



FROM: Law Commission of Ontario
TO: Artificial Intelligence Subcommittee of the Civil Rules Committee
DATE: September 15, 2025
SUBJECT: Consultation on proposals for Rules of Civil Procedure relating to evidence and Artificial Intelligence

Dear Justice Lauwers,

Thank you for the opportunity to comment on the Subcommittee's proposals for *Rules of Civil Procedure* relating to evidence and AI.

The Law Commission of Ontario (LCO) fully supports the initiative to create new and dedicated *Rules of Civil Procedure* to govern AI evidence. We recognize the challenge in creating a framework in a context that is unprecedented. AI is not just a novel technology. It has the potential to transform policy, law, facts, and social interactions.

The LCO believes each of the four proposals is strong in concept and purpose. We do not make any suggestions for change in the structure of these proposals. Our comments, rather, focus on the details and operation of the proposed rules. Our comments are intended as a contribution to the discussion which we understand to be an on-going learning process.

As you may know, the LCO has been studying AI issues in the Canadian justice system for several years. Our comments reflect this experience and our organizational commitment to promoting "trustworthy AI" in the Canadian justice system.

As a preliminary matter, the LCO wants to highlight two issues.

First, many of our comments address the need to ensure "AI contestability" and to protect and promote access to justice in Ontario.¹ As the Subcommittee knows, AI evidence introduces important new challenges. Most notably, there is a risk that under-funded or self-represented litigants will be put at a significant disadvantage in cases where a better-funded party wishes to introduce AI evidence, . As the LCO has written:

How can the individuals [confronting AI evidence] mount a meaningful challenge to the complex statistical, technical and legal issues raised [by these systems]? A partial list of potentially relevant issues in each case might include:

- *Is the data used to train the AI system biased, accurate, reliable or valid?*
- *Are the system's risk factors valid?*

- *Are the system’s variables weighed and calculated appropriately?*
- *Does the system’s code accurately reflect complex government policies?*
- *Is the system’s operation or output understandable?*
- *Is the system accurate?*
- *Is the system testing and validation appropriate?*

Challenging these complex 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 likely 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...decisions.²

For this reason, the LCO recommends the Subcommittee add a Rule that applies to Proposals 2, 3 and 4 stating that “in interpreting and applying these rules, the court will consider the impact on access to justice”.

Second, Subcommittee members may know that the LCO is undertaking a ground-breaking study of AI in the criminal justice system, including issues related to AI evidence in criminal proceedings. Some Subcommittee members attended our August 14th, 2025 expert roundtable on AI evidence in the criminal justice system.³ As discussed at the August 14th roundtable, the proposed amendments to the *Rules of Civil Procedure* will be an important foundation for equivalent rules in the criminal justice system.

About the Law Commission of Ontario

The 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 legislation and policies, and public engagement on important law reform issues. The LCO is independent of stakeholder interests and is committed to a public interest perspective for every project.

The LCO has been working on AI law reform issues for several years. Recent LCO projects, reports and submissions addressing AI issues include:

- [Ai in the Criminal Justice System](#) (2025)
- [Human Rights AI Impact Assessment](#) (with the Ontario Human Rights Commission, 2024)
- [Submission to Government of Ontario Re Bill 194](#) (2024)
- [Accountable AI](#) (2022)
- [Regulating AI: Critical Issues and Choices](#) (2021)
- [Legal Issues and Government AI Development](#) (2021)

More information about the LCO is available at: <https://www.lco-cdo.org>.

Proposal 1: Defining Artificial Intelligence

“Artificial intelligence” refers to a collection of technologies that replicate human intelligence in processing information by performing tasks that are considered to be cognitive, such as perceiving, learning, reasoning, problem-solving, and understanding and generating language.

Comments from the LCO

Providing a definition of AI is important to give clarity as to what technologies are captured by these proposed rules. We have several general comments on the proposed definition:

1. The proposed definition appears limited to very complex AI systems, including machine learning and complex neural networks. The limitation of the definition to “technologies that *replicate* human intelligence in processing information...” [emphasis added] and “tasks that are considered to be cognitive, such as perceiving, learning, reasoning, problem-solving and understanding and generating” excludes many kinds of AI and algorithmic systems, including simpler systems that provide predictions or recommendations (such as risk assessments) or others that could be used to create AI-enhanced or AI-generated evidence, including deep fakes.
2. The Subcommittee may be purposefully limiting the definition to more complex AI systems to weed out less complicated systems, but the LCO believes this definition is too narrow. As drafted, the definition may be too limited in scope to address some of the key concerns with AI introduced as evidence in the courtroom. The LCO notes that the OECD definition of AI is broader than the one proposed by the Subcommittee:

An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment.⁴

3. There should be consistency in adopting the same definition as other AI regulatory frameworks. For example, the province of Ontario adopted a definition that mirrors the OECD definition of AI in their recently passed *Enhancing Digital Security and Trust Act*⁵.
4. The Subcommittee may wish to consider adding a sentence that the definition of Artificial Intelligence is not static and should be reviewed every two years.

Proposal 1: The LCO recommends the Subcommittee:

- 1. Adopt the OECD definition of AI; and**
- 2. Add a provision stating that the definition of AI is not static and should be reviewed every two years.**

Proposal 2: Identification Of Evidence Generated By A Computer System Using AI

A party who puts forward evidence generated in whole or in part by a computer system using artificial intelligence shall:

- (a) Identify the software or program that was used in the generation of the evidence;*
- (b) Identify the categories of data used to train the software or program; and*
- (c) Provide supporting evidence to show that the output or results of the software or program are valid and reliable.*

Comments from the LCO

Proposal 2 appears to establish an introductory disclosure and proof of validity/reliability requirement on parties who want to put forward AI evidence.

The LCO agrees with the principles and obligations established in this proposal. Mandatory disclosure is a foundational principle of “trustworthy AI.” We also agree that the party wanting to rely on AI evidence should have the obligation to disclose and prove validity/reliability.

While agreeing with the proposal generally, the LCO has several comments and recommendations we believe the Subcommittee should consider.

1) The Distinction Between AI-Generated and AI-Enhanced Evidence

Proposal 2 addresses “evidence *generated* in whole or in part by AI.” [Emphasis added.] The LCO believes this definition may be too narrow. For example, some commentators have drawn a distinction between “AI-generated” and “AI-enhanced” evidence. Professor Mary D. Fan explains the distinction as follows:

A faked audio file of threatening calls generated by AI using voice samples, or victim impact video of a dead man speaking at his killer’s sentencing, are examples of AI-generated material. Clarifying blurry video, enlarging an image, enhancing sound quality, using arrows to track key people, or using Adobe Premiere to conduct a frame-by-frame analysis of video of a contested incident are all examples of AI-enhanced evidence.⁶

Importantly, digitally enhanced evidence is “a much broader and prevalent category than AI generated deepfakes.” Moreover, the distinction between AI-generated and AI-enhanced evidence is “not a clear-cut dichotomy.”⁷

In our view, the proposed rules should apply to both AI-generated and AI-enhanced evidence. The risks addressed by the proposed Rules are not limited to AI-*generated* evidence. AI-enhanced evidence, as Professor Fan notes, is equally if not more concerning.

We also note that Proposal 3 arguably addresses both AI-generated and AI-enhanced evidence (“...evidence generated *or modified* by a computer system...” [Emphasis added.]) The LCO believes there should be consistency between these two sections.

Accordingly, the Subcommittee may want to consider the following amendments:

- Ensure AI-enhanced evidence is addressed by the Rule and ensure consistency with Proposal 3. Replace “evidence generated in whole or in part by a computer system using artificial intelligence” with “evidence generated or modified by a computer system”.
- Introduce requirements that the party must (a) identify what portions of the evidence was enhanced, (b) what steps were taken to enhance the evidence, and (c) duplicates of the original and enhanced evidence.⁸

2) Timeline for Identification

Delayed notice and disclosure are problematic in general. However, any delay in disclosure of AI generated or modified evidence is especially concerning because AI can create and transform content in ways that require experts to understand. As legal experts have said, “when even the humans who design machine learning models cannot define how inputs are being combined and transformed, tracing the operations is particularly challenging for opposing parties.”⁹

Timing of disclosure is especially important where significant rights and risks are at stake, or the civil procedure is rushed such as in an interlocutory or *ex parte* injunction. Further, the complexity of introducing AI evidence raises significant access to justice issues including the potential to prolong proceedings and delay outcomes, as well as further enlarge discrepancies in resources where parties are not on equal footing.

Accordingly, the Subcommittee may want to consider the following amendments:

- Specify that the identification must be contemporaneous with the production of evidence.
- Introduce a rule around timing such as “the time should be sufficient to allow a party, and or the court, to investigate the technology and find experts to help challenge it, if necessary.”

3) The Proposed Identification Requirements Should be Considered a Minimum Only

The requirements in Proposal 2 appear limited to identification purposes only. The details required do not necessarily provide enough information about an AI system for an opposing party to challenge. For example, Proposal 2 requires parties putting forward AI evidence to:

(a) “identify the software or program.” The word “identify” suggests that a party must provide the name and/or type of software and program. This does not appear to require a party to produce the software or source code or information that they would need for the opposing party or court to assess the system.

(b) “identify categories of data.” Categories of data can be fairly high level and broad. To assess an AI system, a party will likely need to know additional information including (i) where the data is from; (ii) how and when collected; (iii) How labelled; (iv) whether it includes synthetic data; and (v) how the data was trained.

(c) “provide supporting evidence to show... valid and reliable.” There is no standard or agreement on what “valid and reliable” means in the context of AI. This is a contentious issue. For example, “valid” could mean that the AI system is operating as it was designed to. However, this does not preclude results that are discriminatory, unjust, or incomplete. Further, AI tested in a lab tends to produce results that can vary dramatically from AI results in the real world.

The LCO believes there is value in having the initial identification of AI evidence not be onerous. However, the Subcommittee may wish to consider adding a provision that further information about the AI system could be ordered produced if a party has reason to challenge its authenticity. The LCO is concerned that Proposal 2 as drafted could become the legal standard for disclosure of AI systems. In our view, the proposal should be amended to allow the court to consider additional information that may be necessary to provide sufficient information about an AI system for an opposing party to challenge that system.

4) Section (c) Raises Important Access to Justice Issues

Many respondents will be unable to challenge/assess whether a party putting forward AI evidence has met its obligation to “[p]rovide supporting evidence to show that the output or results of the software or program are valid and reliable.” AI validity and reliability raise complex technical and legal issues.¹⁰ At the very least, any party challenging the validity/reliability of another party’s AI evidence will require well-funded, technically-sophisticated counsel. As a result, the proposal, as drafted, could inadvertently put under-funded or self-represented litigants at a significant litigation disadvantage in cases where a better-funded party wishes to introduce AI evidence. This is an obvious access to justice issue.

This is the reason the LCO recommends that the Subcommittee add a Rule that applies to Proposals 2, 3 and 4 that states “In interpreting and applying these rules, the court will consider the impact on access to justice.””

Proposal 2: The LCO Recommends the Subcommittee:

- 1. Ensure AI-enhanced evidence is addressed by the Rule and ensure consistency with Proposal 3. Replace “evidence generated in whole or in part by a computer system using artificial intelligence” with “evidence generated or modified by a computer system.”**
- 2. Introduce requirements that the party must (a) identify what portions of the evidence was enhanced, (b) what steps were taken to enhance the evidence, and (c) duplicates of the original and enhanced evidence.**
- 3. Specify that the identification must be contemporaneous with the production of evidence.**
- 4. Introduce a rule around timing such as “the time should be sufficient to allow an opposing party to investigate the technology and find experts to help challenge it, if necessary.”**
- 5. Add a provision that further information about the AI system could be ordered produced if a party has reason to challenge its authenticity.**

Proposal 3: Potentially Fabricated or Altered Computer-Generated or Other Electronic Evidence

A party may challenge the authenticity of evidence generated or modified by a computer system that used artificial intelligence. If the court finds that the evidence could both reasonably be believed by the trier of fact and could reasonably be fabricated in whole or in part, then it is not admissible unless the proponent demonstrates on the balance of probabilities that the evidence's probative value exceeds its prejudicial effect.

Comments from the LCO

This rule is crucial because it is here that courts will determine whether evidence can be admitted or not. We appreciate what the Subcommittee is trying to achieve, and we support the proposal in principle. However, the LCO has two concerns.

1. The Proposed Rule Raises Several Access To Justice Issues

The LCO agrees that the Rules should provide the court discretion and flexibility to determine whether evidence is likely to be fake or not. This is particularly suitable in the context of quickly-evolving technology.

This rule is likely to turn on the determination of what qualifies as "could reasonably be fabricated..." and what parties are required to demonstrate to meet that standard. Courts have interpreted "reasonable" as a standard for a long time. However, understanding what is required to show potential "fabrication" has less precedent.

As noted above, determining or challenging whether the proffered evidence is a fabrication is likely to be complex and costly. This situation raises important concerns. Most significantly, a party without sufficient resources may be unable to contest AI evidence even if they have legitimate and well-founded reasons to do so. Similarly, better resourced parties may be able to have another party's AI evidence excluded if the responding party lacks the expertise or resources to defend a challenge. In either case, lower-income or otherwise vulnerable parties could be at a significant litigation disadvantage and may suffer adverse consequences. These concerns are obviously exacerbated if one of the parties is self-represented.

In sum, the LCO echoes concerns articulated by Mary D. Fan in her recent article:

*The design of new evidentiary safeguards, including those for AI-enhanced evidence, also should take into consideration resource disparities and long-burning access to justice challenges so that resort to technologically enhanced evidence does not become a one-sided weapon of the more powerful party in litigation.*¹¹

The LCO is not suggesting that the *Rules of Civil Procedure*, by themselves, can answer AI evidence's access to justice challenges by themselves. We believe, however, that the *Rules* should acknowledge these challenges if AI evidence is to be used in Ontario fairly and equally. As a result, the LCO recommends the Subcommittee add a Rule that applies to Proposals 2, 3 and 4, that states "In interpreting and applying these rules, the court will consider the impact on access to justice. "

2. The “Probative Value Exceeds the Prejudicial Effect” Test May Not Be Suitable To Guard Against False Evidence

Probative value and prejudicial effect typically speak to the available inference from evidence. The question “does this evidence lead to a good chain of reasoning (probative) as we try to discern what happened here, or a bad chain of reasoning (prejudice)” does not fit in this context. The problem with AI generated evidence is not that it is likely to lead to a prohibited chain of reasoning in finding facts. The question is whether the evidence is reliable. Simply stated, if evidence could reasonably be false, then what relevance is a balancing of probative value vs. prejudicial effect?

The LCO agrees that the *Rules* should place the burden on the proponent to demonstrate the worthiness of AI evidence. We recommend, however, that the proposed Rule be amended to remove:

“then it is not admissible unless the proponent demonstrates on the balance of probabilities that the evidence’s probative value exceeds its prejudicial effect”

and replaced with:

“then it is not admissible unless the proponent demonstrates why the evidence is sufficiently reliable to put before the trier of fact, with whatever limitations or caveats are necessary to appreciate what the evidence may and may not be used for.”

Proposal 3 The LCO Recommends the Subcommittee:

- **Remove the phrase “then it is not admissible unless the proponent demonstrates on the balance of probabilities that the evidence’s probative value exceeds its prejudicial effect” and replace it with: “then it is not admissible unless the proponent demonstrates why the evidence is sufficiently reliable to put before the trier of fact, with whatever limitations or caveats are necessary to appreciate what the evidence may and may not be used for.”**

Proposal 4: Admissibility of Expert AI Evidence

Where the output of a computer system using artificial intelligence, either in whole or in part, would be subject to rule 4.1.01 and 53.03 (2.1) if testified to by a human witness, the court must find that the output satisfies the following requirements:

- (a) the evidence must be relevant and material;*
- (b) the evidence must be necessary in assisting the trier of fact;*
- (c) no other evidentiary rule would apply to exclude the evidence;*
- (d) the evidence is based on sufficiently valid and reliable facts or data;*
- (e) the evidence is the product of valid and reliable principles and methods; and*
- (f) the evidence reflects a valid and reliable application of the principles and methods to the facts of the case.*

The admission of expert evidence generated in whole or in part by a computer system using artificial intelligence is ultimately within the discretion of the judge in determining whether the evidence's probative value exceeds its prejudicial effect.

Comments from the LCO

The LCO supports the Subcommittee's approach in this proposal to codify the *Mohan* criteria (sections (a), (b) and (c)) and to add three additional criteria ((d), (e) and (f)) to address AI directly. The LCO further recommends the Subcommittee amend sections (d) and (e) to address concerns about AI bias and discrimination.

A key requirement in expert evidence is impartiality. As the Subcommittee knows, many AI systems have been shown to be biased and discriminatory either because of their training data or because of the design of the system.

Bias and discrimination in AI are real and complex. Bias and discrimination can also be hard to detect or easy to overlook. Left unchecked, biased AI evidence could lead to and entrench discriminatory outcomes and result in deep and longstanding harm to individuals, communities and organizations.

The question of how the *Rules* should address potentially biased AI evidence and systems is complicated. The LCO does not suggest that parties submitting AI evidence should be held to a level of perfection. Rather, we believe parties should have to show that they have taken steps to address, expose and disclose potential or existing biases and discrimination. More specifically, we have two recommendations:

First, we recommends that section (d) be amended to add the word "representative". If data is not representative of the populations it is being used to assess, then there is greater likelihood it will produce discriminatory results.

Second, section (e) states "the evidence is the product of valid and reliable principles and methods". The LCO recommends this section be amended to include "the evidence is the product of valid and reliable

principles and methods that include auditing the AI system for fairness including biases or assumptions embedded in the design or data”.

Our second recommendation would establish the principle that AI systems, when being used in the context of expert evidence where impartiality is crucial, must be audited for bias and discrimination. The LCO recognizes that this would be a novel requirement. In our view, this recommendation is justified by the context:

- AI introduces unprecedented changes to the justice system.
- AI systems raise new issues that do not exist with human experts.
- Unlike a human, the AI system itself cannot be cross examined for bias.
- Testing for bias and discrimination are key principles of “trustworthy AI.”

The LCO notes that a bias and discrimination audit requirement is particularly important in the context of complex AI systems, such as those contemplated by the current definition of AI included in Proposal 1. In these systems, concerns about AI explainability and opacity are acute.

It could be argued that Proposals 2 and 4 already addresses our concerns about bias and discrimination by requiring AI evidence to be “valid and reliable.” In our view, these proposals, as drafted, are not sufficient. As noted, as yet there are no widely accepted “validity and reliability” tests for AI. Nor does testing for validity and reliability necessarily include testing for bias and discrimination. As a result, we believe the *Rules* should explicitly include provisions respecting bias and discrimination to address perhaps that the most widely acknowledged risks of AI systems.

Proposal 4: The LCO Recommends the Subcommittee:

- **Amend section d to “the evidence is based on valid, reliable and representative facts or data”.**
- **Amend section e to “the evidence is the product of valid and reliable principles and methods that include auditing the AI system for fairness including biases or assumptions embedded in the design or data”.**

Additional Comments

The LCO additionally suggests:

- In addition to the recommendations above, we recommend the Subcommittee convene a meeting of interested stakeholders to discuss the access to justice challenges raised by AI evidence.
- Given the dynamic nature of AI, the LCO recommends that the Subcommittee commit to reconsidering these rules in two or three years.
- The LCO recommends that the Subcommittee take this process as an opportunity to create expectations and requirements for greater transparency in the use of AI in the courtroom. For example, the Subcommittee could commit to produce a public report on the use of AI evidence

in the court room and how the new Rules are being implemented. Setting up mechanisms to assess and review the effectiveness of the rules will go a long way to maintaining accountability and trust in AI use in the justice system.

- The LCO recommends the Subcommittee commit to develop additional rules to govern AI in civil procedure more comprehensively, potentially including:
 - Discovery of AI systems i.e. who qualifies as a witness for an AI system, what documents should be produced to discover an AI system.
 - Privilege in AI systems.
 - Disclosure of materials prepared in whole or part by AI systems.
 - Cost orders and use of AI systems to assist with litigation.

More Information

The LCO appreciates the opportunity to comment on the proposed Rules. The LCO is willing to share any resources or information with the Subcommittee on AI evidence issues, particularly as they may relate to AI evidence in criminal proceedings.

For further information or to contact the LCO, please contact Susie Lindsay, Policy Counsel, Project Lead AI in the Civil Justice System (slindsay@lco-cdo.org) or Ryan Fritsch, Policy Counsel, Project Lead AI in the Criminal Justice System (rfritsch@lco-cdo.org).

Cc LCO Board of Directors

¹ A good example of the LCO's analysis of AI and access to justice issues is included in Law Commission of Ontario, *Accountable AI*, (Toronto: June 2022), online: <https://www.lco-cdo.org/en/our-current-projects/ai-adm-and-the-justice-system/ai-and-adm-in-the-civil-administrative-justice-system/> at 34-38.

² *Accountable AI* at 38.

³ The roundtable included members of the judiciary, Ministry of the Attorney General, RCMP, Legal Aid, defence counsel, senior academics and community organizations. Topics discussed include the challenges and benefits of AI used as evidence in the courtroom, and accompanying legal issues of admissibility and weight, disclosure and timing, and competing authenticities. There were also demonstrations of how AI is currently being used in the criminal justice system. The LCO is happy to share our resources on these issues including notes, analysis and reports.

⁴ https://www.oecd.org/content/dam/oecd/en/publications/reports/2024/03/explanatory-memorandum-on-the-updated-oecd-definition-of-an-ai-system_3c815e51/623da898-en.pdf

⁵ *Enhancing Digital Security and Trust Act*, 2024, S.O. 2024, c. 24, Sched. 1, section 1.

⁶ Mary D. Fan, "AI-Enhanced Evidence" (forthcoming Boston University Law Review, 2025-2026) at pg.8

⁷ Mary D. Fan at pg. 7.

⁸ Mary D. Fan

⁹ Mary D. Fan at pg 50

¹⁰ Add note here

¹¹ Mary D. Fan page 51