



THE CANADIAN
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November 24, 2023

Via email: caroline.perrier@cas-satj.gc.ca

The Honourable Justice Michael D. Manson
Chair, Federal Court Intellectual Property Users Committee
c/o Caroline Perrier, Legal Counsel
Federal Court
180 Queen St. W.
Toronto ON M5V 3L6

Dear Justice Manson:

Re: Draft Federal Court Practice Direction on AI Guidance

I write on behalf of the Intellectual Property Section of the Canadian Bar Association (the CBA Section), in response to matters raised by the Bar following the November 9, 2023, Federal Court IP Users Committee meeting about the draft *Federal Court Notice to Profession and Public: Principles on the Prospective Use of Artificial Intelligence (AI)* (Draft Direction).

The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. We promote the rule of law, access to justice and effective law reform, and offer expertise on how the law touches the lives of Canadians every day. The Intellectual Property Section deals with law and practice relating to all forms of ownership, protection and enforcement of intellectual property and related property rights, including patents, trademarks, copyright, industrial designs, plant breeders' rights, as well as trade secrets.

The CBA Section welcomes the invitation to comment on the Draft Direction, given the importance of AI and the implications of its use on the administration of, access to, and public perceptions of the Canadian justice system. We appreciate the complexity of these issues as technology changes seemingly by the day. We understand that the Court is keen to adopt a Practice Direction in view of the increasing adoption of AI.

While we appreciate the short extension of time to comment, we note that representatives of the IP Users Committee and some other Federal Court specialty committees were given a short timeframe to share their feedback. Consulting with CBA Section members to obtain meaningful and substantive feedback on the Draft Direction requires more time than was allocated. Further, we worry that not all CBA members who practice in areas of law before the Federal Court had an opportunity for input. While we understand that the Draft Direction has been in the works for a year, all interested stakeholders should be granted adequate time to share formal and specific feedback to assist the Court. This includes the ability to review earlier drafts ahead of the formal consultation.

In the limited time available, CBA Section members shared the following feedback. Several of these correspond to comments made by members of the bar during the November meeting.

1. **The definition of AI is too broad.** As phrased, the definition of AI in the Draft Direction, *“information technology that generates text, sound, image, or other content, or which performs tasks that would ordinarily require human brainpower to accomplish, such as assessing vast amounts of information, adapting to new situations, or solving problems. Unlike other computational tools, such as automation, AI can learn, improve its accuracy, and work independently of human guidance”*, raises concerns that it includes non-generative AI and could encompass CanLII, LexisNexis, Westlaw and e-discovery systems, amongst others. It appears that the concerns motivating the Draft Direction are largely based on the misuse of generative AI. We suggest refining the definition to reflect that the generation of content using AI (as opposed to the manipulation of extant data) should lie at the root of the definition. The use of concrete examples of what is and is not within the definition of AI would assist parties, counsel and the Court in applying the Draft Direction in practice.
2. **Disclosing that AI has been used and how it was used creates privilege concerns.** The Transparency & Explainability section of the Draft Direction (see 2.2 Directions) requires that *“any documents parties submit to the Court ..., to the best of the submitting party’s knowledge, (i) advise what portions, if any, were created with the assistance of AI, and (ii) explain the nature of that assistance.”* The CBA Section has concerns that this requirement may require counsel to breach their privilege obligations to disclose when and how AI is used in the preparation of any documents submitted to the Court. It is unclear what level of detail is required to “explain the nature of [the AI] assistance.” If search strings, prompts, and the like must be outlined in the explanation, it will be challenging for counsel to comply with this requirement without client consent. A refined definition of AI, as outlined above, may address this concern.
3. **Certification is unnecessary in view of counsel’s professional obligations.** The Verification section of the Draft Direction (see 2.2 Directions) requires *“the submitting party ... certify upon submission that they have verified the accuracy of all AI-assisted text and citations.”* The CBA Section is of the view that this certification is not needed, as counsel are required to sign submissions to the Court and have obligations as officers of the Court, which require them to use tactics that are legal, honest and respectful of the courts, to act with integrity and professionalism, to maintain their overarching responsibility to ensure civil conduct, and to educate clients about the court processes in the interest of promoting the public’s confidence in the administration of justice.¹

It is unclear how certification is to be made and whether that will require the Registry to take any steps in response. The apparent voluntary nature of this requirement may mean that it will not be properly adopted by all parties. In addition, as is noted in the Adversarial Process section, the adversarial nature of proceedings means that counsel will raise any concerns regarding the use of AI in submissions, and the Court may address them at that time.

4. **Certification may overburden the registry and create filing delays.** The CBA Section is concerned that given the lack of clarity on the form certification will take (*e.g.*, a form or a text box when e-filing to declare what portions of the submission are AI-assisted) and how that information be handed to the Court (*e.g.*, will counsel have to mark submissions and identify the portions with sidelining), registry officers will be expected to assess each submission and accept or reject it depending on whether certification has been properly made. This may lead to differences in acceptance depending on the registry officer’s

¹ Bell R and Abela C, “A Lawyer’s Duty to the Court”, Institute for Civility and Professionalism, [online](#).

perception of the certification's sufficiency. This has the potential to overburden the registry, which is already working at its capacity. If this requirement is to be introduced, clear parameters as to what constitutes appropriate certification should be outlined to ensure clarity for parties and consistency and ready application by the Registry.

5. **Negative perceptions of AI may be seen to impact reception of a party's submission.** As the Court is no doubt aware, there is a negative perception of AI, in particular its role in institutions like the justice system. Some CBA Section members note that if they certify materials as being AI-assisted, the Court may scrutinize their materials more carefully, and have an unconscious distrust of the materials and submissions made on behalf of the party.

We appreciate that the Court is an impartial adjudicator and would not be negatively influenced by certification. However, parties may feel that, with negative perceptions of AI, the Court was negatively influenced by its use in the materials. In view of counsel's obligations as officers of the Court outlined in paragraph 3, not requiring certification would eliminate this concern, and be consistent with existing requirements for counsel who make submissions to the Court.

The CBA Section thanks the Court for soliciting our input on this issue of importance for the judiciary and the profession. We would be pleased to offer further substantive, specific feedback on the Draft Direction, in any future discussions or consultations. In the interim, we suggest that the Draft Direction be amended in line with our recommendations. We also recommend that it be labeled as an interim Direction to ensure the profession and parties know it is subject to changes in the future.

The CBA Section continues to be eager to work with the Federal Court to share constructive feedback throughout the process.

Best regards,

(original letter signed by Véronique Morissette for Amrita V. Singh)

Amrita V. Singh
Chair, Intellectual Property Section