Canada

Sean Mason, Aird & Berlis LLP, Toronto

Aaron Baer, Aird & Berlis LLP, Toronto

1. What is the understanding of AI in your jurisdiction?

In recent years, the concept of artificial intelligence (AI) has come to encompass an array of technological advancements in the legal field. Indeed, due to its novelty and inherent complexity, there is no consensus understanding of what the term AI entails. As the Law Society of Ontario (LSO) posits in their *Technology Task Force Update Report*, there are at least three generally accepted understandings of AI: (1) it is a branch of computer science that focuses on the simulation of intelligent behaviour in computers; (2) it is a machine's capability of imitating intelligent human behaviour; and (3) it is a collection of processes and techniques.[41] However, to presumably create consensus among these viewpoints, the LSO outlined a 'generally acceptable' definition of AI by describing it as 'the ability for computers to accomplish tasks normally associated with the intelligent actions of human beings'.[42] The need for such a consensus becomes apparent when considering the use of AI in Ontario's legal sector.

2. In your jurisdiction, besides legal tech tools, are there already actual AI tools or use cases in practice for legal services?

As one of the leading areas in AI development, Ontario has experienced a spike in emerging legal tech products that have been utilised by legal professionals to complement their practices. Common instances of such complementary uses include:[43]

- document discovery and due diligence;
- assistance with routine questions;
- outcome prediction;
- contract analysis; and
- legal document generation.

41 See https://lawsocietyontario.azureedge.net/media/lso/media/about/convocation/2019/convocation-november-2019-technologytaskforce-report.pdf, at p 387, accessed 15 September 2020.

42 *Ibid*.

43 At p 389, see n 1 above.

3. If yes, are these AI tools different regarding – independent law firms, international law firms, in-house counsel – and what are these differences?

Although there is commonality between firms with respect to the tools used to achieve the above capabilities, the use cases for a particular tool vary. For example, a larger law firm focusing on M&A transactions may use an AI contract analysis tool primarily for due diligence (eg, identifying change of control and assignment clauses, and providing general summaries of the target company's contracts). A company might use the same tool to identify which contracts need to be modified due to changes in laws or standards (eg, General Data Protection Regulation (GDPR), London Interbank Offered Rate (LIBOR), etc). Other tools may only be applicable for in-house counsel. For example, a tool that helps improve the contract negotiation process for a specific form of contract that is negotiated over and over again with different counterparties (eg, the vendor's form of SAAS (software as a service) agreement) will have plenty of value for a company that always negotiates using the same template, but will be of little use to a law firm that is less likely to perform this work on a regular basis for the same client. Much of the existing AI technology is not cheap – and the result of which is that smaller law firms have been less likely to adopt this technology. However, as the technology becomes more affordable, and as more younger lawyers open their own practices, we expect to see a dramatic increase in adoption by independent law firms.

4. What is the current or planned regulatory approach on AI in general?

Canada's regulation of AI is still in its early stages. However, there are several government initiatives and commitments that offer insight into how Canada is approaching the technology. In 2017, the Government of Canada announced a C$125m Pan-Canadian Artificial Intelligence Strategy, to be developed and led by the Canadian Institute for Advanced Research.[44] Part of the Strategy's objectives include collaborating on policy initiatives, both domestic and international, which encourage the responsible, ethical and economic stewardship of AI.[45]

One such initiative comes from the Organisation for Economic Co-operation and Development (OECD), who in 2019 released a Statement of Principles regarding the use of AI. These principles focused on ensuring the benefit of people; respecting the rule of law, human rights, democratic values and diversity; ensuring transparency and responsible disclosure; maintaining robust, secure and safe functioning of AI systems; and ensuring accountability on behalf of organisations

44 See www.cifar.ca/ai/pan-canadian-artificial-intelligence-strategy accessed 15 September 2020.

45 See www.cifar.ca/ai/pan-canadian-artificial-intelligence-strategy/artificial-intelligence-policy-initiatives accessed 15 September 2020.

and individuals involved in AI.[46] Though not legally binding, the OECD also provides five 'highly influential' recommendations to governments. These recommendations express the importance of facilitating investment in research and development, fostering accessible AI ecosystems, ensuring policy environments that facilitate the deployment of trustworthy AI systems, empowering people with the skills for AI and supporting workers for a fair transition, and cooperating across borders and sectors to ensure responsible stewardship of trustworthy AI.[47]

5. Which are the current or planned regulations on the general use of AI or machine learning systems?

In April 2019, the Government of Canada issued its Directive on Automated Decision-Making (the 'Directive'). The Directive is aimed at ensuring that automated decision-making systems used by the federal government are used in an ethical and effective manner.[48] Notably, the Directive only applies to the federal government's use of systems that provide external services, specifically, federal institutions referenced in the Policy on the Management of Information Technology. It does not apply to the use of AI or machine learning systems in the private sector or to provincial governments directly. There are five guiding principles to the Directive. To ensure the effective and ethical use of AI the [government] will:

1. understand and measure the impact of using AI by developing and sharing tools and approaches;

2. be transparent about how and when it is using AI, starting with a clear user need and public benefit;

3. provide meaningful explanations about AI decision making, while also offering opportunities to review results and challenge these decisions;

4. be as open as it can by sharing source code, training data, and other relevant information, all while protecting personal information, system integration, and national security and defence; and

5. provide sufficient training so that government employees developing and using AI solutions have the responsible design, function, and implementation skills needed to make AI-based public services better.[49]

The use of AI is also regulated through the Personal Information Protection and Electronic Documents Act (PIPEDA), which generally applies to all organisations in

46 See www.oecd.org/going-digital/ai/principles accessed 15 September 2020.

47 *Ibid*.

48 See www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592 accessed 15 September 2020.

49 See www.canada.ca/en/government/system/digital-government/digital-government-innovations/responsible-use-ai.html accessed 15 September 2020.

the private sector that collect, use, or disclose personal information in the context of commercial activities.[50] PIPEDA is 'technologically neutral,' meaning that AI is 'governed by the same rules as other forms of processing'.[51] As a result of the fact that PIPEDA was not created to deal with AI specifically, the Office of the Privacy Commissioner of Canada (OPC) is of the opinion that PIPEDA, in its current iteration, is insufficient in its application to such systems.[52] The OPC has thus made several proposals for key reforms to PIPEDA:

- Proposal 1: Incorporate a definition of AI within the law that would serve to clarify which legal rules would apply only to it, while other rules would apply to all processing, including AI.
- Proposal 2: Adopt a rights-based approach in the law, whereby data protection principles are implemented as a means to protect a broader right to privacy – recognised as a fundamental human right and as foundational to the exercise of other human rights.
- Proposal 3: Create a right in the law to object to automated decision-making and not to be subject to decisions based solely on automated processing, subject to certain exceptions.
- Proposal 4: Provide individuals with a right to explanation and increased transparency when they interact with, or are subject to, automated processing.
- Proposal 5: Require the application of Privacy by Design and Human Rights by Design in all phases of processing, including data collection.
- Proposal 6: Make compliance with purpose specification and data minimisation principles in the AI context both realistic and effective.
- Proposal 7: Include in the law alternative grounds for processing and solutions to protect privacy when obtaining meaningful consent is not practicable.
- Proposal 8: Establish rules that allow for flexibility in using information that has been rendered non-identifiable, while ensuring there are enhanced measures to protect against re-identification.
- Proposal 9: Require organisations to ensure data and algorithmic traceability, including in relation to datasets, processes and decisions made during the AI system lifecycle.

50 See www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda_brief accessed 15 September 2020.

51 See www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-ai/pos_ai_202001, accessed 15 September 2020.

52 *Ibid*.

- Proposal 10: Mandate demonstrable accountability for the development and implementation of AI processing.

- Proposal 11: Empower the OPC to issue binding orders and financial penalties to organisations for non-compliance with the law.[53]

The OPC published these proposals on 28 January 2020 and sought input from stakeholders and experts in the field. The deadline for feedback was 13 March 2020.[54] To date, nothing has been published regarding the results of this consultation.

6. Is free data access an issue in relation with AI?

In order for AI systems to function accurately, vast amounts of diverse data are needed.[55] This raises a number of issues relating to who has access to Big Data and how such access is attained. In response to such concerns, the Competition Bureau released a report in 2018, outlining key implications of Big Data on Canadian competition policy.[56] The paper explored how the current approach to competition policy proposes to deal with concerns related to mergers and monopolistic practices, cartels, and deceptive marketing practices. Ultimately, the Bureau was confident that despite the new challenges posed by Big Data, a new approach to competition policy is not needed.

Another issue is that in rural communities across Canada, 'hundreds of thousands of residents do not have basic, high speed internet access'.[57] Those that do have access often have unstable connections as a result of weather or internet traffic volumes. Further, connections may be limited by data restrictions. The National Research Council of Canada is working to improve these conditions through its government mandated High-throughput and Secure Networks Challenge programme. The programme seeks to develop innovative technologies 'so network operators and service providers can offer faster, less costly and more secure internet services to rural and remote communities across the country'.[58] Interestingly, AI is actually being used to assist with this objective. AI can be used to detect and fix network problems, ultimately saving both time and money due to the reduced need for sending technicians to remote areas.[59]

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53 *Ibid*.

54 See www.priv.gc.ca/en/opc-news/news-and-announcements/2020/an_200128 accessed 15 September 2020.

55 See www.theglobeandmail.com/opinion/article-innovation-in-health-care-depends-on-responsible-expanded-data-access accessed 15 September 2020.

56 See www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html accessed 15 September 2020.

57 See https://nrc.canada.ca/en/stories/stepping-internet-services-rural-remote-locations accessed 15 September 2020.

58 *Ibid*.

59 *Ibid*.

7. Are there already actual court decisions on the provision of legal services using AI or decisions concerning other sectors that might be applicable to use of AI in the provision of legal services?

Canadian case law on the provision of legal services using AI is sparse, and most of the judgments that do discuss the use of AI only do so in *obiter*. What can be gleaned from the few cases that mention AI, however, is that its use is not unwelcome in Canadian courts, especially when it comes to processes such as discovery in litigation proceedings.

In 2016, an Ontario Superior Court of Justice case, *Bennett v Bennett Environmental Inc*, addressed the use of predictive coding in conducting a first-review of documents obtained during document disclosure after the plaintiff's arrangement. In discussing the costs of document review, the judge noted the following:

> 'Given the use of predictive coding for the first level review of massive document disclosure, I do not find it unreasonable for the lawyer to then use paralegals to conduct the next level or levels of review. I make no adjustment on this account.'[60]

Drummond v The Cadillac Fairview Corp Ltd is another Canadian case from the Ontario Superior Court of Justice that briefly discusses the use of AI within the legal profession. In discussing the parties' cost submission, and after finding technology-assisted research to be a recoverable counsel fee item, the judge shares their views on the future of AI in the practice of law, noting:

> 'The reality is that computer-assisted legal research is a necessity for the contemporary practice of law and computer assisted legal research is here to stay with further advances in artificial intelligence to be anticipated and to be encouraged. Properly done, computer assisted legal research provides a more comprehensive and more accurate answer to a legal question in shorter time than the conventional research methodologies, which, however, also remain useful and valuable.'[61]

The slightly more recent case of *The Commissioner of Competition v Live Nation Entertainment Inc* is a 2018 judgment from Canada's Competition Tribunal. In this case, the applicants brought a motion seeking an order compelling the respondents to produce additional affidavits of documents. This was due to the fact that the respondents produced a narrowed number of documents to the applicants after using document review software. In this case, the Tribunal went as far as to endorse the use of AI, stating:

60 *Bennett v Bennett Environmental Inc*, 2016 ONSC 503, 2016 CarswellOnt 670 (WL Can) at para 44.

61 *Drummond v The Cadillac Fairview Corp Ltd*, 2018 ONSC 5350 (CanLII) at para 10.

> 'The Tribunal encourages the use of modern tools to assist in these document-heavy cases where they are as or more effective and efficient than the usual method of document collection and review.'[62]

These cases suggest that Canadian courts are willing to accept the use of AI in the provision of legal services. This seems to be especially true when it comes to cases that involve the review and disclosure of documents that would otherwise require many hours of work if done by humans. This perhaps speaks to the importance that Canadian courts place on efficiency and considerations as to the cost of legal proceedings. However, it may also equally reflect the relative maturity of processes such as document review, for which the use of AI is more palatable as compared to other potential applications, such as the provision of legal advice.

8. What is the current status – planned, discussed or implemented – of the sectorial legislation in your jurisdiction on the use of AI in the legal profession or services that are traditionally being rendered by lawyers?

With such a broad scope of application to the legal field, the emergence of AI presents several regulatory and legislative concerns with respect to its usage. In efforts to address this, the LSO formed its Technology Task Force (the 'Task Force'): a group of lawyers, paralegals and publicly-appointed lay benchers, whose goal is to review the Law Society's framework and standard to determine whether they are adequate in serving the needs of the legal field.[63] To do so, the task force has grounded its approach to AI in the Law Society's mandate and foundational principles[64] – sections 4.1 and 4.2 of the Law Society Act.[65] These principles entail an ongoing focus on facilitating access to justice, evaluating regulatory risks and opportunities, and protecting the public interest. This focus must be conducted in a manner that is proportionate to the LSO's regulatory objectives. Currently, the Task Force has made inquiries into three key topics: (1) defining the scope of how far the LSO's mandate ought to expand to effectively meet its regulatory objectives; (2) determining how the LSO should be structured and who should bear responsibility to ensure these objectives are met; and (3) what steps should the LSO take to better promote innovation and the adoption of emerging technology in an informative way that educates those who use it or are impacted by it. However, as a self-regulator, the LSO is faced with the challenge of whether it is appropriately situated and has the resources necessary to effectively regulate persons and entities operating legal tech tools.[66] Inevitably, the key barrier to overcoming such a challenge is the necessary technological wherewithal required to regulate such

62 *The Commissioner of Competition v Live Nation Entertainment Inc et al*, 2018 CACT 17 at para 15.

63 See https://lso.ca/about-lso/initiatives/technology-task-force accessed 15 September 2020.

64 See https://lawsocietyontario.azureedge.net/media/lso/media/about/convocation/2019/convocation-november-2019-technologytaskforce-report.pdf, at pp 406–407, accessed 15 September 2020.

65 *Law Society Act*, RSO 1990, c L8, ss 4.1–4.2.

66 At p 411, see n 22 above.

legal tools. That said, there is little doubt that the changes resulting from Covid-19 are dramatically accelerating the adoption of technology in Canada's courts and the legal profession.

While the inquiries made by the LSO have yet to lead to concrete changes in legislation, on 13 March 2020, the OPC initiated a legislative reform policy analysis of federal privacy laws to aid in addressing this regulatory concern.[67]

9. What is the role of the national bar organisations or other official professional institutions?

Currently, the Canadian Bar Association does not play a large role in regulating the use of AI in the field of law. However, many provinces have general guidelines that pertain to the use of technology more broadly. For example, the Law Society of Ontario has published *Practice Management Guidelines*, providing Ontario lawyers with a general set of professional standards by which to adhere. Section 5.5 of these Guidelines is titled 'Competent Use of Information Technologies' and states that: '[l]awyers should have a reasonable understanding of the technologies used in their practice or should have access to someone who has such understanding'.[68]

Similarly, the Law Society of Saskatchewan's Code of Conduct includes the ability to use technology as necessary to the provision of legal services in the definition of a 'competent lawyer'. It also makes specific mention of understanding the risks associated with various technologies, which can easily be applied to the use of AI. Section 3.1(4A) of the Code of Conduct states:

> 'To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3.'[69]

An almost identical provision is also included in the Law Society of Alberta's Code of Conduct.'[70]

As a whole, the Canadian Bar Association as well as the Law Societies of each province have maintained a relatively hands-off approach when it comes to AI, playing a minimal role in its regulation and oversight.

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67 See analysis of 'Which are the current or planned regulations on the general use of AI or machine learning systems?' at question 5 above.

68 See https://lso.ca/lawyers/practice-supports-and-resources/practice-management-guidelines/technology accessed 15 September 2020.

69 See https://www.lawsociety.sk.ca/wp-content/uploads/2020/03/codeofconduct13dec2019.pdf accessed 15 September 2020.

70 See https://documents.lawsociety.ab.ca/wp-content/uploads/2017/01/14211909/Code.pdf, see section 3.1(5), accessed 15 September 2020.