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AI and the Law:

A Guide for Canadian Businesses

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Introduction

The rise of AI is quite remarkable as a technological and social phenomenon. It has existed in various forms and applications for years but ever since the release of generative AI tools to the general public, it has entered public discourse in a way previously unforeseen. We now understand that it can and will impact the way we do business, the way we deliver legal and medical services, and the way we manage supply chains or conduct hiring processes. We also understand how it can exacerbate existing risks to cybersecurity and data privacy, and how it may impact the way we view the creation and protection of intellectual property.

The global legal and regulatory landscape was not fully prepared for AI, but there are efforts in many jurisdictions and internationally to adapt to or create new regimes. The EU has led the way as the first jurisdiction to pass comprehensive targeted AI legislation; this will undoubtedly have an impact on Canadian businesses and likely on how our legal landscape will develop.

We have prepared this Guide to AI for Canadian businesses in the hope that it will shed light on key areas that are impacted by AI from a legal perspective and how we can help organizations navigate the current and evolving legal landscape.

Miller Thomson has national reach and local knowledge with 10 offices in 5 provinces, and a global network of legal expertise that we can tap into to help organizations of any size and stage of development manage the legal aspects of AI in their business. We have deep sector specific experience and a roster of specialized expertise relevant to AI, and we are happy to partner with you in this area.

DAVID KREBS, LEADER, PRIVACY, DATA GOVERNANCE AND CYBERSECURITY

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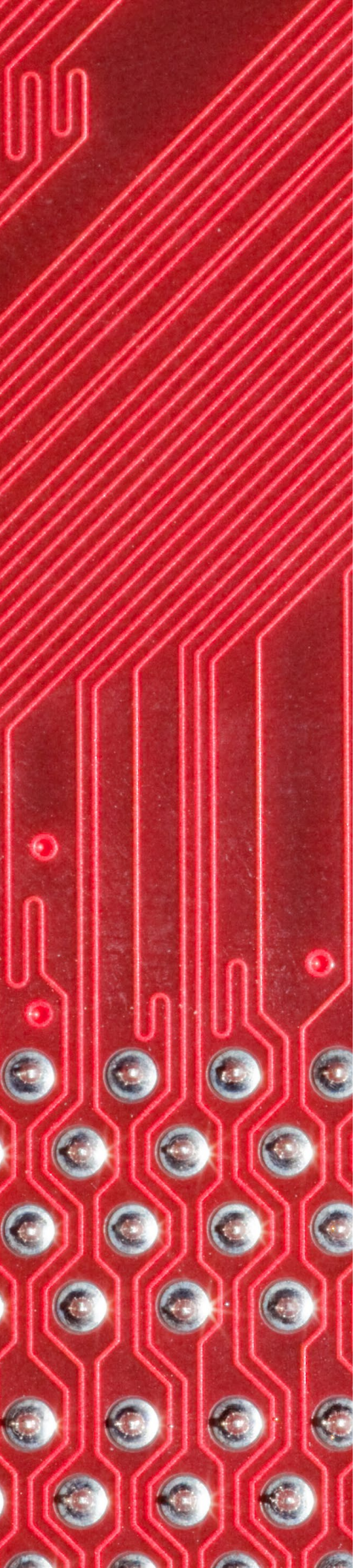

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Regulating the development and use of AI has become a key focus for governments around the world, with an emphasis on accountability, transparency, and mitigating potential risks. This comes as no surprise given the current context and speed of development of these technologies. The opportunities AI presents to solve anything from the climate crisis to help cure human diseases are as present as the potential threats it presents, such as misinformation or fear of AI "outsmarting" humans. Targeted AI regulation would create the need for both developers and users to implement AI compliance programs and governance regimes within their organizations.

Canada has been working on a regulatory response to AI in the form of the *Artificial Intelligence and Data Act* ("AIDA"), part of Bill

C-27. AIDA would impose safeguards aimed to generate a foundation for the responsible design, development, and deployment of AI systems in Canada.* AIDA has generated significant debate in Canada, both in Parliament and the general community. AIDA is quite controversial as key aspects of the law are at issue, as it is unclear which types of AI would be caught by relevant laws. In the interim, a voluntary AI code of conduct exists to guide industry stakeholders through the responsible development and management of AI systems.

Canada is not first past the post in this initiative. Several other countries have already adopted or are currently working on their development of AI legislation and regulations.

The European Union ("EU") introduced the first comprehensive legal framework on AI, the *Artificial Intelligence Act* (the "EU AI Act"). The EU AI Act seeks to foster safe and trustworthy AI development and uptake across the EU. The EU AI Act applies a mechanism to regulate AI systems proportionately to the level of risk they pose. While the EU AI Act entered into force on August 1, 2024, certain provisions will not be enforced until specified times within the next three years, giving countries within the EU a transition period to bring themselves in compliance with the new legislation. The EU AI Act is more prescriptive than what is being proposed in Canada's AIDA (which leaves more detail to be provided by regulation at a later date). The EU AI Act will no doubt have a significant impact on Canadian developers and users of AI, and will very likely inform any future Canadian-grown AI legislation, Some AI applications may be strictly regulated while others may be prohibited altogether.

The United States are currently experiencing a change of tone regarding AI regulation. Joe Biden' Executive Order, introduced in late 2023, surpassed prior efforts, moving beyond high-level principles to create tangible obligations for government bodies and tech companies. President Trump's Executive Order (January 23, 2025) has since revoked the Biden AI Executive Order, and it calls for a rescission of all actions that are "inconsistent with enhancing America's leadership in AI." Several US States, on the other hand, have either signed laws aimed at AI regulation (California, Colorado, and Utah) or are in the process of considering legislative proposals covering transparency, governance, and individual rights.

China has been the subject of attention through its public declarations that promote international cooperation and governance in the field of AI. China's technological and financial partnerships with emerging economies will likely contribute to shape the landscape of AI governance going forward.

Organizations involved in the development or use of AI are faced with the challenge of identifying and complying with international regulatory regimes, as well as with consumer and customer expectations, which includes ethical considerations that surround the use of AI. In this dynamic environment, the ability of organizations to proactively adapt and contribute to the shaping of responsible AI governance will be pivotal for its successful integration in Canada.

* With the recent resignation of Prime Minister Trudeau, Parliament will be prorogued until March 24, 2025. As a result, AIDA and Bill C-27 have died on the Order Paper, and the Standing Committee on Industry and Technology's work with Bill C-27 has ceased as of Jan 6, 2025.

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The increased sophistication, availability, and use of AI technologies is having a profound and lasting impact on both the nature of work and employment practices. In Canada, employment law, once governed by high-level and non-binding principles, is undergoing national changes due to the use of AI and related legislative responses.

For instance, Ontario's proposed amendments to its *Employment Standards Act, 2000* requires employers to disclose their use of AI in their hiring processes. This proposal aims to promote transparency in hiring practices and encourage employers to minimize unintended errors, biases, and discrimination flowing from their use of AI decision-making systems. Employers established in and outside

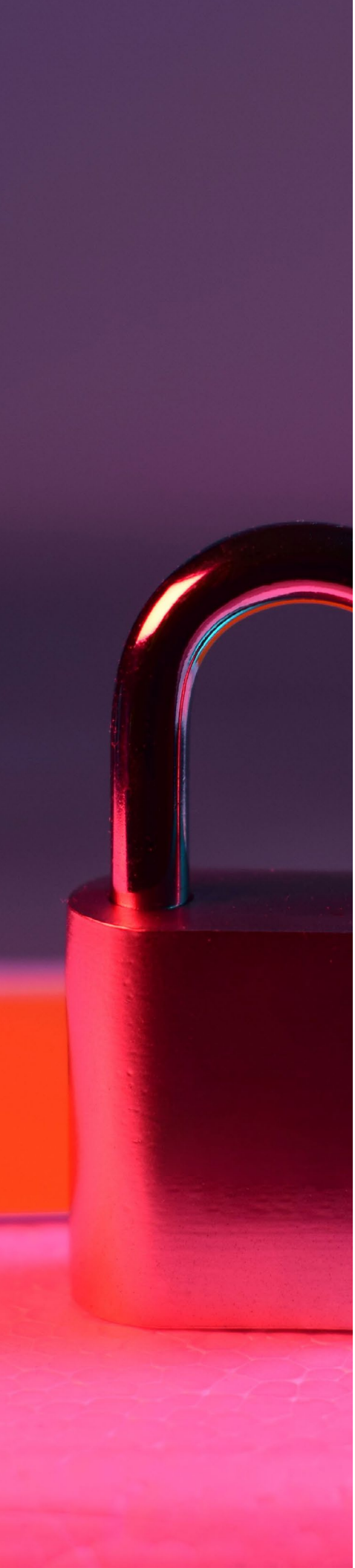
of Canada will need to take into consideration global developments, such as the EU AI Act, and developments in the United States.

Beyond the use of AI in hiring, employers using AI to evaluate employee performance and make disciplinary decisions are likely to be impacted by proposed national privacy laws. Businesses will be subject to significant penalties where they fail to properly collect, use, or disclose personal information processed by AI tools whether they are developed in-house or by a third party.

The use of AI by employees also presents opportunities and challenges. For example, AI can boost productivity by automating time consuming and repetitive administrative tasks. The challenge for employers, however, is to ensure that employees do not disclose confidential or commercially sensitive information to AI, as such data may become publicly disclosed at a later date. Policies governing the use of AI in the workplace will need to be sensitive to these issues and comply with existing employment, privacy, and human rights legislation.

Further legal challenges arise when AI-driven productivity gains alter employers' labour needs. Employees may find their roles completely different or rendered obsolete by AI. The introduction of AI should be weighed against the potential risk and complexity of constructive dismissal claims and terminations.

As the landscape of AI, employment, and labour law continues to evolve, employers are recommended to take proactive steps to best navigate legal challenges, including but not limited to, their disclosure mandates, privacy policies, and workplace dynamics.



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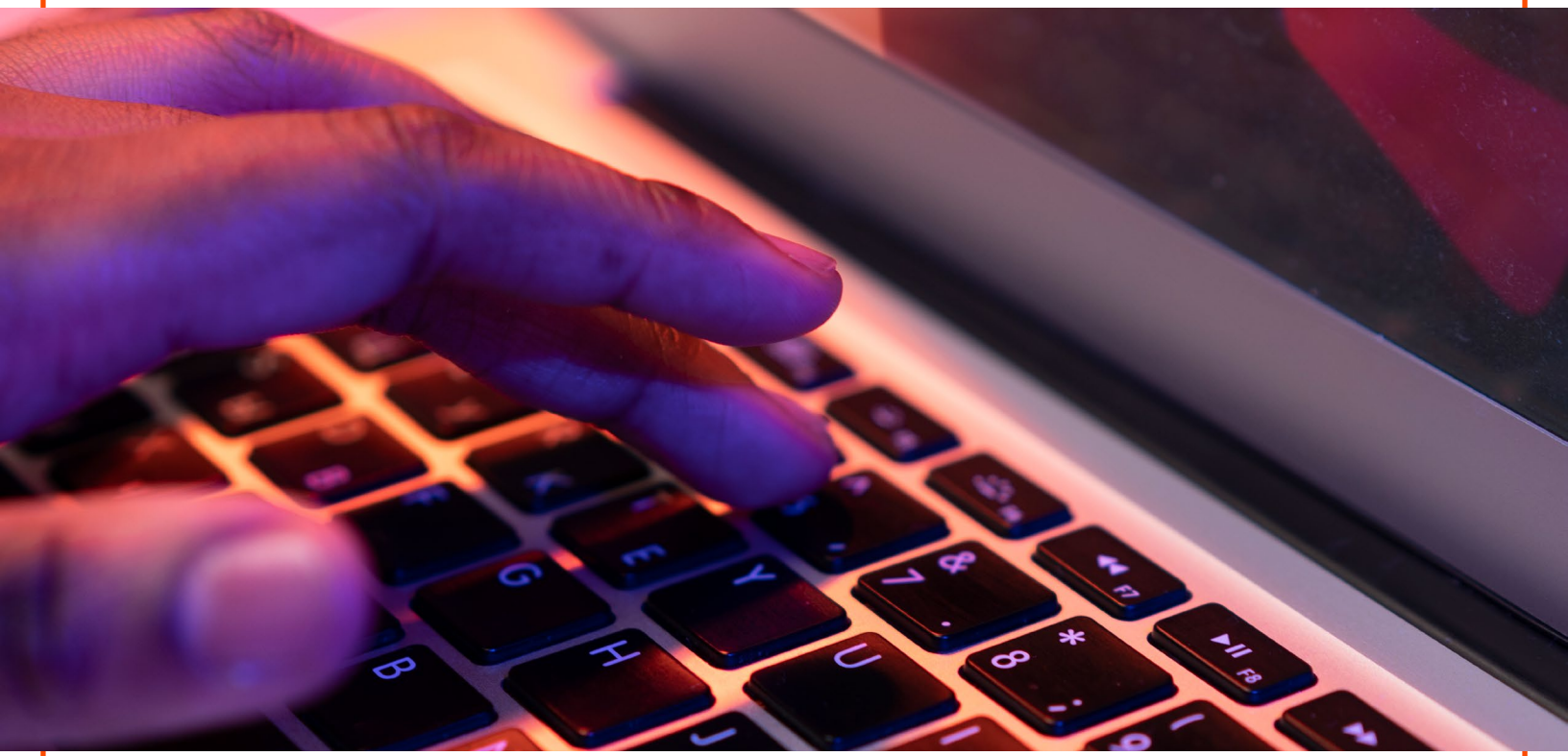
It is no secret that training and using AI involves the collection, disclosure, and processing of information, which also includes personal information. In Canada and most other jurisdictions, the collection, use, and disclosure of personal information is regulated to some extent. Data "scraping" is a live issue and concern. Developing AI or using AI can pose various privacy issues that need to be addressed in a way that protects the organizations from compliance risk as well as the privacy of those whose information is being processed in this context. Using personal information in AI may also be a matter of ethics in some cases.

Just because there is not yet an AI-specific legislation in Canada does not mean there are no Canadian laws that protect the use of personal information in AI. The *Personal Information and Protection of Electronic Documents* Act ("**PIPEDA**") and its provincial substantially similar counterparts, govern the collection, use and disclosure of personal information in the course of "commercial activities." Quebec has enacted a regime with monetary penalties in this regard.

Public-sector freedom of information and privacy legislation, as well health-specific legislation are present in every province. The themes in many of these legislative instruments include: ensuring organizations are accountable and transparent; obtaining individual consent when appropriate; limiting collection, use, disclosure and retention of data; and, employing security safeguards.

The call for legislation specific to AI has arisen contemporaneously with the innovation of new and emerging AI technologies. AI tools raise issues concerning (data scraping) privacy rights: non-consensual collection, biased inputs resulting in discriminatory outputs, and use or intentional misuse in the hands of malicious actors. For example, AI tools can be manipulated through the poisoning of data sets and can be used to execute cyberattacks such as malware and phishing attacks.

Miller Thomson's Privacy and Cybersecurity Team have been monitoring developments and continue to guide clients through balancing the innovation of new AI technologies while ensuring compliance with existing and new privacy, data protection and AI-specific legislation.



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The rise of AI development and its potential in innovation will likely spur a great deal of M&A activity. Companies will improve and emerge as a result of AI development and M&A transactions can be made more efficient with AI technology. The potential of AI is exciting but comes with risks that organizations ought to keep in mind when either building or improving their businesses with AI technologies or seeking to acquire other businesses whose focus is on AI or who utilize AI in their processes.

Existing companies will seek to use AI to develop their mode of operation and new companies focusing on AI technology will emerge. These companies will become targets in acquisitions based on the benefits that AI technology offers including, among other things, the lower costs of operations and the enhanced

analytics that AI can provide. However, M&A activity surrounding organizations that use AI or sell an AI-based product may involve a heightened degree of risk. Notably, in an M&A transaction, parties will be required to scrutinize the technologies being implemented and the legal issues that arise in respect of those technologies and the data used to feed them. These legal issues will include compliance with data privacy regulations especially amid the rise of AI governance. It may also inform representations and warranties negotiations as an acquirer may wish to have representations and warranties from the target regarding compliance with data protection, cybersecurity and AI governance regulations.

Ever evolving AI technologies pose exciting capabilities in respect of preparing business for M&A transactions. AI can support strategic decisions in respect of whether an M&A deal should be pursued through an assessment of market trends, competitors and historic deal outcomes. One of the largest benefits is the use of AI technology is to assist with due diligence processes amid M&A deals. Notably, the ability for AI models to consume vast amounts of information and provide enhanced analytics allows to complete the due diligence processes in a cost and time-efficient manner and provides more information to deal advisors and counsel in their assessments of risk. One of the major concerns with the use of AI in due diligence models, however, is providing AI tools with data which is highly sensitive. Ensuring that the tools being used contain adequate data safeguards is exceptionally important.

Both parties of an M&A transaction are advised to take a holistic and informed approach to maximize the benefits of AI when preparing for closing and post-closing operations.

Patents & Innovation

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A key debate surrounding patents and AI is whether inventions created solely by AI can be patented. The basis of the patent laws in Canada, as well as those in many other countries around the globe, centres around an individual inventor being the first owner of all right, title and interest in the inventor's inventions. If there is no inventor, then there can be no patent.

An inventor is someone whose conception gives rise to a new, non-obvious, useful invention and sets out the conception into a definite shape, configuration or structure. As AI continues to evolve and participate in the inventive process (including but not limited to the use of generative AI tools in drug discovery and development, where AI tools are capable to analyzing vast genomic datasets to

identify promising treatment biomarkers), there will be many instances where AI will contribute materially to the inventive process.

At this time, it is (at best) unclear as to whether an AI system or tool can be named as the inventor of invention under a patent application filed in Canada. While an inventor is not defined within the *Patent Act*, related jurisprudence seems to indicate that an inventor must be a natural person. Without changes to the current *Patent Act*, this may leave inventions unpatentable in scenarios in which an AI system is solely responsible for an inventive idea without human intervention. In other cases, a human who makes a significant contribution to an invention should qualify as an inventor, even if the invention was developed using the assistance of AI.

At the time of this writing, the Canadian Patent Office has not categorically ruled that an inventor must always be human. In fact, the Canadian Patent Office is presently reviewing a patent application which lists an AI tool as the inventor. In the future, we anticipate new guidance from the Canadian Patent Office to address the issue of inventorship in respect of AI generated inventions.

As we wait for jurisprudence and legislation to catch up to the advancement of AI, one existing protection available to protect AI work product is trade secrets. Unlike patents, trade secrets do not need to be registered in order to be protected. An AI conceived invention can therefore be protected. However, the rights and value of trade secrets can be lost once that information is no longer protected, and is publicly disclosed. A risk to trade secrets arising out of the development of AI is individuals entering confidential information related to trade secrets into open AI systems. Open AI systems, such as open AI chatbots, are systems that provide free access to use AI, but the data entered into the AI system by users can be used to further train it. The disclosure of trade secret information to an open AI system could destroy trade secret status.

Copyright and Artificial Intelligence

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With the rapid growth of generative artificial intelligence (AI) usage worldwide, a key issue that has arisen for copyright owners is how to protect their work against infringement by AI tools under the existing intellectual property legal framework.

At the time of this writing, the Government of Canada is conducting consultations to determine how the *Copyright Act* should be amended to address a range of legal issues at the intersection of copyright and AI.

i. Rights in Materials Used to Train AI Systems

Generative AI is trained through text and data mining, which involves examining large amounts of text, art, drawings, video and sound recordings and other data and materials, and using what it learns through the data mining process to generate creative material, including but not limited to literary, artistic and musical works, such as text and writing, drawings and illustrations, and songs. Importantly, the mined data may include copyrighted works. The owners of those copyrighted works are concerned about their unauthorized to train AI systems. In this context, Canadian lawmakers must consider whether any of the existing fair dealing exceptions apply to the use of the copyrighted material for use in training AI tools and systems, and if not, whether a new exception should be created for this purpose. On the other hand, many creatives argue that no fair dealing exception should apply to AI systems. They believe that the owners of AI systems must obtain express licenses from the copyright owners to use their works for AI training purposes. Many creatives are also advocating for full and comprehensive disclosure of the data, information and materials that AI owners use to train their AI systems.

ii. Authorship and Ownership of AI-Generated or Assisted Works

AI users are also concerned with whether they can protect the creative outputs of their AI machines under the existing *Copyright Act*. The current *Copyright Act* ties copyright protection to human authorship. Under the current framework, it is unlikely that solely AI-generated work would be protectable under the *Copyright Act*; however, AI-assisted work may be shielded. In fact, the Canadian Intellectual Property Office has permitted a copyright registration which listed an AI system as a *co-author* of the work together with a human author. In contrast, the U.S. Copyright Office has stated that simply providing a prompt to AI is insufficient to create copyright in a work and confirmed that traditional elements of authorship in the work must be attributable to the human user for copyright to exist. In each case, AI users should consider the degree of AI usage in their creative outputs, and other jurisdictional requirements, in order to determine the degree of protection that will be afforded to them. Moreover, AI users should review the terms of service and any other contracts they enter into when using AI tools and systems (or working with service providers who might be using them) to confirm who amongst all the parties involved owns the works generated by the AI tools and systems.

iii. Liability Resulting from the Use and Commercialization of AI Systems

There are also concerns under the existing *Copyright Act* as to the liability resulting from an AI system infringing a copyright owner's rights in copyrighted works. A key question to consider is whether there is a sufficient amount of human involvement in the AI output to find the AI user or the AI tool provider liable. Additionally, if the AI user distributes the infringing material, can they be found liable for secondary infringement, if the infringer knew or ought to have known, that they were dealing with an infringing work? Since AI self-learns and it is not always clear what works

they have accessed in their creation of their AI outputs, it may be difficult to prove the knowledge component of the infringement test.

As the laws surrounding AI continue to evolve, it is important to consult an intellectual property expert to ensure that your works are properly protected (and that your associated rights in these works are properly enforced) and to ensure that you are not inadvertently infringing on third party copyright when using generative AI tools in your own business.

Health

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AI is revolutionizing how the health industry operates. Pharmaceutical companies have been using AI to assist with drug development and discovery, helping to reduce costs at all stages of development. Machine learning enabled medical devices are changing how physicians analyze digital imaging and engage in disease surveillance, increasing overall accuracy and detection rates and aiding diagnosis. In addition, AI can help reduce the administrative burden for hospitals, physicians and other health professionals, including in areas such as clinical documentation, patient communication, virtual care, clinical decision support, research and development, freeing up time for patient care. This is particularly crucial given the current shortage of health human resources across Canada. Health industry organizations must understand the impact of generative

and traditional AI and the changing regulatory landscape before implementing these tools in their work streams.

There are many considerations for the health industry when looking at the design, adoption and implementation of potential AI solutions. The health industry is highly regulated, with federal, provincial, professional and industry regulators having specific requirements. However, there are significant privacy and security risks related to the collection, use and disclosure of patient data, and the need to comply with applicable federal and provincial privacy legislation, including health privacy laws. For example, open-source AI tools may retain user input data for training. This information may enter the public domain and it may not be possible to remove this data once it has been disclosed.

There are also legal questions about the ownership of data (patient data and derivative data) and intellectual property, when informed consent is required, and how organizations obtain such consent. Furthermore, although AI technologies are increasingly more reliable, one of the risks of generative AI technology is accuracy and the potential for incorrect or even fabricated responses (sometimes called "hallucinations"), with the potential for liability if things go wrong. AI may also be used for malicious activities, such as the impersonation of real individuals (deepfakes), phishing attacks, and other forms of cybercrime. In the health industry, where organizations are dealing with sensitive personal health information, there must be comprehensive systems in place to protect patients' data from malicious activities. Additionally, organizations need to be aware of ethical concerns and biases that may exist within an AI system's algorithms and training data and ensure that these embedded biases are not perpetrated into the AI outputs.

AI is increasingly used in Canada for both clinical and non-clinical applications and as with most other industries, it will disrupt the health industry. Governments, legislators, regulators and associations are grappling with how to address these evolving risks. The World Health Organization recently released considerations for the regulation of artificial intelligence for health. We can expect more regulatory frameworks to emerge.

To prepare for the implementation of AI, there are proactive steps that the health industry can take to mitigate risk. Multidisciplinary teams established to identify and manage risks associated with generative AI are a fundamental part of such an endeavour. Education of stakeholders, including boards of directors, employees and contractors, respecting their responsibilities for the safe use of AI is crucial. Organizations may also wish to consider establishing AI guidelines that include key principles, such as those suggested in Canada's *Voluntary Code of Conduct on the Responsible Development and Management of Advanced Generative AI Systems*, as well as updating their policies to reflect the issues that arise with AI use. Conducting privacy impact and security assessments, and maintaining human oversight and monitoring of AI systems are also essential aspects of a successful transition.

As AI continues to be adopted by organizations at all levels of the health industry, it is important to consult a qualified legal advisor to ensure compliance with all applicable legislation, regulations, policies and frameworks as they continue to evolve.

Transportation and Logistics

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The transportation and logistics industry is increasingly driven by AI as it embraces a wide range of AI applications to improve efficiency, safety, and profitability of supply chain operations.

For instance, municipalities and road authorities use AI to gather data from GPS, sensors, and cameras built into road infrastructure to monitor road density, traffic stoppages, maintenance issues, and parking space usage. AI can then make recommendations related to road improvements and redesign, including changes to the timing of traffic lights and the placement of roundabouts or crosswalks.

For logistics, AI vastly improves risk management through predictive analytics that can help identify and assess potential red flags,

propose workaround solutions, and expedite the decision-making process to mitigate risks. AI provides logistics companies with far deeper insight than they have ever had before. It reduces errors by automating key processes, which allows logistics companies to become more time and money-efficient, and provides a competitive advantage compared to companies that do not use AI.

AI streamlines supply chain operations as it forecasts demand for products to avoid stockouts and overstocks, better manages inventory levels, automates warehouse operations such as "pick, pack and ship," and expedites eCommerce deliveries. In warehousing specifically, AI minimizes the energy used and waste created by its analysis of inventory levels and demand of the products.

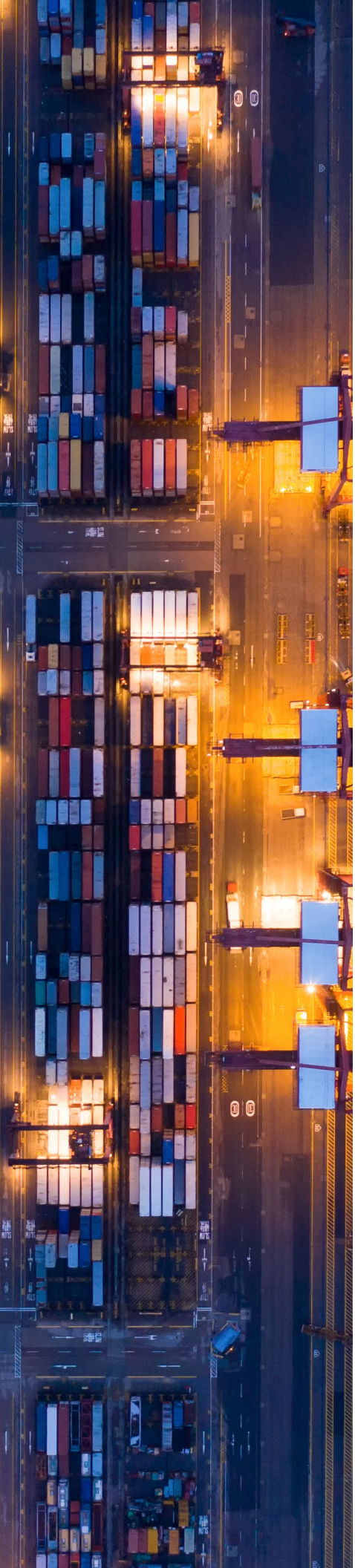
AI has vast applications for driver assistance. Driver behaviour, vehicle performance and road conditions can all be monitored with AI through onboard computers that gather data from a complex network of sensors such as radar, LIDAR and ultrasonic sensors. The network of sensors watches for road hazards, monitors for hard braking, improper lane changes, speeding, and more in real time.

AI can also assist in criminal investigations with its ability to automatically recognize licence plates, anticipate and prevent or detect crimes, including instances of cargo or vehicle loss or damage.

AI is already being used to program drones and eVTOLs to assist with GPS navigation, delivery drops, obstacle detection and avoidance, and contingency and emergency management. Busy ports and harbours also use AI to identify hotspots, where there is a high risk of vessel collisions and allisions, and issue warnings to ship's crews and traffic control officers to take evasive action.

Self-driving vehicles programmed by AI are another hot topic in the transportation and logistics industry as they reduce driver compensation costs, minimize the effect of driver shortages, and increase efficiency by eliminating the need for rest breaks.

While AI can be very helpful to the transportation and logistics industry, there are still a number of issues and risks related to its use, including malfunctions, errors, or cyber-attacks, that place participants as a risk of loss, damage or delay of a shipment or a life-or-death accident. It is important for companies contemplating or already using AI in their operations to carefully consider the risks and applicable legislation before implementing AI in their practices. Working with legal counsel should be a priority to ensure their existing and future transportation and logistics agreements are updated accordingly to accurately represent their positions on important terms and conditions.



Trade
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AI is changing the global trade and customs landscape as leading customs authorities, customs brokers, importers, exporters, and service providers have been engaged in its use. AI has been able to modernize customs clearance processes, reduce customs transaction costs and delays, provide insights into trade flows, and enhance regulatory efficiencies.

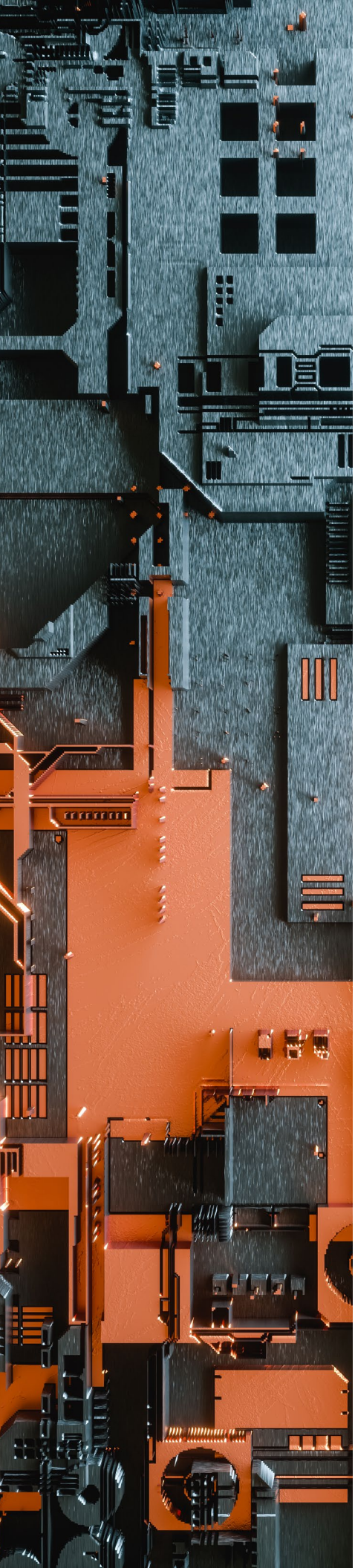
AI has a steeper initial adoption curve than other technologies, driving industry-wide changes, new opportunities, and challenges. It can empower businesses to obtain a competitive edge by increasing operational efficiencies and enhancing compliance. Successful leaders will need to identify systems and processes that benefit from AI-driven technologies, integrate and scale them.

The Canada Border Services Agency ("CBSA") has taken steps to benefit from AI in its Assessment and Revenue Management ("CARM") project. CARM marks a pivotal shift towards modernizing customs procedures through an online portal. CARM leverages AI to streamline the historically paper-intensive process of trade and customs documentation. The role of AI in CARM extends beyond simplifying document preparation, including waybills, commercial invoices, customs declarations, and tariff classifications. It also enhances accuracy and efficiency in trade operations, significantly reducing manual errors associated with data entry by customs brokers.

Several customs brokers have adopted AI and machine learning ("ML") to modernize clearance operations. The benefits include reduce labour costs associated with data entry, enhanced precision and accuracy, and increased capacity. AI and ML platforms use data from importers, suppliers, and service providers as well as data from bills of lading, commercial invoices, permits, and certificates of origin, to complete draft customs reporting and accounting documents. AI also allows shipments and customs activities to be traced and the condition of shipments to be identified.

The area of global trade and customs goes well beyond accounting for duties and taxes. It includes economic sanctions regimes which support the resolution of conflicts. AI's potential to automate compliance checks against international sanctions presents an invaluable tool for businesses to ensure their trade practices align with global regulations. Companies can swiftly identify and mitigate risks associated with sanctioned entities and individuals by utilizing AI to review public databases and internet resources. Integrating AI into trade and customs presents challenges similar to other industries, particularly concerning regulatory compliance and privacy concerns. As the technology relies on the processing of personal data, privacy-conscious practices in AI's development and application is required. Formal assessments, such as data protection impact assessments, are crucial in identifying and mitigating potential risks, including biases and inaccuracies or the compromise of privacy or compliance standards.

Customs transactions involve the use of sensitive information such as the identities and consumption activities of consumers. As AI revolutionizes trade and customs, the emphasis on data privacy, security, and the protection against malicious cyberattacks and unauthorized data access has become increasingly important. These factors highlight the need for establishing and maintaining adequate data privacy protection measures that do not unnecessarily restrict the ability to use data for trade and customs compliance purposes.



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AI and machine learning ("ML") is redefining operational models and client interactions within Canada's financial services sector.

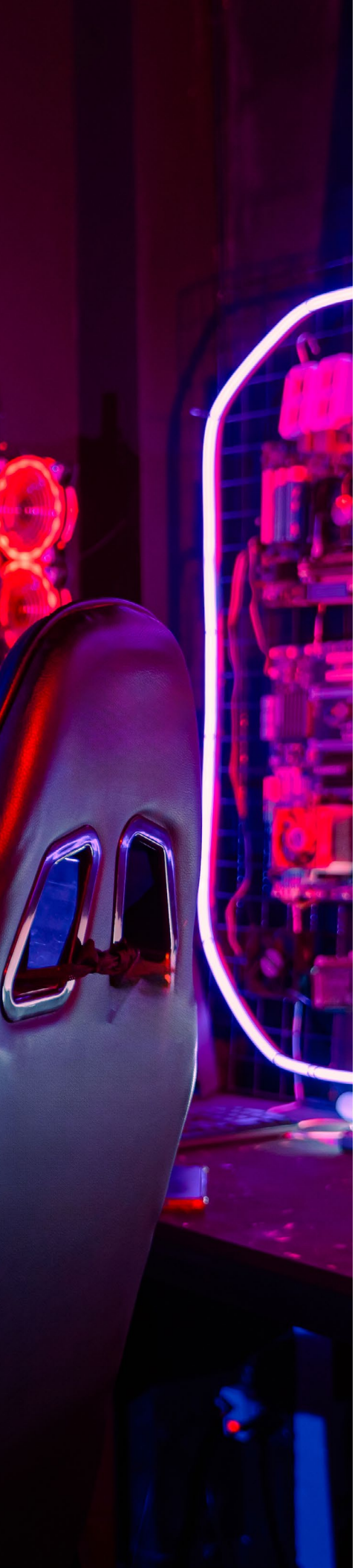
The ability of AI and ML to analyze extensive datasets helps financial institutions enhance operational efficiency, personalize services, and strengthen security measures against financial crimes. Together, they enable institutions to deliver tailored financial products and services, driving a shift towards a more nuanced and client-centric business model.

Financial institutions are exploring their use of AI to streamline operations and improve client experiences, and the application of AI in financial services is quite expansive. AI can be used for predictive analytics, risk assessment, market trend analysis, enhanced fraud

detection systems and decision-making. AI is also being used in the adjudication of loans and credits, involving using AI to assess and make decisions on loan applications, and leveraging both traditional and alternative data sources to evaluate an applicant's creditworthiness more accurately.

Adopting AI presents challenges, notably in ensuring data accuracy, mitigating biases, and maintaining clients' trust. Financial institutions must navigate these challenges thoughtfully and develop internal policies and procedures to ensure they meet applicable regulatory requirements and are prepared for the potential reputational risk that could occur if a solution does not perform as expected. They must consider whether internal policies will be prohibitive to the development of its use of AI and if engaging external stakeholders would be a better approach.

It is clear that AI will continue to play a pivotal role in shaping the future of finance in Canada. AI's integration into financial services will require continuous learning, adaptation, and regulatory evolution. In this landscape, financial institutions are not just adopting new technologies but also setting new standards for innovation, efficiency, and client service in the digital age. As such, the role of legal professionals is becoming increasingly important as businesses and banking institutions implement and maintain their use of AI, as they must comply with applicable provincial and federal laws and regulations.



Entertainment and Gaming

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AI has revolutionized the entertainment and gaming industry and has a multitude of uses. AI can generate improved special effects, actors in film, in-depth open world games and detailed non-playable characters in video games, musical works in the style of popular musicians, or write novels in the style of a favourite author. With these endless possibilities, some creatives may want to protect their materials from being used by AI to create works similar to their creative styles or likenesses, without consent or agreed upon compensation. Other creatives want to use the cost saving advantage of training AI to produce additional creative works in the same creative style or likeness.

These issues came up in the film industry in the US during the 2023 Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA) strikes. Studios agreed they would not use an actor's digital image or likeness without the actor's consent and agreed upon compensation. Subject to limited exceptions, AI may currently only be used to create a synthetic performer if they notify SAG-AFTRA, provide the union an opportunity to bargain in good faith for a real actor to audition for the synthetic performer's role, and if the synthetic performer resembles a real actor, obtain the real actor's consent. In Canada, these issues are going to be addressed during the negotiation of the new collective bargaining with the Canadian Media Producers Association and the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA). ACTRA has been lobbying the federal government as it prepares to introduce the *Artificial Intelligence and Data Act.* ACTRA suggested that any new AI legislation should allow performers to consent and control the use of their voice, image, or likeness by AI, as well as being provided compensation for such use.

Several authors have brought copyright infringement claims to U.S. courts regarding AI's use of copyrighted materials to recreate similar or competitive works. As no analogous claims have been made in Canadian courts, it remains unclear whether such uses will be considered copyright infringement or fall under a fair dealing exception.

There are risks with creatives using AI to make their creations. As discussed in further detail under the Copyright and Trademarks section of this guide, the *Copyright Act* likely requires a human author for materials to be granted copyright protections. It is unclear as to how much AI assistance will be allowed in the creation of a work before the AI is deemed to be the author of the work and therefore not protected under the *Copyright Act.*

As AI continues to transform creative works, a characteristic once thought to be unique to humans and immune from AI encroachment, understanding AI's evolving strengths and weaknesses is important to ensure individuals and businesses are not left behind the curve.

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