

LAW AND TECHNOLOGY



Law Commission of Ontario/Mozilla Foundation
Digital Rights, Digital Society Roundtable Report



LAW COMMISSION OF ONTARIO
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EVENT REPORT

Law Commission of Ontario and Mozilla Foundation Digital Rights, Digital Society Roundtable

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Towards a Digital Rights Agenda for Ontario

An increasing number of daily headlines tell the story of a digital society in rapid transition. We read about the development of “smart cities” built with an array of passive sensors and facial recognition cameras; police forces who deploy algorithms to predict where crimes might occur, and who might fit the profile; “gig economy” platforms that lock workers out of a livelihood after a questionable customer review; and online shoppers baffled to find different prices than their friends, based on an invisible profile they didn’t know they had, and can’t access.

In this rapidly changing world, there is often a sense that the law isn’t keeping pace with technology. People’s expectations about transparency, fairness, privacy, and free and informed consent are challenged by new digital platforms and services that seem to be using a different set of rules. As a result, more and more people seem to believe that digital rights and digital citizenship are a new and important frontier in access to justice. For example,

- How effective (or ineffective) are online contracts in protecting privacy and personal information?
- Is human rights legislation equipped to ensure algorithms do not discriminate?
- How can privacy and personal information be protected in a “smart” city that might be full of sensors and cameras?
- Should labour or employment laws be amended to protect “gig” economy workers?
- What does modernized consumer rights protection look like in the digital marketplace, or with the internet of things?

The need to address these issues promoted the **Law Commission of Ontario** (LCO) to partner with the **Mozilla Foundation** (Mozilla) to host a full-day roundtable discussion on digital rights and digital society in May 2018.

The Roundtable included policy makers, community groups, academics, practicing lawyers, technologists, and digital executives.

The goal of the Roundtable was to help the LCO and Mozilla develop a digital rights agenda for Ontario and beyond.

The Roundtable heard about many issues and from many perspectives.

This is our report on what we heard.

What is the Law Commission of Ontario?

The Law Commission of Ontario (LCO) is Ontario's leading law reform agency. The LCO's mandate is to advance law reform, promote access to justice, and stimulate public debate. The LCO's work is based on rigorous, evidence-based research; contemporary public policy techniques; and a commitment to public engagement. The **LCO's Strategic Plan** commits the LCO to undertake independent, forward-looking projects considering the impact of technology on the law

What is the Mozilla Foundation?

The Mozilla Foundation is a non-profit that believes the Internet must always remain a global public resource, open and accessible to all. Our work is guided by the **Mozilla Manifesto**. The direct work of the Mozilla Foundation focuses on fueling the movement for an open Internet. We do this by connecting open Internet leaders with each other and by mobilizing grassroots activists around the world.

Who Participated in the Roundtable?

Bram Abramson

Ford-Mozilla Open Web Fellow, Citizen Lab

Benjamin Alarie

Co-founder & CEO at Blue J Legal; Osler Chair in Business Law, University of Toronto

Avery Au

Citizen Tech Toronto, Law & Design Project

Andrew Clement

Professor Emeritus, Faculty of Information University of Toronto

Jennifer Davidson

Technology Lawyer, Deeth Williams Wall LLP

David Fewer

Canadian Internet Policy and Public Interest Clinic at the Centre for Law, Technology and Society, University of Ottawa

Lex Gill

Research Fellow at Citizen Lab, Munk School of Global Affairs

Maura Grossman

Research Professor and eDiscovery Lawyer University of Waterloo

Thomas Hamilton

VP Strategy & Operations at ROSS Intelligence

Jairus Khan

Outreach Coordinator at Mozilla

Brenda McPhail

Director, Privacy, Technology & Surveillance Project at Canadian Civil Liberties Association

Ellie Marshall

JD Candidate, University of Toronto

Kirsti Mathers McHenry

Director, Policy & Programs, Law Foundation of Ontario

Marina Pavlovic

Assistant Professor, University of Ottawa

Shelley Robinson

Executive Director, National Capital FreeNet

Michael Tamblyn

CEO, Rakuten Kobo Inc.

Amy ter Haar

President, Integra Ledger

Jutta Treviranus

Director and Professor at Inclusive Design Research Centre, OCAD University

Armene Yalnizyan

Economist. Commentary at @metromorning and @OnTheMoneyCBC

Bianca Wylie

Head, Open Data Institute Toronto



Participants constructing a yarn web connecting interests and concepts

How Did We Organize the Roundtable?

There is no single definition of “digital rights.” Digital rights include topics as diverse as digital inclusion and access; a digital bill of rights; rights in a “smart” city; “digital due process;” regulatory sandboxing; professional regulation and practices; social scoring and algorithmic black boxing; digital democracy; new frameworks for informed online consent; and more. These are important, timely, and challenging issues.

The purpose of the Roundtable was to encourage a diverse and committed group of experts to begin thinking about technology as a question of access to justice. In this manner, the LCO and Mozilla hoped to begin shaping a set of options and priorities for a digital rights agenda for Ontario and beyond. A second goal was to begin identifying projects and topics for further research and public consultations.

To achieve these ends, the LCO and Mozilla organized the roundtable in four phases.

Phase 1: Research

The LCO began researching law reform and technology issues in 2017. This research generated names of individuals and organizations who we believed would make a significant contribution to the Roundtable.

Phase 2: Participant Interviews

The LCO conducted preliminary interviews with most Roundtable participants. Participants were asked to identify the issues of greatest concern or top of mind to them. They were also asked to identify aspects of their topic most promising and timely as law reform matters.

Phase 3: Identifying Themes

The preliminary interviews were analyzed carefully. Surprisingly, the interviews revealed several common themes and priorities. These themes became the foundation for the Roundtable agenda and discussions.

Phase 4: Facilitating the Discussion

The Roundtable itself was divided into three parts. In part one, participants were invited to “spin us their yarn” by telling us what brought them to the roundtable. In part two, participants collectively examined the themes generated in the preliminary participant interviews. In part three, participants worked in small, self-selected expert groups to consider in detail the policy and legal aspects of each theme.

Law Reform Themes and Priorities



Taking a look at the
brainstorm of ideas and issues

The Roundtable identified six general law reform themes or priorities

1

Algorithmic Accountability. Algorithms are the new “invisible hand” that have the potential to influence just about everything: bail eligibility, plane seat fares, social credit scores, news feeds, automated content filtering, surgical recommendations, and the gig economy. How can the public ensure that AI or machine learning decision-making is transparent, fair and accountable?

2

The Platform Marketplace. How can we ensure privacy, data protection, and consumer rights in the digital marketplace? Can we adapt “click” contracts or online consent to more effectively protect public and personal interests and rights? How can we level the playing field for consumers, workers, retailers, and others operating in an international digital marketplace?

3

Digital Civil Society. Democratic governance and successful law reform depend on public participation and informed debate. What policies, tools or supports are needed to encourage digital policy literacy and digital civil society? How can decisions and discussions regarding law reform and technology be transparent, participatory and evidence-based?

4

Regulatory Approaches to Technology. What regulatory tools or strategies can governments and others use to protect the public interest in the face of rapidly changing technology? How can law, regulation, or other policy tools be used to address “law lag.” Is this even a priority?

5

Digital Justice & Equity Principles. Many new technologies challenge human rights and related legal rules. For example: Privacy rights may be challenged by “smart city” surveillance; Human rights and anti-discrimination policies may be challenged by AI and machine learning. How do we ensure new technologies respect core principles of human rights, equality, and due process?

6

Technology and Work. It’s been said that “Uber, the world’s largest taxi company, owns no vehicles. Facebook, the world’s most popular media owner, creates no content. And Airbnb, the world’s largest accommodation provider, owns no real estate.” How can or should labour and employment law be adapted to the future of work in the “gig” economy?

Additional Insights, Ideas, and Questions

In addition to the themes and priorities identified above, the Roundtable generated many insights, ideas and questions that we believe will come to shape our discussions and analysis as we go forward.

It is worth stressing that these are preliminary insights and take-aways, which express commonly shared concerns, and early thinking about legal issues and options. We are sharing these as conversation starters to stimulate thinking. More concrete proposals and discussions will be had through a later consultation process.



► **Technology is the new frontier for access to justice.** Technology raises new and crucial questions about access to justice that are rooted in fundamental civil rights and due process. How do you know when an algorithm has been involved in deciding a job application, eligibility for social entitlements, or is adjudicating your legal claim to housing or immigration status? How can you protect reputation online? How are digital platforms, like social media and commerce sites, subject to collective consumer rights, and what dispute resolution mechanisms are needed?

► **We need legal innovation and creative thinking about new and complex legal issues.** There is considerable need for the legal imagination to begin generating practical and effective solutions to regulation beyond the traditional binary of “do / do not regulate.” This will connect digital citizens to their rights and provide a predictable and level playing field for technologists. For example, what if the focus of privacy law shifted from individual consent to collective consumer rights? Could protections from discrimination guaranteed under Ontario’s Human Rights Code be incorporated directly into an algorithm, and

thus ensure structural compliance? What tools will help technologists incorporate legal considerations into their design and development process?

► **Individuals no longer feel in control of their “digital self.”** There is growing awareness that information is being used beyond the control or even the knowledge of most people. A person’s “digital footprint”, while often invisible, can have far-reaching consequences. It can potentially influence a person’s employment, their access to (or the price of) public and private goods and services, or even the information and news a person sees online. Roundtable participants asked whether “privacy” is an effective approach to meet these challenges. Participants also asked whether the “contract” model of click-consent really offered meaningful free and informed consent when the only real choice is to opt-in or miss-out. Several alternatives were suggested, such as a consumer rights approach that could standardize terms and conditions, or mandate certain protections and rights across an array of different products and platforms; creating a “digital bill of rights”; and/or “smart” contracts that offer the opportunity to line-item consent.

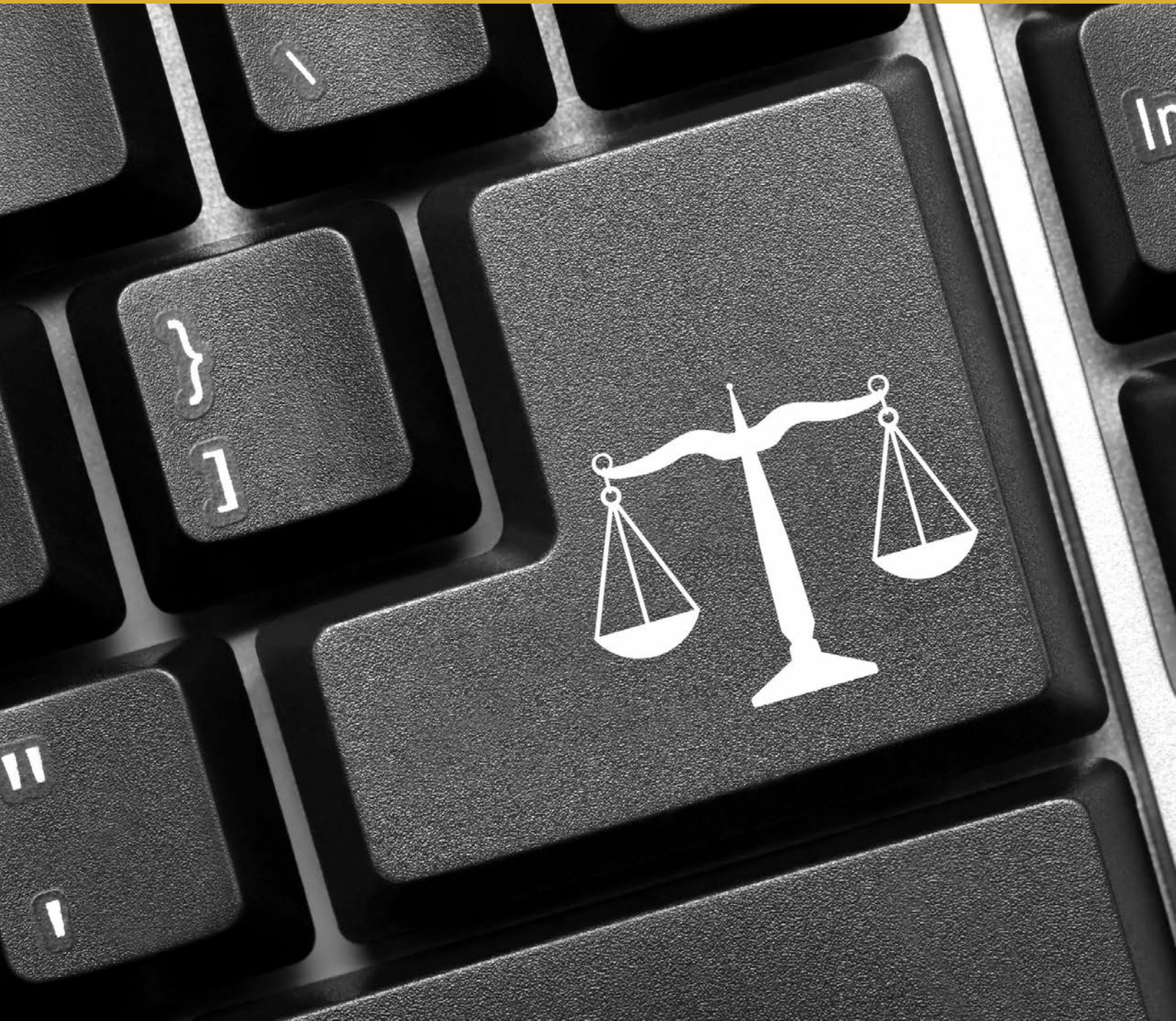
► **Technologists and developers are important law reform stakeholders.** Technology platforms and products shape behaviour, filter information, automate activities, and set terms and conditions for use. They have important perspectives and untapped potential to analyze and shape access to justice in the 21st century. Any discussion of law reform and technology must ensure a highly inter-disciplinary conversation between technologists, policy makers, law makers, and others that may open up new approaches to law reform.

► **Labour and employment law hasn’t tracked the rise in the “gig economy.”** Roundtable participants noted how a significant and rising proportion of Ontario’s workforce earn income through short-term and precarious work, often tied to digital platforms. More people working in the “gig economy” means more people working where the law may be unclear. Key issues included: greater legal clarity for the employee / contractor relationship; how labour rights apply to digital platforms; whether “terms of service” contract relationships are based on free and informed consent; the fairness, transparency, and protection from

discrimination in assigning work via algorithm; dispute resolution and mandatory arbitration; and whether there is a “right to access” work only available through private digital platforms.

► **There is no digital citizenship without equity in access.** Social equality is increasingly tied to digital access. Access to information, government programs, jobs, news, banking services, and even transit passes – almost all of it is increasingly and exclusively available through digital platforms. Disparities in access to these platforms – what we might call disparities in digital citizenship – deepen socio-economic and generational divides. This creates a “digital determinant of health” that directly impacts access to opportunity and services. Several participants emphasized that a modernized definition of “public health” needs to include education on these issues and proactive programs to ameliorate disadvantage.

Next Steps



In May 2018 the Mozilla Foundation supported the launch of a new **Digital Justice Lab** based in Toronto. Their nation-wide mandate is to “build towards a more just and equitable digital future in Canada.” Their process is to build a feedback loop between three pillars of engagement, collaboration, and experimentation. These steps will be taken with technologists, community activists, and policymakers alike.

For its part, the LCO has been working on several technology law reform projects:

- In 2016, the LCO partnered with Legal Aid Ontario and the Canadian Forum for Civil Justice to host an **Open Data, Open Government Symposium** to consider opportunities for greater transparency, accountability, and accessibility in the justice and tribunal sector.
- In 2017, the LCO launched the **Defamation in the Age of the Internet Project**, which considers how laws governing reputation should be updated to account for “internet speech,” including social media, blogs, internet platforms and digital media. This most recently included hosting a panel discussion at **RightsCon Toronto**.
- And in late 2017, the LCO’s **Class Actions project** received funding from the Department of Justice to establish a public, online, open data catalogue of class action cases and information. This is the first of its kind in Canada and will support ongoing access to justice and law reform research across the country.

These projects will build on the results and input obtained from the roundtable. The LCO is also interested in identifying experts and potential partners, with the goal of launching several law and technology reform projects over the coming year. Get involved by emailing lawcommission@lco-cdo.org or **signing up for our project updates**.

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<https://www.lco-cdo.org/techlaw>



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