe, Australia, and New Zealand demonstrates the serious risk of bias, “data discrimination,” lack of due process, and “black box” decision-making.¹⁸ AI systems also risk reducing judicial and administrative discretion, entrenching automation bias, and undermining the legitimacy of government and agency decision-making.¹⁹

The burden of these harms and risks is not shared equally, as they fall disproportionately on racialized or otherwise vulnerable communities.²⁰

Absent proactive measures, AI tools may worsen bias, unfairness, and legal accountability in government decision-making. That said, AI tools offer significant potential to improve fairness and enhance legal accountability. Neither outcome is predetermined or inevitable. Whether government AI is harmful or beneficial will depend on choices and decisions made by governments, courts and others in the coming months and years.

How AI Transforms Government Decision-making

AI and ADM tools will transform government decision-making and administration.²¹ For example:

- AI accelerates the speed and scale of government decision-making.
- AI systems can be biased.
- AI systems embed complex legal, technical, statistical, and operational decisions into code, often resulting in opaque “black box” systems or decision-making.
- Data issues and choices are pervasive in AI systems.
- AI systems may change the decision-maker of government decisions.
- AI may reduce administrative discretion and independence, even when there is a “human in the loop.”
- AI systems can reduce public and stakeholder engagement in policymaking and oversight of important government services and functions.

These changes raise significant new questions about how to ensure legal accountability for government decision-making.

Accountable AI

All Ontarians have a fundamental interest in ensuring government AI systems are effective, accurate, fair, transparent and legally accountable.

Legal accountability for government AI in Ontario will depend on a sophisticated mix of technical, operational and legal strategies and skills, including:

- Fulfilling the promise of Ontario’s *Trustworthy AI Framework*.
- AI regulation.

- Reforms to, or reinterpretations of, existing human rights and administrative law rules.
- Considering new AI-specific Rules of Civil Procedure and related reforms as may be necessary.
- Innovative access to justice strategies.

Legal accountability strategies are interdependent. For example, systemic regulation will not provide meaningful accountability unless litigants have a realistic opportunity to challenge AI-based government decisions and have access to appropriate legal remedies. In this respect individual rights and systemic governance complement and support each other.

Trustworthy AI

Many governments have responded to the challenges of AI by announcing or adopting “trustworthy AI” or “ethical AI” frameworks and policies.²² These frameworks are designed to assure the public and stakeholders that government AI development and use will be transparent, legal, and beneficial. The critical reception to many of strategies has been mixed, and many have been harshly criticized as “whitewashing biased tech.”²³

The Government of Canada’s Directive on Automated Decision-making (“the Canada ADM Directive”) is the most notable Canadian “trustworthy AI” framework.²⁴ Internationally, the most comprehensive and significant proposed “trustworthy AI” framework is the European Commission’s proposed AI rules (“EC AI Proposal”).²⁵

As part of their *Digital and Data Strategy*, the Government of Ontario has been working to develop its own *Trustworthy AI Framework*.²⁶

In May 2021, the province commenced a consultation process asking the public to provide input and ideas on how government

can develop an AI Framework that is “accountable, safe and rights based.”²⁷ The province framed the consultation through three key commitments: (i) No AI in secret; (ii) AI use Ontarians can trust; (iii) AI that serves all Ontarians. The consultation process included the release of the province’s draft Alpha documents on *Principles for Ethical Use of AI* and *Transparency Guidelines for AI* (“Alpha documents”).²⁸

In September 2021, the provincial government announced its “Action Plan.”²⁹ The Action Plan had two key components. The first was a commitment to operationalize the Alpha Documents. The second was to improve the province’s AI and Algorithm Inventory.³⁰

The provincial government continued targeted consultations and in January 2022 released its “Beta principles for the ethical use of AI and data enhanced technologies in Ontario” (the “Beta Principles”).³¹

The LCO commends the Government of Ontario for taking many positive steps to promote trust in provincial AI systems, including the province’s emerging *Trustworthy AI Framework* and draft Alpha documents and Beta Principles.

The provincial government’s commitments and draft Principles highlight many significant government AI issues. However, more work is needed to address outstanding issues regarding the legal status, scope, transparency, and enforceability of these commitments.

The LCO believes the provincial government can fulfill the promise of its *Trustworthy AI Framework* by:

- Committing to not deploy high-risk AI systems prior to adopting its *Trustworthy AI Framework*.
- Establishing the *Trustworthy AI Framework* in legislation and regulations.

- Committing to transparency, accountability, and public engagement in provincial AI systems.
- Ensuring that criminal justice AI systems (such as facial recognition, biometric identification, predictive policing, and bail/sentencing risk assessments) are included in a dedicated criminal law *Framework*;
- Ensuring provincial agencies, tribunals and courts are included in the *Framework*.
- Committing to assist municipalities and local agencies develop resources, tools, and standards to ensure *Trustworthy AI* in these organizations.
- Developing performance metrics to ensure the province is meeting the goals of *Trustworthy AI*.
- Establishing a multidisciplinary *Trustworthy AI* Advisory Group and public consultation plan.
- Committing to meaningful and multidisciplinary public input and participation in all phases of provincial AI regulation and development.

AI Regulation

Comprehensive AI regulation is an important element of accountable AI.³² The systemic legal issues raised by AI cannot be addressed through individual litigation, “ethical AI” guidelines, best practices, or piecemeal legislation. There are many potential legislative or regulatory responses. Choices in this area are complex and consequential.

In August 2021, the ADA Lovelace Institute, the AI Now Institute and the Open Government Partnership released a summarizing the lessons learned from what they describe as the “first wave” of “algorithmic accountability policy for the public sector.”³³ This report, titled *Algorithmic Accountability for the Public Sector*,

identified eight policy mechanisms “through which governments have sought to achieve algorithmic accountability in the public sector,” including principles and guidelines, prohibitions and moratoria, public transparency, impact assessments, audits and regulatory inspection, external/independent oversight bodies, rights to hearings and appeals, and procurement conditions.³⁴

The LCO’s April 2021 Issue Paper, *Regulating AI: Critical Issues and Choices*, set out the first comprehensive framework for regulating government AI systems in Canada. The LCO’s cascading “mixed model” of regulations, practices, and standards should be implemented to address the well-established risks and potential harms of government AI systems.³⁵

Accordingly, the LCO recommends that Government of Ontario’s *Trustworthy AI Framework* be established in legislation and regulations. The legislation should include provisions to ensure provincial AI, ADM and related systems are transparent, accountable, and legal. The legislation should also include provisions that promote access to justice, address bias/discrimination, and a requirement to mitigate harms. Finally, the LCO recommends that the comprehensive regulatory regime include:

- Baseline requirements for all public sector AI, ADM and related systems, irrespective of risk.
- Strong protections for AI and ADM transparency, including disclosure of both the existence of a system and a broad range of data, tools and processes used by the system.
- Mandatory “AI Registers”.
- Mandatory, detailed and transparent AI or algorithmic impact assessments, including the identification of prohibited and high-risk systems.

- Explicit compliance with the *Charter*, human rights legislation and administrative law.
- Explicit requirements to measure, correct and audit/monitor bias in AI systems.
- Data standards.
- Access to meaningful remedies.
- Mandatory auditing and evaluation requirements.
- Independent oversight of both individual systems and government use of AI, ADM and related systems generally.

AI Litigation

AI regulation is designed to provide a systemic accountability framework for government AI decision-making. These proposals typically do not provide rights to challenge an AI tool in individual cases. AI litigation raises distinct legal accountability and access to justice issues.

Right to Contest AI

The “right to contest” AI is an emerging AI accountability strategy that would enshrine an explicit, individual right to contest AI decisions.³⁶ At this point, the LCO is not recommending the adoption of an independent right to contest AI in Ontario. There are too many outstanding legal, technical, and operational issues to address before we take that step. Moreover, the LCO believes there are more important law reform priorities in Ontario at this stage, including our recommended regulatory reforms and our recommendations in the areas of human rights and administrative law. That said, there are important reasons to study the “right to contest AI” further and to learn from other jurisdictions.

Regulation by Litigation and the Access to Justice Challenge

AI litigation places extraordinary legal and financial burdens on the individuals wishing to challenge government AI-based decisions.³⁷

Challenging complex AI issues in court or at a tribunal would be difficult under any circumstances, even assuming the challenging party had high quality, fully funded and technologically competent legal representation. These challenges would undoubtedly be significantly worse for under- or unrepresented litigants.

The legal and social implications of this analysis are worrisome. It is possible that only the best resourced and most sophisticated litigants will be able to challenge many AI-based government decisions. Absent positive initiatives, government AI decision-making may add significant new access to justice barriers to low-income, marginalized, Indigenous, and racialized communities, thus compounding the over-representation of these communities in Ontario's justice system

Human Rights

Government AI systems must be human rights compliant. However, achieving human rights compliance will be difficult unless several important issues are addressed.

Although the human rights implications of AI are complicated and evolving, there is general agreement that human rights are crucial in the development of AI.³⁸ There is also agreement that analysis must move beyond recital of principles and focus operationalizing human rights compliance

AI systems can be biased or discriminatory against individuals on many grounds including race, age, disability, sex, and family structure.³⁹ Bias in AI systems can also intersect across

multiple grounds at once. Discrimination can occur in the design of an AI system because of the developer's assumptions. It can also occur through use of data with biases often hidden or embedded into the system.

In extensive LCO consultations with government officials, it was apparent that AI developers, administrators and policymakers are committed to developing government AI systems that comply with human rights law. The provincial government has publicly affirmed this goal.

The most common bias criticism of AI is the potential use of biased data. In these circumstances, because the training data or "inputs" used by an AI or algorithm (such as arrest, conviction, child welfare, education, employment or "fraud" data) may themselves be the result of biased practices, the results or outputs of an AI or algorithmic system may also be biased. In other words: "bias in, bias out."⁴⁰

For many, the "bias in, bias out" argument is conclusive proof that AI or algorithmic tools should *never* be used in government decision-making. In this view, AI and ADM systems are often "a sophisticated form of racial profiling."⁴¹ For others, AI or algorithmic tools are valuable because they have the potential to *reveal* systemic bias and discrimination.⁴²

The contrast between these perspectives – AI as perpetuating bias versus AI as revealing bias – runs through entire AI and human rights debate.

The "bias in, bias out" issue is the best-known AI bias issue, but not the only one. Discrimination and bias issues can also arise in statistical "metrics of fairness", AI or algorithmic scoring, automation bias, due process, and concerns about the accuracy, reliability and validity of datasets.⁴³

To its credit, the Government of Ontario has addressed this issue forthrightly. The Beta Principles explicitly states that

Data enhanced technologies should be designed and operated in a way throughout their life cycle that respects the rule of law, human rights, civil liberties, and democratic values. These include dignity, autonomy, privacy, data protection, non-discrimination, equality, and fairness.”⁴⁴

These commitments will be challenging to operationalize.

Notwithstanding its many strengths the LCO has concluded that the current human rights framework in Ontario is insufficient to protect human rights where AI systems are relied on for government decision making. In the long run, human rights compliance will depend on how policymakers, courts and tribunals address significant evidential challenges inherent in “black box” government AI systems. These challenges can be addressed, in part, by systemic and significant disclosure and transparency of government AI systems.

Human rights compliance will also depend on thoughtful answers to several equally important legal, technical and practical issues, including:

- Data standards
- Evidential standards
- Guidelines or metrics to measure bias and discrimination in AI systems
- Bias testing or auditing requirements
- Determining reasonable accommodations in AI systems
- Remedies

Finally, human rights compliance of government AI systems will depend on addressing two further issues:

- Can AI systems be used to reveal or address systemic discrimination?
- Are there AI “no-go” zones where a government AI system’s potential risk to human rights is so significant that governments should prohibit the use AI in that area?

The LCO believes AI and human rights issues must be addressed urgently and proactively. The growing use of government AI systems will likely result in more public interest in human rights issues in Ontario. There is also likely to be more human rights litigation challenging government AI systems in the coming years. The increased use of these systems, when combined with the novel legal issues they present, make them a target for systemic discrimination challenges.

Fortunately, there are many promising practices and law reform measures to begin the process of ensuring human rights compliance in government AI systems. An important early initiative could be to develop a made-in-Ontario AI Human Rights Impact Assessment to assist developers, policymakers, decision-makers and the public assess the human rights compliance of a government AI system. Further steps include:

- Requiring human rights experts and communities to be involved in the design, development and operationalization of government AI systems
- Requiring human rights experts and communities be engaged throughout the lifecycle of a government AI system
- Requiring bias testing or auditing of AI systems

The LCO stresses that these recommendations supplement, and in no way replace, LCO recommendations regarding an appropriate regulatory framework for government AI

systems in Ontario. Those recommendations include several reforms (such as mandatory disclosure of AI systems, risk assessments, etc.) that provide the foundation for the human rights-specific recommendations identified here.

Absent appropriate policy guidance on human rights AI issues, provincial ministries, agencies, tribunals and/or courts will likely need to address complex legal and technical issues on a case-by-case basis, which may result in poorer public services, inconsistent decision-making, diminished rights protection, delays, added costs and unnecessary litigation.

Finally, it is important to note the role of the Ontario Human Rights Commission and Human Rights Tribunal in AI discussions. The OHRC has the authority to draft policy guidelines and to add themselves as an intervenor or a party to a test case where new law is likely to be made. The Human Rights Tribunal can go beyond restitution for a single individual and order respondents to correct systemic issues. In these circumstances, the Ontario Human Rights Commission and Human Rights Tribunal will play an important role in determining if, or how, systemic discrimination is addressed in government AI systems.

Fortunately, the OHRC has already begun to consider these issues. On December 10, 2021, the LCO, the Ontario Human Rights Commission and the Canadian Human Rights Commission announced a joint research and policy initiative to examine human rights issues in the development, use and governance of artificial intelligence and algorithms in Canada and specifically in Ontario.

Administrative Law

Administrative law is likely to have a profound impact on government use of AI, ADM and related technologies. These systems will have

to be designed, administered and evaluated to ensure compliance with the principles of procedural fairness and substantive fairness.

The Government of Canada's Automated Decision-making Directive (Canada ADM Directive) addresses many administrative law issues positively. For example, many features of the Canada ADM Directive raise the standard of administrative governance. The Directive has gaps and shortcomings, however, even within the realm of federal administrative law.

There is no equivalent of the Canada ADM Directive at the provincial level, nor are there equivalent laws, policies or directives at the municipal or provincial agency level. As a result, the challenge of reconciling AI systems and administrative law will be greater in Ontario. Accordingly, the LCO recommends the Government of Ontario adopt a provincial equivalent of the Canada ADM Directive.

A provincial Automated Decision-making Directive could address many of the important legal, technical, and practical issues necessary to ensure government AI systems are compliant with administrative law, including but not limited to:

- "Notice" when an AI system is used by the provincial government, municipality, or agency
- How to assess the "reasonableness" of a government decision made or influenced by AI
- "Reasons" from an AI system?
- "Explainable AI" and legal justifications
- How to assess risk and impact of a government AI decision
- Meaningful participation and appeal rights
- Efficient and cost-effective dispute resolution

As with human rights issues, the absence of appropriate guidance on AI administrative law

issues will likely mean that provincial ministries, agencies, tribunals and/or courts will need to address complex legal and technical issues on a case-by-case basis, which may result in poorer public services, inconsistent decision-making, diminished rights protection, delays, added costs and unnecessary litigation.

In the U.S., there is a growing body of academic thought about the long-term implications of AI on administrative law and administrative decision-making in the U.S.⁴⁵ Danielle Citron, one of the pioneers in this area, is skeptical about whether judicial review of complex AI systems is realistically possible. As a result, she and others have suggested the need a new model of “technological due process.”⁴⁶ Many commentators are more optimistic and suggest that AI systems will improve legal accountability and government decision-making, perhaps dramatically. Still others caution against what they call “techno-utopianism.”⁴⁷ In this view, administrative law will have to be adapted significantly meet the new realities of AI-powered government decision-making.⁴⁸

The LCO agrees there are reasons to be cautious. Government algorithmic and AI systems to date have a decidedly mixed track record. That said, there also are many reasons to be optimistic about AI in government decision-making and to encourage its use. This optimistic future will not create itself, however, and is dependent on the choices that policymakers, program officials, tribunals, and courts make now in the relatively early stages of AI implementation in government.

In the not too distant future, hard questions will need to be asked about whether Canadian administrative law principles remain viable in a more technologically advanced administrative state. Will the comparatively comprehensive Canada ADM Directive still be a viable tool when the speed, scale, and

number of AI systems in government expands rapidly, as it is likely to do?

Danielle Citron and Ryan Calo suggest the question is not “how to restore the status quo ex ante given that machines have supplanted people...[but rather]” whether technology obligates a fundamental re-examination” of why administrative bodies are bestowed with decision-making power in the first place.⁴⁹ In their view, “[a]gencies that automate throw away expertise and discretion with both hands.”⁵⁰

From a Canadian perspective, Teresa Scassa points out that the factors justifying the creation of administrative bodies are quite different than the factors justifying the automation of government decision-making.⁵¹ If automation and AI shift the purpose of administrative bodies and tribunals, do we need to fundamentally reconsider the principles that govern administrative decisions?

At this stage of government AI development these questions are impossible to answer. Nevertheless, it is difficult to conceive of a future where the principles of transparency, participation, impartiality, fairness, and reasons are not central to ensuring the legal accountability of government decision-making. It is also true that the significance of these principles will always be heavily dependent on context and impact. Administrative law will have to adapt accordingly over time.

Privacy

Privacy is a seminal issue in discussions about AI and other data driven technologies.

The tension between protection of individual privacy rights and the benefits of AI innovation was quickly recognized as a significant AI governance and rights issue.

In the last several years, the Government of Ontario has taken several initiatives to facilitate data sharing and support the development of government AI systems. These initiatives include amendments to the *Freedom of Information and Protection of Privacy Act (FIPPA)*,⁵² and Ontario's *Data Strategy Initiative*⁵³ and *Digital and Data Strategy Directive*.⁵⁴ These initiatives and other initiatives in Ontario, Quebec and the federal level have focused public attention on privacy law and data protection.

Governmental sharing of data can fundamentally alter the control government have over individuals. There is a need for public discussion about the balance between the potential benefits of greater government data sharing (improved government services, for example) and the potential risks of data sharing (surveillance, privacy violations, human rights, legal fairness).

As the province moves forward, there are gaps that should be monitored and addressed:

- The effectiveness of de-identification may be limited.
- AI challenges an individual's right to access their personal data.
- Remedies.
- How to ensure privacy and data governance policymaking is transparent and participatory.

Ontarians can learn from the examples in Australia (Robodebt), Michigan (MiDas), and the Netherlands (SyRi). All three systems involved AI that scanned huge amounts of government data to find "irregularities" in either individual employment insurance records (Robodebt/MiDas) or social benefits determination (SyRi). All three systems were widely criticized, legally challenged, and eventually reformed or cancelled due to privacy, due process or system accuracy concerns. All three systems also caused great harm. The repercussions for each government was significant. In Australia, for example, the government lost a US \$1.7B class action lawsuit.⁵⁵

Civil Procedure and Other Issues

In Ontario, civil cases are governed by procedural rules to ensure proceedings are fair for both sides. AI accountability depends on these rules and laws being fair and appropriate.

Rules of Civil Procedure

Ontario's *Rules of Civil Procedure* will likely allow parties to navigate disputes about artificial intelligence fairly. As the law develops, new AI-specific *Rules of Civil Procedure* should be considered.

Confidentiality and Sealing Orders

The current laws governing confidentiality and sealing orders are likely to be sufficient to address AI-related concerns. Blanket sealing orders, or redaction of confidential information, are likely to be problematic. Other alternatives may be preferable.

Crown Privilege

It is important that the provincial government not be immune to tortious liability for government AI systems. The new provincial *Crown Liability and Proceedings Act, 2019* raises questions about whether parties can be barred from negligence claims against the provincial government for developing, implementing, deploying, and relying on AI systems.

Evidence

"Black box" AI systems could create burdensome and potentially impossible evidentiary thresholds for plaintiffs challenging government AI systems. Evidentiary thresholds in AI cases will be a key issue. The laws of evidence are flexible and adaptable but should be monitored.

Education

It will be necessary to develop training and guidance for participants in Ontario's civil justice system. The provincial government, judiciary, court administrators and provincial legal organizations should develop educational programs and materials for the judiciary, tribunal members, counsel and administrators.

Ongoing Monitoring

The development and use of AI in Ontario's justice system should be monitored. The provincial government, judiciary, academics, NGOs, and legal organizations should consider establishing a working group or measures to analyze, monitor and report on the use of AI and algorithms in Ontario's civil justice system.

APPENDIX A

Accountable AI

List of Recommendations

Trustworthy AI

To support Trustworthy AI in Ontario, the LCO recommends:

1. The provincial government should not deploy high-risk AI or automated decision-making technologies prior to adoption of its comprehensive Trustworthy AI Framework.
2. The Trustworthy AI Framework should be established in legislation and regulations.
3. The Trustworthy AI Framework should promote AI transparency, accountability, and public engagement in the development, operation, and evaluation of provincial AI systems.
4. The provincial government should create an AI framework to specifically address AI systems that are developed, or used in, the criminal justice system, such as facial recognition, biometric identification, predictive policing and bail/sentencing risk assessments.
5. The Trustworthy AI Framework should establish a framework for municipalities, provincial agencies, and courts and tribunals under provincial jurisdiction.
6. The provincial government should commit to assisting municipalities and public agencies develop resources, tools, and standards to ensure Trustworthy AI in these organizations.
7. The provincial government should develop public performance metrics to ensure the province is meeting the goals of Trustworthy AI.
8. The provincial government should establish a multidisciplinary Trustworthy AI Expert Advisory Task Force and public consultation plan to advise provincial policymakers on how to fulfill the commitments and recommendations herein.
9. The provincial government should continue to seek meaningful and multidisciplinary public input and participation in all phases of AI regulation development.

AI Regulation

To ensure government AI is properly regulated, the LCO recommends:

10. The provincial government's Trustworthy AI Framework should be established in legislation and regulations. The legislation should include, but not be limited to, provisions to ensure provincial AI, ADM and related systems are transparent, accountable, and legal. Legislation should also include provisions that promote access to justice, address bias/discrimination, and a requirement to mitigate harms. The regulations should be reviewed regularly.

11. The comprehensive regulatory regime should include:
 - Baseline requirements for all public sector AI, ADM and related systems, irrespective of risk.
 - Strong protections for AI and ADM transparency, including disclosure of both the existence of a system and a broad range of data, tools and processes used by the system.
 - Mandatory “AI Registers”.
 - Mandatory, detailed and transparent AI or algorithmic impact assessments, including the identification of prohibited and high-risk systems.
 - Explicit compliance with the Charter, human rights legislation and administrative law.
 - Explicit requirements to measure, correct and audit/monitor bias in AI systems.
 - Data standards.
 - Access to meaningful remedies.
 - Mandatory auditing and evaluation requirements.
 - Independent oversight of both individual systems and government use of AI, ADM and related systems generally.

Human Rights and AI

To ensure government AI systems comply with human rights requirements, the LCO recommends:

12. The provincial government, Ontario Human Rights Commission, technologists, human rights Experts, and community members work together to develop a provincial human rights strategy for Government of Ontario AI systems. This strategy should address the following issues:
 - A made-in-Ontario AI Human Rights Impact Assessment
 - Data standards
 - Evidential standards in government AI systemic discrimination cases
 - Guidelines or metrics to measure bias and discrimination in government AI systems
 - Bias testing or auditing requirements
 - Determining reasonable accommodation in government AI systems
 - Reviewing remedy provisions in the Ontario Human Rights Code for sufficiency to address potential harms of government AI systems
 - Access to justice challenges

A key element of this strategy should be to develop guidance for policymakers to determine what AI systems or applications should be prohibited on human rights grounds.

This strategy should require:

- That human rights experts and communities to be involved in the design, development and operationalization of government AI systems
- That human rights experts and communities to be meaningfully engaged throughout the lifecycle of a government AI system

Administrative Law

To ensure government AI systems comply with administrative law requirements, the LCO recommends:

13. The provincial government should develop and adopt a Directive for provincial government agencies that can guide provincial decision-making and serve as template for other public organizations under provincial jurisdiction. Factors that the Directive could address include:
 - What constitutes “notice” when an AI system is used by the provincial government, a municipality or provincial agency?
 - Do impacted parties need to know only that an AI system was used in the process of the decision, or do they need more information about how the system works, such as what data it relied on, how the data was sorted and weighted, or whether a human was involved in the decision at a certain stage?
 - Do parties need to participate in a decision made in part or in whole by an AI system?
 - Do parties need to be consulted in the creation of a system?
 - What type of “reasons” or “explainability” is required from a system?
 - How to assess the “reasonableness” of a decision made or influenced by AI? What is the standard an AI system will be held to?
 - Can an AI system be explained sufficiently in a way that impacted parties can understand the decision made against them and are meaningful appeal options possible?
14. The provincial government, community legal clinics, members of the private bar, academics, the judiciary, tribunals, and technologists should come together to consider the following issues:
 - How to determine the evidence required when assessing a government AI system?
 - How to assess the “reasons” of a government AI system?
 - How to assess the risk and impact of a decision made or aided by a government AI system?
 - How to ensure there is a “human-in-the-loop” while protecting against automation bias?
 - Is a government AI system sufficiently understandable to meet the requirements of justification?
 - Does AI “explainability” models provide transparent and intelligible understanding of how a specific outcome was reached?
 - How can appeals from decisions of AI systems be meaningful to the parties?
 - Who is to be held to the standard of reasonableness?
 - How can parties, courts and tribunals address challenges to government AI systems in a fair, efficient and cost-effective manner?

Civil Procedure, Evidence and Other Issues

In addition to Recommendations 1-14 above, the LCO recommends:

15. Ontario's *Rules of Civil Procedure* should be monitored. As the law develops, new AI-specific *Rules of Civil Procedure* should be considered.
16. The provincial government should not be immune to tortious liability for government AI systems. The new provincial *Crown Liability and Proceedings Act, 2019* should not be used to bar negligence claims against the provincial government for developing, implementing, deploying and relying on AI systems.
17. Ontario's laws of evidence should be monitored to gauge whether the current law evaluating expert evidence is sufficient and effective when applied to AI litigation.
18. The provincial government, judiciary, court administrators and provincial legal organizations should develop educational programs and materials for the judiciary, tribunal members, counsel and administrators.
19. The development and use of AI in Ontario's justice system should be monitored. The provincial government, judiciary, academics, NGOs, and legal organizations should consider establishing a working group or measures to analyze, monitor and report on the use of AI and algorithms in Ontario's civil and administrative justice systems.

Endnotes

- 1 Most analysis of government AI systems to date has focused on AI decision-making in the criminal justice system or on specific technologies, such as algorithmic risk assessments or facial recognition systems. In contrast, this paper considers how AI will affect government decisions in the civil and administrative justice systems.

- 2 Law Commission of Ontario, *The Rise and Fall of Algorithms in American Criminal Justice: Lessons for Canada*, (October 2020) [LCO Criminal AI Issue Paper], online: <https://www.lco-cdo.org/wp-content/uploads/2020/10/Criminal-AI-Paper-Final-Oct-28-2020.pdf>.

- 3 Law Commission of Ontario, *Legal Issues in Government AI Development*, (March 2021), [LCO Government AI Issue Paper], online: <https://www.lco-cdo.org/en/our-current-projects/ai-adm-and-the-justice-system/>.

- 4 Law Commission of Ontario, *Regulating AI: Critical Issues and Choices*, (April 2021) [Regulating AI], online: <https://www.lco-cdo.org/en/our-current-projects/ai-adm-and-the-justice-system/regulating-ai-critical-issues-and-choices/> and Law Commission of Ontario, *Comparing European and Canadian AI Regulation*, (November 2021) [LCO Canada/EU AI Issue Paper], online: <https://www.lco-cdo.org/en/our-current-projects/ai-adm-and-the-justice-system/comparing-european-and-canadian-ai-regulation/>.

- 5 Law Commission of Ontario, *AI Case Study: Probabilistic Genotyping DNA Tools in Canadian Criminal Courts*, (June 2021) [LCO AI DNA Issue Paper], online: <https://www.lco-cdo.org/en/our-current-projects/ai-adm-and-the-justice-system/ai-case-study-pg/>.

- 6 David Freeman Engstrom & Daniel E. Ho, *Algorithmic Accountability in the Administrative State* (2020) *Yale J on Reg 800*, online: papers.ssrn.com/sol3/papers.cfm?abstract_id=3965041 [Engstrom and Ho] at 813-814.

- 7 See, for example, George Atalla, “How AI Can be a Force For Good in Government” (28 February 2019), online: [EY Consulting https://www.ey.com/en_gl/consulting/how-ai-can-be-a-force-for-good-in-government](https://www.ey.com/en_gl/consulting/how-ai-can-be-a-force-for-good-in-government); Harvard Kennedy School Ash Center, “Ten Ways Data can Make Government Better”, online: [Harvard.edu https://datasmart.ash.harvard.edu/news/article/ten-great-ways-data-can-make-government-better-1041](https://datasmart.ash.harvard.edu/news/article/ten-great-ways-data-can-make-government-better-1041) and Cary Coglianese and David Lehr, “Transparency and Algorithmic Governance” (2019) 71:1 *Admin LR 1* [Coglianese and Lehr] at 49-54.

- 8 See generally, Coglianese and Lehr.

- 9 *Ibid* at 39-40.

- 10 AI Now, “Automated Decision Systems: Examples of Government Use Cases” (2019), online: <https://drive.google.com/file/d/1k4HKer-SLqEWnjNOWaXg6iM9mAvcf-fhf/view> [AINow Use Cases].

- 11 *Ibid* at 4.

- 12 *Ibid* at 2.

- 13 *Ibid*.

- 14 *Ibid*.

- 15 *Ibid*.

- 16 *Ibid*.

- 17 *Ibid* at 27.

- 18 See generally several international surveys of government use of AI and ADM by governments, including AINow Institute, *Algorithmic Accountability Policy Toolkit*, (October 2018), online: <https://ainowinstitute.org/aap-toolkit.pdf>; David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey and Mariano-Florentino Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* (February 1, 2020) [US Federal Administrative Agencies], online: <https://ssrn.com/abstract=3551505>; Michele Gilman, *Poverty Algorithms: A Poverty Lawyer’s Guide to Fighting Automated Decision-Making Harms in Low-Income Communities*, *Data and Society* (September 2020), online: <https://datasociety.net/wp-content/uploads/2020/09/Poverty-Law-algorithms-20200915.pdf>; Australian Human Rights and Technology; and Government Use of Artificial Intelligence in New Zealand: Final Report on Phase 1 of the NZ Law Foundation’s AI and Law in NZ Project, (Wellington, 2019) [NZ AI and Law], online: <https://www.cs.otago.ac.nz/research/ai/AI-Law/NZLF%20report.pdf>.

- 19 See generally the discussion and accompanying notes at pgs. 18-19 of the LCO's *Accountable AI* paper.
- 20 LCO Criminal AI Issue Paper at 20-26.
- 21 For a detailed discussion of how AI changes government decision-making, see pages 17-20 in the LCO's *Accountable AI* report.
- 22 A small sample of additional "trustworthy AI" frameworks includes the UK Government's Ethics, Transparency and Accountability Framework for Automated Decision-Making (<https://www.gov.uk/government/publications/ethics-transparency-and-accountability-framework-for-automated-decision-making/ethics-transparency-and-accountability-framework-for-automated-decision-making>); Scotland's AI Strategy (<https://www.scotlandstrategy.com/>); New South Wales in Australia (<https://www.digital.nsw.gov.au/policy/artificial-intelligence/ai-strategy/building-public-trust>); and New York City (<https://cities-today.com/new-york-launches-strategy-for-ethical-ai/>).
- 23 Surveillance Technology Oversight Project, "S.T.O.P. Condemns New York City AI Strategy for "Whitewashing Biased Tech," (October 4, 2021), online: <https://www.stopspying.org/latest-news/2021/10/14/stop-condemns-nyc-ai-strategy-for-whitewashing-biased-tech>.
- 24 See Regulating AI at 17-49.
- 25 European Commission, Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, (2021) [EC AI Proposal], online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1623335154975&uri=CELEX%3A52021PC0206>.
- 26 Ontario, "Consultation: Ontario's Trustworthy Artificial Intelligence (AI) Framework" (6 May 2021) [Ontario Trustworthy AI Framework], online: <https://www.ontario.ca/page/ontarios-trustworthy-artificial-intelligence-ai-framework-consultations>.
- 27 Ontario Trustworthy AI Framework.
- 28 Ontario, "Artificial Intelligence (AI) Guidance" (April 15, 2021), online: <https://www.ontario.ca/page/artificial-intelligence-ai-guidance#section-1>.
- 29 Ontario Digital Service, "Action Plan – Ontario, Canada, 2021-2022", online: <https://www.opengovpartnership.org/documents/action-plan-ontario-canada-2021-2022/>
- 30 The Government of Ontario's current inventory of AI and algorithms can be found in the Ontario Open Data Catalogue at: data.ontario.ca/group/artificial-intelligence-and-algorithms.
- 31 Ontario, "Beta principles for the ethical use of AI and data enhanced technologies in Ontario" (2022) [Ontario Beta Principles], online at <https://www.ontario.ca/page/beta-principles-ethical-use-ai-and-data-enhanced-technologies-ontario#:~:text=The%20Ontario%20%E2%80%9Cbeta%E2%80%9D%20principles%20complement,best%20practices%2C%20principles%20and%20frameworks>.
- 32 For a detailed discussion of AI regulation, see the LCO's Regulating AI paper.
- 33 Ada Lovelace Institute, AI Now Institute and Open Government Partnership. Algorithmic Accountability for the Public Sector [Algorithmic Accountability in the Public Sector] (2021), online at: <https://ainowinstitute.org/pages/algorithmic-accountability-for-the-public-sector-report.html> at 3.
- 34 Ibid at 13.
- 35 Regulating AI at 25-27.
- 36 See generally, Margot E. Kaminski & Jennifer M. Urban, *The Right to Contest AI* (2021) 121:7 Colum L Rev 1957, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3965041.
- 37 See generally the discussion of the "limits of litigation" in the LCO's Criminal AI Issue Paper at 36-37.
- 38 See generally, Australian Human Rights Commission, *Human Rights and Technology: Final Report* (2021), online: tech.humanrights.gov.au/downloads?_ga=2.224262939.1812174511.1647717023-723935921.1647717023.
- 39 The LCO's Criminal AI Issue Paper discusses bias and discrimination within the context of criminal proceedings at length. The report addressed the many ways in which an AI or ADM system can be biased and the pressing need for law reform. In the LCO's view, the is-

- sues and lessons from the criminal context are applicable to other areas of government decision-making.
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- 40 This phrase is taken from an article by Sandra Mayson. See generally Sandra Gabriel Mayson, *Bias In, Bias Out* (2018) 128 Yale L J 2218 [Mayson] (2019), online: <https://ssrn.com/abstract=3257004>.
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- 41 Human Rights Watch at 8.
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- 42 See generally, Jon Kleinberg, Jens Ludwig, Sendhil Mullainathan & Cass Sunstein, *Discrimination in the Age of Algorithms* (2018) 10 J of L Analysis 113, online: <https://doi.org/10.1093/jla/laz001> at 113
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- 43 See generally, LCO Criminal AI Issue Paper at 20-26. Note, however, the importance of understanding the differences and distinctions between how lawyers and technologists understand bias. See generally, Alice Xiang, *Reconciling Legal and Technical Approaches to Algorithmic Bias* (13 July 2020) 88:3 Tenn L Rev, online: <https://ssrn.com/abstract=3650635>.
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- 44 Ontario Beta Principles.
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- 45 Danielle Keats Citron, *Open Code Governance* (2008) 1 U Chi L Forum 355, online: chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1430&context=uclf; Danielle Keats Citron & Frank Pasquale, *The Scored Society* (2014) 89 Wash L Rev 1 [Pasquale 2014]; Joshua A. Kroll et al, *Accountable Algorithms* (2017) 165:3 U Pa L Rev 633 online: scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9570&context=penn_law_review; Robert Brauneis & Ellen P. Goodman (2018) *Algorithmic Transparency for the Smart City*, 20 Yale J L Tech 103 at 115–118, online: yjolt.org/algorithmic-transparency-smart-city#:~:text=As%20artificial%20intelligence%20and%20big,be%20accountable%20for%20its%20behavior.
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- 46 Danielle Keats Citron, *Technological Due Process* (2008) 85 Wash U L Rev 1249 [Citron 2008] at 1254.
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- 47 Engstrom and Ho at 854.
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- 48 *Ibid* at 823-845.
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- 49 Citron & Calo at 6-7.
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- 50 *Ibid* at 36 and 39.
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- 51 Teresa Scassa, *Administrative Law and the Governance of Automated Decision-making*, (2021) 54 UBC L Rev 251.
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- 52 R.S.O. 1990, c. F.31. There are also privacy protections in The Personal Health Information Protection Act, and the Child, Youth and Family Services Act. The Personal Information Protection and Electronic Documents Act (PIPEDA) applies to private-sector organizations across Canada that collect, use or disclose personal information in the course of a commercial activity – it does not apply to government. Information held by municipal governments is governed by the Municipality Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M56.
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- 53 <https://engage.ontario.ca/en/engagement-initiatives/ontarios-data-strategy>.
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- 54 <https://www.ontario.ca/page/building-digital-ontario>.
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- 55 See generally the discussion and accompanying notes considering “untrustworthy AI systems in Accountable AI at 26-30.”
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