January 24, 2025

Via email: Jason.Choueiri@cic.gc.ca

Jason Choueiri
Senior Assistant Deputy Minister and Chief Digital Officer
Client Service and Innovation
Immigration, Refugees and Citizenship Canada
365 Laurier Avenue West
Ottawa ON K1A 1L1

Dear Jason Choueiri:

Re: Artificial Intelligence and automated decision-making in Immigration Law

I write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) to call for the urgent implementation of legislative provisions in the *Immigration and Refugee Protection Act* (IRPA) and the *Immigration and Refugee Protection Regulations (IRPR)* regarding the deployment of artificial intelligence (AI) and other technologies supporting automated decision-making.

The Urgent Need to Enact Domestic Artificial Intelligence Legislation:

The CBA Section applauds the Treasury Board's efforts on the *Directive on Automated Decision Making*[1] and *Algorithmic Impact Assessments*[2], including the upcoming 4th review of the *Directive on Automated Decision-Making*. The *Guide on the Use of Generative AI* is another meaningful expression of the Government's commitment to the safe deployment of AI technologies.

Given the precipitous evolution of AI, Canadian legislation is urgently needed to protect users against its unrestrained potential. While legislation is not a panacea, it is an important step towards elevating and entrenching AI literacy and modernizing foundational legal principles. To ensure that the enormous benefits of automated systems are realized, it is essential to maintain alignment with democratic values while safeguarding human rights, fundamental freedoms, and individual privacy.[3]

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[1]   Canada, Treasury Board Secretariat, "Directive on the Management of Projects" (Ottawa: Treasury Board of Canada Secretariat, 2019), online.

[2]   Canada, Treasury Board Secretariat, "Open Government Licence – Canada" (Ottawa: Treasury Board of Canada Secretariat, 2022), online.

[3]   United States, White House, Office of Science and Technology Policy, "Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People" (Washington, DC: White House, 2022), online. United States, White House, Office of Science and Technology Policy, "AI Bill of Rights" (Washington, DC: White House, 2022), online.

Achieving these goals requires transparency and explicability as cornerstones for fostering widespread understanding, confidence, and trust in AI technologies and the Canadian legal system.

Despite AI governance rising internationally, there is still no enforceable legislation in Canada, nor has the *IRPA* been amended to govern AI uses in the immigration context. In the broader context of Canadian law, AI plays a pivotal role in streamlining case management, facilitating legal research/writing, and supporting decision-making processes. Within the realm of immigration and refugee law, AI applications continue to expand in scope and reach[4] with 10 of 23 *Algorithmic Impact Assessments* published on the Open Governmental Portal being submitted by Immigration, Refugees and Citizenship Canada (IRCC).[5] These developments highlight the importance of data governance, accessibility, and infrastructure for harnessing the potential of AI systems, and call for domestic and international cooperation on data governance to ensure consistency and interoperability.

Immigration legislation is a reflection of society's beliefs and attitudes, but it also reveals Canada's history of inclusion and exclusion.[6] The worry is that AI technology can shield exclusion and promote intentional or unintentional bias in its application. This is captured in the recent *Independent Auditor's Report 9 – Processing Applications for Permanent Residence – Immigration, Refugees and Citizenship Canada[7], which* revealed some of the challenges with automated decision-making tools used in the In-Canada spousal/common-law sponsorship context:

> *9.62 We also found that applicants from certain countries of citizenship were directed to manual processing by the tool at higher rates and experienced longer than average processing times. For example, almost all applications from individuals with Haitian citizenship were routed to manual processing, and applicants waited twice as long for a final decision. At the same time, applications from other countries of citizenship, including India and South Korea, received automated eligibility decisions at higher rates and experienced faster than average processing times.*

> *9.63 We note that applications that are sent to manual processing by the tool may be more complex because of country-specific conditions, resulting in delays and longer processing times. However, the department had not examined the extent to which application complexity affects processing times, nor had it allocated sufficient additional resources to reduce the delays experienced by some groups of applicants.[8]*

These findings prompted the Auditor to make important recommendations, including that IRCC review the processing time differences caused by automation tools and reallocate more resources to complex cases requiring manual processing to reduce disparities.[9] The Auditor also recommended the prompt implementation of online applications for refugee programs and the

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[4]   Canada, Immigration, Refugees and Citizenship Canada, "Uses of Advanced Technology" (Ottawa: Immigration, Refugees and Citizenship Canada, 2023), online.

[5]   Canada, Open Government Portal, "Algorithmic Impact Assessment" (Ottawa: Open Government Portal, 2023)," online.

[6]   *Canada, Canadian Museum of Immigration at Pier 21, "Canadian Immigration Acts and Legislation" (Halifax: Canadian Museum of Immigration at Pier 21, 2023),* online.

[7]   Canada, Office of the Auditor General, "Report 9 - Processing Applications for Permanent Residence—Immigration, Refugees and Citizenship Canada" (Ottawa: Office of the Auditor General, 2023), online.

[8]   *Ibid.*, p. 29.

[9]   *Ibid.*, p.30, Recommendation 9.64.

completion of IRCC's Digital Platform Initiative.[10] IRCC's comprehensive response[11] speaks to exciting possibilities, including the reallocation of resources. However, we respectfully submit that a domestic regulatory regime remains essential.

International Principles as a Basis for a New Regulatory Regime:

Digital Nations was established in 2014 as a forum for governments to pursue their collective goal of "*harness[ing] the potential global power of digital technology and help[ing] one another to become even better digital governments, faster and more efficiently through sharing and learning from each other.*"[13] Canada joined Digital Nations in 2018, and has since been heavily involved in the group's work on AI. In November 2023, the member countries re-committed to a "*shared approach to the responsible use of artificial intelligence in government,*"[14] by outlining twelve core principles to guide future actions:

1. Promoting openness about how, why, and when AI is used;

2. Prioritizing the needs of individuals and communities, including Indigenous peoples, and considering the institutional and public benefits of AI;

3. Assessing and mitigating the risks of AI to legal rights and democratic norms early in the lifecycle of AI systems and following their launch;

4. Ensuring training or other input data used by AI systems is lawfully collected, used, and disclosed, taking account of applicable privacy and intellectual property rights;

5. Evaluating the outputs of AI systems, including generative tools, to minimize biases and inaccuracies, and enabling users to distinguish between AI and human outputs;

6. Publishing legal or ethical impact assessments, source code, training data, independent audits or reviews, or other relevant documentation about AI systems, while protecting privacy, government and national security, and intellectual property;

7. Explaining automated decisions to people impacted by them and providing them with opportunities to contest decisions and seek remedies, which could involve human review, where applicable;

8. Encouraging the creation of controlled test environments to foster responsible research and innovation;

9. Establishing oversight mechanisms for AI systems to ensure accountability and foster effective monitoring and governance throughout the lifecycle;

10. Assessing and mitigating the environmental impacts of the training and use of AI systems, and where appropriate opting for zero-emissions systems;

11. Providing training to civil servants developing or using AI so that they understand legal, ethical, and operational issues, including privacy and security, and are equipped to adopt AI systems responsibly; and

12. Creating processes for inclusive and meaningful public engagement on AI policies or projects with to raise awareness, build trust, and address digital divides.

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10   *Ibid.*, p.30, Recommendation 9.67.

11   *Ibid.*, p.37.

13   Canada, Treasury Board Secretariat, "Digital Operations Strategic Plan: 2021–2024" (Ottawa: Treasury Board of Canada Secretariat, 2021), online.

14   Leading Digital Governments, "Leading Digital Governments" (2023), online.

The Canadian government's acknowledgment of these principles underscores the importance of regulating AI usage. Although not legally binding, these principles are a key resource in identifying best practices, a present necessity underscored by the Federal Court's recent caution that IRCC's "systemic daily deletion of all material generated by processing technology may not reflect best practice".[15] It is our recommendation that these principles – which were echoed in a 2023 Section Resolution[1] – form the basis for a new regulatory regime. IRCC can become a leader in the safe and effective deployment of these tools through the enshrinement into law of the rights and freedoms set out above.

We welcome the opportunity to collaborate with the government in crafting these proposed amendments and ensuring that Canada remains a leader in the safe and effective deployment of artificial intelligence in the immigration context.

Yours truly,

(original letter signed by Véronique Morissette for Kamaljit Kaur Lehal)

Kamaljit Kaur Lehal
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[15]   *Mehrara v Canada (Minister of Citizenship and Immigration),* 2024 FC 1554 at para 69.

[16]   Canadian Bar Association, "Use of Artificial Intelligence in Immigration Law" (Ottawa: Canadian Bar Association, 2024), online.