



February 21, 2024

Via email: [INDU@parl.gc.ca](mailto:INDU@parl.gc.ca)

Joel Lightbound, M.P.  
Chair, Standing Committee on Industry, Science and Technology  
Sixth Floor, 131 Queen Street  
House of Commons  
Ottawa, ON K1A

Dear Joel Lightbound:

**Re: Bill C-27, *Digital Charter Implementation Act, 2022 (AIDA)***

The Canadian Bar Association's Privacy and Access Law Section (CBA Section) is pleased to present additional comments to the Standing Committee on Industry, Science and Technology, further to its initial submission on Bill C-27, *Digital Charter Implementation Act, 2022*. This letter addresses the *Artificial Intelligence and Data Act (AIDA)* portion of the Bill.

The Canadian Bar Association is a national association of 38,000 lawyers, Québec notaries, law teachers and students, with a mandate to promote improvements in the law and the administration of justice. The CBA Section represents specialists in privacy law and access to information issues from across Canada.

### **Definitions**

Section 3 of AIDA sets out its non-application to certain legal entities. Subsection 3(1) states that it will not apply to a government institution as defined in section 3 of the *Privacy Act*:

*government institution* means:

- (a) any department or ministry of state of the Government of Canada, or any body or office, listed in the schedule, and
- (b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the *Financial Administration Act*.

The federal government is therefore excluded from the Bill and free from any type of check and balance system.

Subsection 3(2) of AIDA states:

(2) This Act does not apply with respect to a product, service or activity that is under the direction or control of

- (a) the Minister of National Defence;
- (b) the Director of the Canadian Security Intelligence Service;
- (c) the Chief of the Communications Security Establishment; or
- (d) any other person who is responsible for a federal or provincial department or agency and who is prescribed by regulation.

The CBA Section questions how “product, service or activity” will be defined under the Bill. We are also concerned that ministers and ministerial offices are excluded from the application in ss. (d).

The government may be excluding government institutions and ministerial offices based on the Supreme Court of Canada decision in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*.<sup>1</sup> The Court held that the *Privacy Act* did not apply to documents held by ministerial departments and the ministers themselves since the documents were not controlled by the government institution.

These legislated exclusions will make it difficult and costly for a member of the public to seek judicial review of any artificial intelligence (AI) decision made by a federal department. For instance, under the *Immigration and Refugee Protection Act* and *Immigration and Refugee Protection Regulations*, AI assists the decision maker by applying a series of algorithms, gathering evidence and key marking data to decide the fate of a person’s temporary resident visa application. It is difficult for that person to seek judicial review of a negative decision since they must first convince a court to grant leave to appeal to benefit from a hearing. The mandatory leave requirement in all federal court immigration matters implies that AI in the immigration context will go unchecked based on the non-applicability of the Bill to government institutions.

### **Due Process and Procedural Fairness**

How can an applicant seeking judicial review in the Federal Court obtain procedural fairness if the challenged institution is excluded from the oversight of the impugned Act? Unless an applicant can demonstrate that the interpretation of AIDA is subject to the standard of correctness, any decision made by a government officer, in any department, will face the less onerous standard of “reasonableness” based on the 2019 SCC decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*.<sup>2</sup> The result is a decreased opportunity for an individual to challenge decisions made by government officers applying the Act.

### **Inclusion of Research and Development**

AIDA should take a true risk-based approach where required measures are appropriate and proportionate to the risk. Canada is a global leader, both academically and business wise, in the research and development of AI technologies and techniques. Government at all levels have invested heavily in developing the research and development capacity to place Canada at the forefront of this emerging area, including the \$125 million invested in the Pan-Canadian AI Strategy.<sup>3</sup>

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<sup>1</sup> 2011 SCC 25.

<sup>2</sup> 2019 SCC 65.

<sup>3</sup> Pan-Canadian Artificial Intelligence Strategy, Phase 2, Innovation, Science and Economic Development Canada: [online](#)

The regulatory scheme set out in the Bill is burdensome and documentation-intensive, with significant possible penalties for inadvertent missteps. This scheme does not exist in other countries that are similarly attempting to develop world-leading expertise. When AIDA requirements are applied to research and development, they are disproportionate and have a discouraging effect.

Consistent with a true risk-based approach, the CBA Section recommends that pure research and development activities without AI deployment in a public-facing manner and without a real risk of harm be removed from the scope of the Bill.

### **1. Recommendation:**

The CBA Section recommends several amendments to address Ministerial authority:

5(1) regulated activity means any of the following activities carried out in the course of international or interprovincial trade and commerce:

- (a) processing or making available for use any data relating to human activities for the purpose of ~~designing, developing or~~ using an artificial intelligence system;
- (b) ~~designing, developing or~~ making available for use an artificial intelligence system or managing its operations. (*activité réglementée*)

5(2) Person responsible

(2) For the purposes of this Part, a person is responsible for an artificial intelligence system, including a high-impact system, if, in the course of international or interprovincial trade and commerce, they ~~design, develop or~~ make available for use the artificial intelligence system or manage its operation.

38 Possession or use of personal information

Every person commits an offence if, for the purpose of ~~designing, developing,~~ using or making available for use an artificial intelligence system, the person possesses — within the meaning of subsection 4(3) of the *Criminal Code* — or uses personal information, knowing or believing that the information is obtained or derived, directly or indirectly, as a result of

- (a) the commission in Canada of an offence under an Act of Parliament or a provincial legislature; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted such an offence.

## **Overall Approach**

### **Harmony/cohesiveness with evolving international norms and standards**

While Canada seeks to become a world leader in the development and responsible deployment of AI, the reality is that it is relatively small compared to other large economies in which AI is being developed and deployed. Large companies at the leading edge want to deploy their resulting products around the world, with the United States and Europe constituting larger markets than Canada. When a responsible operator seeks to deploy an AI-powered product or service, it must comply with the intended market's regulations. If Canada's regulatory requirements are an outlier or out of sync with its major trading partners, companies will be less likely to launch in Canada.

AIDA should recognize that our trading partners are developing standards for the deployment of AI solutions, and accordingly incorporate a mutual recognition scheme. As an example, subsection 3(f)

of the *Electronic Commerce Protection Regulations*, made pursuant to Canada's Anti-Spam Law,<sup>4</sup> excludes from that Act's ambit, commercial electronic messages that are sent to a listed jurisdiction if the message complies with the laws of that jurisdiction.

The Bill should incorporate a system that allows a non-Canadian company deploying AI products in Canada to be deemed to comply with the Bill if they comply with the regulatory scheme of their home jurisdiction and that regulatory scheme has been deemed by the Minister or the Commissioner to be substantially like the one created by the Bill.

### **Role of the Minister and Commissioner**

AIDA s. 32 outlines several general administrative powers for the Minister of Innovation, Science and Industry: promoting public awareness and public education of the Act; making recommendations and having reports published regarding compliance with the Act; and, establishing guidelines regarding compliance with the Act. Additional, and significant powers (in the Act and/or through future regulations) are given to the Minister with respect to:

- receiving notifications of systems resulting in or likely to result in material harm (s. 12);
- ministerial orders requiring receipt of records (s. 13-14);
- conducting audits (s. 15);
- implementing measures under said orders (s. 16);
- ceasing to use or make available said systems (s. 17);
- publishing information in relation to same (s. 18); and
- requiring compliance of said orders (s. 19) (with said orders, in part, surprisingly being exempt from the *Statutory Instruments Act*); and,
- designating persons or classes of persons who could exercise authority under the administrative monetary penalty scheme [s. 29(4)(g)].

Specifics are lacking with respect to most if not all these enumerated powers.

AIDA s. 33 also proposes that the Minister appoint a senior departmental official as the Artificial Intelligence and Data Commissioner. The Minister may confer a host of powers and authority to the Commissioner, save for regulation-making authority. The Minister may then designate individuals to support the administration and enforcement of this part of the Act. Like the gaps outlined for the proposed Advisory Committee (see below), this proposed regulatory structure raises several concerns specific to independence and oversight:

1. Lack of transparency and accountability [s. 33(1)]: AIDA does not outline the Commissioner's necessary qualifications, responsibilities and authority (which seems minimal, if any, given that the only role they have is, "to assist the Minister in the administration and enforcement of this Part." Similar to the Advisory Committee (see below), the Commissioner's designation is at the discretion (and not a requirement of) the Minister (i.e., "may designate"). Also problematic is that the role does not appear to be independent, given the Commissioner is a senior bureaucrat in the Minister's department.

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<sup>4</sup> SOR/2013-221, and *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, S.C. 2010, c. 23.

2. Lack of clarity or distinction between roles of Commissioner and Analysts: While the Commissioner may have an enforcement role in administering monetary penalties listed in section 29, for example, AIDA does not specify how the Commissioner is involved, what oversight they have (if any), or the reporting structure between it and the Minister. Similarly lacking is clarity around what – if any – management role the Commissioner has over those designated by the Minister to support the administration and enforcement of this Part of the Act. Notably, the proposed role of the Commissioner is framed in the same way as those “Analysts” designated by the Minister [see ss. 33(1) and 33(2)].

## **2. Recommendations:**

The CBA Section recommends that AIDA sections 31-34 regarding Ministerial authority be amended to ensure and afford the Commissioner these roles and responsibilities as an independent regulator and not an appointed bureaucrat from the Minister’s department.

The Minister’s roles and responsibilities for oversight and enforcement under the Act should be given to this independent Commissioner (who would have the responsibility of appointing and managing the team of analysts). Meanwhile, the Personal Information and Data Protection Tribunal, created under Part II, would have jurisdiction over and the ability to determine and hear cases, and impose penalties, following investigations, recommendations, and appeals to or from the Commissioner.

## **Role of the Advisory Committee**

AIDA proposes the establishment of an Advisory Committee to give advice to the Minister on matters related to AI and data. However, there are several gaps in the proposed legislation e, particularly when it comes to the composition, role, and reporting structure of the Committee:

1. Lack of transparency and accountability [s. 35(1)]: The Bill gives no specifics about the Committee’s composition, how members are selected, operation, the types of advice it gives, and how its advice is reviewed, evaluated or implemented. The Committee’s creation is at the whim of the Minister (“may establish”). The only details given are the possibility to publish the Committee’s advice on a publicly available website [s. 35(2)] and Committee members are paid (without specifics) and reasonable expenses are covered when working away from their ordinary place of residence [s. 35(3)]. A perceived lack of transparency and accountability can undermine public trust and confidence in the Committee’s work.
2. No reference to regulation-making authority to specify and clarify the Committee’s role [ss. 36 and 37]: While the Bill gives the Governor in Council and Minister regulatory power respectively, those sections are not about expanding on the role, composition, activities and authority of the Committee. This raises the question why the Committee is referenced as a possible body when it is one in name only on a plain reading of AIDA.

## **3. Recommendation:**

The CBA Section recommends that s. 35 be expanded to include specifics about the composition, member selection, roles and responsibilities, operation, and reporting authority of the Committee. Failing this, the CBA Section recommends that s. 36 or 37 be expanded to include the possibility that regulations can be made to address these gaps.

The CBA Section appreciates the opportunity to contribute to the deliberations on AIDA and looks forward to contributing to this important area of public policy in whatever manner is constructive.

Yours truly,

*(Original letter signed by Julie Terrien for Sinziana Gutio)*

Sinziana Gutio (she/her)  
Chair, Privacy & Access to Information Law