Law Commission of Ontario
Digital Rights Project

Experts Planning Meeting
November 20 2018 • Toronto

AGENDA

November 20, 2018 @ 1230PM – 4PM
Advocates Society – 250 Yonge Street, Suite 2700
Toronto

Teleconference	Local Dial-in	416-933-9440
	Toll-free Dial-in	855-453-6959
	Conference ID	7455445#

Contacts

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Maricela Morales, Project Coordinator mvillaltamorales@lco-cdo.org

12:30 **Welcome and introductions**

12:40 **Background on the LCO Digital Rights Initiative**

- How we got here
- LCO approach to law reform
- Where we want to go with this

12:50 **What we're asking of you today – key questions for this roundtable to discuss**

1:00 **Presentation 1 – Algorithmic Accountability**
Host: Aaron Shull | Centre for International Governance Innovation

1:20 **Presentation 2 – The Question of Regulation and Due Process in Digital Rights**
Host: Prof. Lorne Sossin | Osgoode Hall Law School

1:40 **Presentation 3 – Consumer Rights in Digital Society**
Host: Prof. Marina Pavlovic | Centre for Law, Technology and Society – uOttawa

2:00 **Presentation 4 – Employment & Labour Rights for Contingent Workers**
Host: Armine Yalnizyan | Atkinson Foundation Fellow

2:20 **Break + Networking**

2:35 **Roundtable Discussion**

- Defining boundaries and overlaps between these areas
- Identifying concrete questions for law reform of digital rights
- Scope and sequence, where to start

3:35 **Potential Partnerships, Funding Opportunities and Upcoming Events**

3:50 **Wrap-up and next steps**

Materials Package

- Report on the LCO / Mozilla Digital Rights Roundtable (September 2018)
- LCO Brief – Algorithmic Accountability
- LCO Brief – Regulation and Due Process
- LCO Brief – Consumer Protections and Rights
- LCO Brief – Employment and Labour Rights of Contingent Workers
- Selection of readings on each topic (via links)

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DISCUSSION PRIMER – ALGORITHMIC ACCOUNTABILITY

Key Legal / Policy Considerations

- The potential applications of algorithms are unlimited. There is thus a desire, and a tension, in developing general versus application-specific regulations for algorithms

  Algorithms are increasingly and often invisibly deployed in every context, from online shopping profiles and dynamic pricing; criminal bail & sentencing; linguistic prediction and filtering; job applicant filtering; in creating sophisticated "deep fake" images and video; determining workplace performance; determining government entitlements; and so forth
- There is a strong sense of increasing asymmetry between the power of those who wield algorithms and those who are subject to them

  Broadly, there is increasing public concern over transparency in algorithmic use and decision making; bias and discrimination arising out of flawed design and population data; behaviour shaping and profiling; a lack of accountability or redress; etc
- Regulatory uncertainty creates an environment that is of concern to the public, regulators, and technologists and innovators alike
- In many circumstances there may be existing laws and legal doctrines which *may* or *could* apply to algorithms. But this may be very unclear or uncertain, and likely untested, and may not represent the wisest overall approach
- Technology companies indicate an interest in adopting legal regulatory considerations as fundamental to the product design process, but are frustrated there is no "language of legal design" which they can refer to
- There is currently no general *Magna Carta* or *Charter of Rights* that sets universal minimum protections and rights across the innumerable potential applications of algorithms

Legal Regulatory Considerations

A wide array of legal regulatory approaches could apply to algorithms, and in particular or general contexts. It has been noted by others that there is no "language of legal design" readily available for

engineers and coders to more easily adopt. LCO is interested in identifying approaches which are promising or obviously well placed to regulate; where there are opportunities for concurrent regulatory approaches or where they conflict; or even if there is interest in developing a public framework or language of legal design.

Legal Regulatory Concept	Function & Features	Legislative Hooks & Considerations
Bias and discrimination	Invalidates decision making based on historically identified and disadvantaged characteristics such as race, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age or disability	Ontario *Human Rights Code* protects from bias, discrimination and requires accommodation for enumerated grounds, but application of the Act is limited to housing, employment, & government services. Legally unclear how HRC applies to algorithms even in a context where the HRC applies (such as human resources filtering job applicants). Potential advantage in regulating AI through human rights legislation as it aligns provincial with federal and international instruments
Precautionary Approach	Basic principle that before something is authorized for general use or release it must be shown to be safe or that all foreseeable risks are mitigated or managed. Regulatory contexts and examples include: environmental assessment for industrial projects with different levels of screening / scoping depending on deployment/ impact; the Health Canada clinical trials and certification approach; Canadian Standards Association certification to demonstrate product and process compliance with safety and quality standards; product liability law and class actions; etc.	Canadian environmental law is increasingly asserting the importance of precautionary principle, including recent federal court case law confirming that a "lack of scientific certainty" doe not excuse lax regulation or practical safety measures. The federal court also recognizes the precautionary principle as a norm of substantive Canadian law, to be used in the interpretation of all statutes and regulations. Historically the US Congress relied on a non-partisan Office of Technology Assessment to assess new technologies and provide advice on their regulation
Labeling and Disclosure	Public health / disclosure model used for textiles, food, drugs, workplace hazardous materials, advertising, etc Industry compliance or self-regulation could also be an aspect	Compare by analogy to legislation where it is the responsibility of regulated parties to comply with, for example, the Canadian Food and Drugs Act (FDA) and the Consumer Packaging and Labelling Act (CPLA). New York City adopted legislation that requires a complete inventory of all algorithms used in municipal governance.

		California adopted legislation requiring social media platforms with > 10M monthly users to label all bot accounts Adobe systems have suggested watermarks be applied at the software level to "deep fakes", somewhat like photocopiers having "fingerprints" to expose counterfeiting
Professional Responsibility	Rely on regulated professions to define safe use, disclosure, data protection and use procedures, liability obligations, non-discriminatory application, etc. particularly in the use of professional aids, assessment and profiling tools, etc.	Ontario has a wide array of regulated professions with regulatory colleges and legislation, including traditional (doctors, lawyers, teachers, police) and more recent examples (College of Trades which oversees 23 skilled trades). "Coders" are not regulated professionals. Some have suggested that regulating coders could create a sort of "Hippocratic Oath" in the design and implementation of algorithms
Due Process and Administrative Law	Due process and natural justice rights set out both positive and negative rights, including rules against bias, freedom from unnecessary state interference and power, and a right to full, fair, open and transparent legal proceedings making decisions in both the criminal and administrative context. Any administrative or criminal practice which relies on AI or an algorithm would thus be subject to these requirements. This challenges the "explainability" problem of some complex AI systems, as well as ensuring there is no bias against certain identifiable groups.	Due process and natural justice rights take many legislative forms include sections of the *Charter of Rights*, the *Statutory Powers Procedure Act*, *Evidence Act*, *Rules of Civil Procedure,* etc. Applying these same requirements to algorithmic and AI systems would set a high minimum standard of accountability. Recent Canadian Supreme Court cases such as *Ewert* (2018 SCC 30) held that administrative processes relying on psychological and actuarial assessment tools to make decisions (in this case regarding inmates) must demonstrate accuracy in relation to specific identities (such as Indigenous persons), though this may fall short of violating Charter s. 7 and 15 rights.
Privacy Law	Algorithms rely on data. Privacy regulations may provide a means to ensure data integrity and quality, as well as limits on collection, use, disclosure, etc.	Provincial privacy legislation is generally split into three areas: health (PHIPA in Ontario), govt/administrative (M/FIPPA), and corporate. The Federal PIPEDA legislation governs provincial corporate privacy unless there is provincial legislation. Ontario introduced such legislation in the dying days of the last legislative session but it didn't pass first reading, and hasn't been reintroduced. Ontario is also undertaking a review and update of PHIPA in 2019 that may consider data sharing

		for AI use, akin to New Brunswick changes to 20 pieces of privacy legislation to allow data sharing with an arms-length research institute
Industry Bodies and Guidelines	Self-regulatory schemes	One example is the SAE International standard J3016 which defines six levels of automation for automakers, suppliers, and policymakers to use to classify a system's sophistication. Various jurisdictions have subsequently adopted and codified this scheme, including Germany Abode Systems have supported development of an algorithm that detects when algorithms have been used to create a "deep fake"
Consumer Rights	Set minimum standards and practices that would apply across any and common commercial transactions. For example, transparency requirements where differential pricing is being applied; standard terms of use for commercial data collection (Facebook); limits on data monetization; limits on mandatory arbitration; etc	Recent example of consumer rights regulation include Ontario regulating online ticket sales, or some EU jurisdictions restricting the use of "loot boxes" as central reward mechanisms in video games (akin to unregulated gambling). The EU GDPR could also be characterized as consumer rights legislation.
Consent and Capacity Law	Autonomous or quasi-autonomous systems make decisions. How are these decisions, at a minimum, based on "informed consent" that takes into account reasonably foreseeable consequences, risks and benefits of making a decision, while considering all the relevant information required to reasonably make a properly informed decision? In other words, what is "autonomous" systems were held the same decision-making standard as people?	Consent and capacity law in Ontario has examples that are both formal (such as the *Health Care Consent Act, Substitute Decisions Act*) and informal (such as how a lawyer assesses a client's capacity to give instructions). Consent and capacity law also extends to 3rd party and fiduciary contexts in which decisions are made on a supportive or substitute basis where the law mandates such decision makers to take into account similar criteria.
Intellectual Property	IP has implications for regulation, particularly in relation to the disclosure and transparency of proprietary information, and ownership over original works created by the algorithm itself (distinct even from the author of the algorithm)	IP law relates to intangible assets, including inventions, brands, new technologies, source code and artistic works. More specifically, IP pertains to patents, trade marks, copyright and industrial design. IP also extends to trade secrets and confidential information. However, these latter two categories are not governed by a specific statute in Canada, unlike the other kinds of IP.

Examples of Work in the Field

- *EU Communication on Artificial Intelligence for Europe*, particularly section 3.3, "Ensuring an appropriate ethical and legal framework" (April 2018) (link)
- US Senate Intelligence Committee Vice Chairman Mark Warner, *Potential Policy Proposals for Regulation of Social Media and Technology Firms* (Draft, August 2018) (link)
- AI Now Institute, *Litigating Algorithms: Challenging Government Use of Algorithmic Decision Systems* (September 2018) (link)
- CitizenLab and UToronto Intl Human Rights Program, *Bots at the Gate: A Human Rights Analysis of Automated Decision-Making in Canada's Immigration and Refugee System* (September 2018) (link)
- Jesse Beatson, *AI-Supported Adjudicators: Should Artificial Intelligence Have a Role in Tribunal Adjudication?* (31 Canadian Journal of Administrative Law & Practice 3 (Sept 2018), 307-337)
- IEEE.org, *Ethically Aligned Design, v.2* (2018) (link)

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DISCUSSION PRIMER – REGULATION, DUE PROCESS AND FAIRNESS

Key Legal / Policy Considerations

- Law defining *due process and fairness* may be emerging as a distinct and principled approach or set of concepts for thinking about the regulation of technology. This particularly concerns technology that contributes to the "automation of inequality" by supplementing or supplanting human decision making that, while imperfect, has a rich history of accountability and traditional physical limitations
- Due process and fairness rights ensure fundamental procedural fairness and accountability for (human) decision makers. These enshrine rights such as: protection from bias; protection from discrimination; fully explicated reasons for decisions; rights of appeal; knowledge of neutral and clear criteria for a decision; right to face an accuser; right to review all the evidence and information relied on; presumptions about transparent and public hearings; and so forth
- A recent proliferation of cases demonstrate how technology is impacting rights related to due process and fairness rights in contexts including criminal, civil, administrative tribunal, and government decision making
- At the same time, practitioners note that "that there aren't really any novel legal claims" – a lot of new technology is evidently bumping into well established due process and fairness doctrine. A challenge is that while this is being scrutinized in the criminal context, there may be less scrutiny in civil and administrative contexts where personal impacts may be perceived as less invasive or presumptively justified

Legal Regulatory Considerations

- Administrative state functions are increasingly being determined by algorithm, raising concerns with bias, due process, a right to reasons, and questioning the ability of a claimant to question or cross-examine an automated decision, and receive an explanation of how the decision is being made. Howe does one cross-examine an algorithm? Does "code" need to be subpoenaed? Well know cases of this include the Michigan state MiDAS unemployment system as a "case study into how to automate false accusations of fraud for more than 34,000 unemployed people." Recent Canadian Supreme Court cases such as *Ewert* (2018 SCC 30) held that

administrative processes relying on psychological and actuarial assessment tools to make decisions (in this case regarding inmates) must demonstrate accuracy in relation to specific identities (such as Indigenous persons), though this may fall short of violating Charter s. 7 and 15 rights.

- Reports indicate that the judiciary may rely on algorithms to set bail eligibility, terms, and conditions. US cases such as *Loomis* have created a framework for sentencing risk assessments algorithms
- Due process also raises concerns about surveillance, predictive policing based on "big data", and automation facilitating monitoring on a whole new scale. For example, Nordstrom uses facial recognition AI to achieve "one of the world's most aggressive, cutting edge approaches to in-store security and customer surveillance." Racial bias has also been demonstrated in the deployment of tools used across the US to predict "future criminals." Criminal lawyers also hypothesize how police could start using automated drones to track suspects or enforce bail conditions.
- In the criminal context, a series of SCC cases have explored the limits of the state's scrutiny of your "electronic roadmap of your cybernetic peregrinations" (R. v. Morelli, 2010 1 SCR 253) but these are regarded as largely a starting point as opposed to the final word. For example:
    - *Spencer*: limits ability of police to access subscriber information from telecom providers per Charter s. 8. A reasonable expectation of privacy looks at a "life cycle" approach to how data could be used, or what else it might reveal via a mosaic of small bits of data
    - *Marakah*: found in favor of a reasonable expectation of privacy in text msgs, both on your own device and in hands of recipient (even if police seize a friends phone)
    - *Reeves*: is adjudicating whether a co-habitor can consent to police search of shared digital device like a tablet
    - *Mills*: is adjudicating online undercover police investigations where police pose, for example, as a 13 year old girl. Should this be subject to wiretap? Is there an expectation of privacy in a 1:1 conversation?
- Emerging work (for example, Cohen on the AODA and Treviranus at OCAD) is also underway around legal challenges to machine learning/big data based on discrimination against "outlier" groups such as people living with disabilities. This work highlights the distinction within fairness between individual bias in a particular decision from a particular decision-maker as distinct from institutional bias where systemic flaws can taint all decisions by a particular decision-maker or decision-making structure/framework
- What are the right "triggers" for due process rights? For example, racial profiling in the criminal context needs to be linked to some specific decision and animus, whereas in housing, social entitlements, or in job promotions there are statutory protections that allow bias and discrimination to be raised
- How balance "proprietary information" against due process rights to understand how a decision is being made?

Examples of Work in the Field

- AI Now Institute, *Litigating Algorithms: Challenging Government Use of Algorithmic Decision Systems* (September 2018) (link)
- IEEE Spectrum, "Michigan's MiDAS Unemployment System: Algorithm Alchemy Created Lead, Not Gold: A case study into how to automate false accusations of fraud for more than 34,000 unemployed people" (Jan 2018) (link)
- The Guardian, "Child abuse algorithms: from science fiction to cost-cutting reality" (Sept 2018) (link)
- NY Times, "How Big Data Is Automating Inequality" (May 2018) (link)
- Wired, "Courts are using AI to sentence criminals" (April 2017) (link)
- MIT Technology Review, "How to Upgrade Judges with Machine Learning" (March 2017) (link)
- Cohen, Hoffman and Sage, "Big Data's New Discrimination Threats: Amending the Americans with Disabilities Act to Cover Discrimination Based on Data-Driven Predictions of Future Disease" (2016) (link)
- CBC Radio, "AI's problem with disability and diversity (interview with Jutta Treviranus)" (Sept 2017) (link)

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DISCUSSION PRIMER – CONSUMER RIGHTS IN DIGITAL SOCIETY

Key Legal / Policy Considerations

- Consumer protection law appears to be suffering "law lag" in keeping up with practices now commonplace to online and digital society. Issues frequently cited include "click consent" terms of use and service contracts that are never read; mandatory arbitration, gag order, and dispute resolution conditions; online rating and reputation systems that may be bought, manipulated or censored through SLAPP threats; right to repair devices; malicious enforcement of terms (such as canceling accounts or remotely deactivating IoT devices); a lack of minimum security standards for IoT devices, and concerns for intimate partner abuse of devices and "family accounts;" so-called "dynamic pricing" based on consumer profiling; the asymmetric deployment of bots to influence prices or be first in line; the use of nearly anonymous, extra-jurisdictional 3rd party fulfillment; and so forth
- While some of these share concerns with traditional consumer rights issues, such as purchase and sale agreements or warranties, what is new is the scale of the issues which impact millions if not billions of regular users. This invites thinking about more systemic regulation and access to justice because these claims can't reasonably be individuated
- Technologists and corporations suggest that the lack of regulation creates an unpredictable market for investment, results in uneven playing fields between jurisdictions, and encourages a "race to the bottom" in making every attempt to monetize the customer in ways they may not like
- The monetization of customer data – including their profile, purchasing habits, and online behaviour – is becoming a primary driver of commercial relationships but is often invisible or unknown to the consumer. Consumers report no longer feeling in control or aware of their "digital footprint" while catching glimpses of significant abuses when scandals and data breaches arise

Legal Regulatory Considerations

- Are we using appropriate legal regulatory frameworks when deploying "privacy" or "contract" regimes to regulate by individuation? Is free and informed consent possible when the only real choice for a consumer is to opt-in or miss-out?

- Problems being highlighted seem to suggest a review of various pieces of legislation, such as the *Consumer Protection Act*, *Arbitration Act*, and *Class Actions Act*. A series of cases seem to indicate three types of contractual restrictions to access to justice: forum selection clauses (which SCC addressed in Douez v Facebook, 2017 SCC 33); arbitration clauses (Telus v Wellman, heard before the SCC Nov 6 2018, but also Seidel v. TELUS Communications Inc, 2011 SCC 15, and Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34, which have are partly a problem); and class action waivers (no cases, so far, on class action waivers on their own). Similarly, standard form contracts are currently defined in common law by a "series of unfortunate cases" (many from Ontario) which some suggest have "established an e-contract free-for-all"
- Is there agreement on what it is we mean by "consumer rights issues in the digital economy"? Is there any comprehensive comparative work that indexes emergent and established problems and contextualizes them through a multi-jurisdictional comparative survey on consumer rights legislation? If so, do these identify and map areas where there are clearly gaps?
- If a consumer rights approach is to revitalized, what are some of the jurisdictional challenges that need to be addressed, both from the perspective of federal / provincial division of powers, the competitive business environment, and consumer needs?
- 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
- Is it appropriate to reconsider "consent" in the digital space, or are efforts more wisely directed at regulating standard terms and permissible kinds of clauses?
- What is the appropriate agency to house a revitalized consumer rights group? For example back in the 1970s Canada had an umbrella consumer rights agency that did product reviews and convened cross-sector advice from experts and policy people.

Examples of Work in the Field

- Pavlovic, "Consumer rights in a radically different marketplace" (Policy Options, June 2018) (link) and the ongoing series "Recalibrating Canada's Consumer Rights Regime (link)
- Margaret Radin, "The Deformation of Contract in the Information Society" (37 Oxford J. Legal Studies 2017)
- OECD, *Consumer Protection in E-Commerce: Digital Economy Policy Legal Instruments* (OECD, 2016)
- *Building a Consentful Economy: A report on Developments and Trends relevant to building consent-based digital services* (MCDE Project, U. Southhampton, April 2017)

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DISCUSSION PRIMER – CONTINGENT WORKERS

Key Legal / Policy Considerations

- A wide array of economic, political, demographic *and* technological forces are escalating wealth inequity and a labour market characterized by short-term, non-benefit, precarious or "contingent" employment
- There are some 500,000 Uber drivers in the US; seventy-two per cent of American adults had used one of eleven sharing or on-demand services; a third of people under forty-five had used four or more; and 22% have contributed to an online fundraising project on a site like Kickstarter or GoFundMe. A 2017 Canadian study by the Canadian Centre for Policy Alternatives reported that 9% of working adults surveyed in Toronto have worked or currently work in the "sharing economy" and 38% say they have purchased services within this sector
- Workers in this "precariat" class are rarely entirely clear about the nature of the employment relationship as an employee or contractor, and may even be unclear if they are in a relationship with a *software company* or a transportation, delivery, or hospitality company
- Effectively, *all* participants in the "gig economy" are rendered *consumers of technology*, a relationship which undermines traditional labour laws. Ontario's *Changing Workplaces Review* recently reported that unionization in the private sector has dropped dramatically (from 19.2% in 1997 to 14.3% in 2015) making employment standards and their enforcement much more important for the non-unionized worker
- Many commentators note that there is now a significant asymmetry in power between the platform and worker, particularly in "virtual" employment platforms, that structurally disenfranchises negotiating power. For example, there may be no transparency in rates of pay, where jobs are posted or how they're allocated, and workers never see or talk to a person

Legal Regulatory Considerations

- Workers are vulnerable to data collection about them, which feeds invisible price-fixing, job allocation, and market manipulation schemes governed by the corporate algorithm
- Employment and labour legislation lags developments while caselaw becomes increasingly contradictory. For contingent workers it often remains unclear (and inconsistent across Canada)

how the law protects basic decent working conditions; a safe and healthy workplace; the provision of minimum wages especially in relation to "micro-tasking" platforms, distributed call centres, and other app- and platform-mediated work; the right to engage in unionization and meaningful collective bargaining; available protections under the ESA for employees who exercise their ESA rights; consistent and strategic enforcement; access to justice and the use of mandatory arbitration (which may be off-shore); an effective mandate for the mandate of the Office of the Worker Advisor; and stronger sanctions and deterrence

- As the LCO has previously recommended there is also a need for expeditious and fair processes be put in place for dealing with alleged reprisals against Temporary Foreign Workers and for hearing cases that could result in repatriation; these issues may impact TFW who may be working in or in relation to the "gig economy" (for example, cleaning AirBnB rooms)
- Access to health, injury, WSIB premiums, pension, CPP, employment insurance, emergency leave and sick days, and other social benefits and entitlements remains unclear
- What kind of training and education requirements are being left out of platform / contractor relationships, for example, ride share drivers receiving education on human rights accommodation, AODA requirements, OHSA protections, etc.
- Is there a "right to work" in access to platforms? For example, if a driver gets kicked off the major ride share platform, or a programmer is banned from the major app store, what right to work protections might need to be raised?
- How is the data of the platform workers and platform users being otherwise monetized? What rights should platform workers have to consent to the collection, use, disclosure, and monetization of their data? How should these kinds of concerns be captured in the ESA or elsewhere?
- As noted in the *Changing Workplaces Strategy*, the issue of employees who are misclassified – intentionally or unintentionally – as independent contractors not covered by the ESA is a significant one. There is also deliberation about adding "dependent contractor" to the definition of "employee" in the ESA
- As with many questions of regulating technology, it may be unclear if concerns like those above are regulatory issues properly grounded in privacy law, employment law, labour law, human rights law, contract law, or other or all of the above. How is this contributing to "regulatory arbitrage" and what should be done about it?
- While systems of reputation, rating, and comment drive enforcement mechanisms, they are also actively exploited to unilaterally shape the behaviour of labour, often invisibly, generally with total asymmetry in the employment relation, and almost entirely without state regulation

Examples of Work in the Field

- Ontario, *The Changing Workplaces Review* (May 2017) (link)
- Ryan Calo and Alex Rosenblat, "The Taking Economy: Uber, Information, and Power" (Columbia Law Review, Vol. 117, 2017) (link)

- Harvard Business Review, “What Customer Data Collection Could Mean for Workers” (Aug 2016) (link)
- Research Handbook in Comparative Labour Law, “The Subjects of Labor Law: “Employees” and Other Workers” (Finkin & Mudlak, Eds., 2015) (link)
- Twitter thread of Matt Wallace re experience as a contractor with UpWork (Twitter thread of Nov 8 2018)

LAW AND TECHNOLOGY

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

LCO
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LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

EVENT REPORT

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

Nasma Ahmed, Mozilla Foundation
Ryan Fritsch, Law Commission of Ontario

May 14, 2018 • Toronto

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

Armine 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?

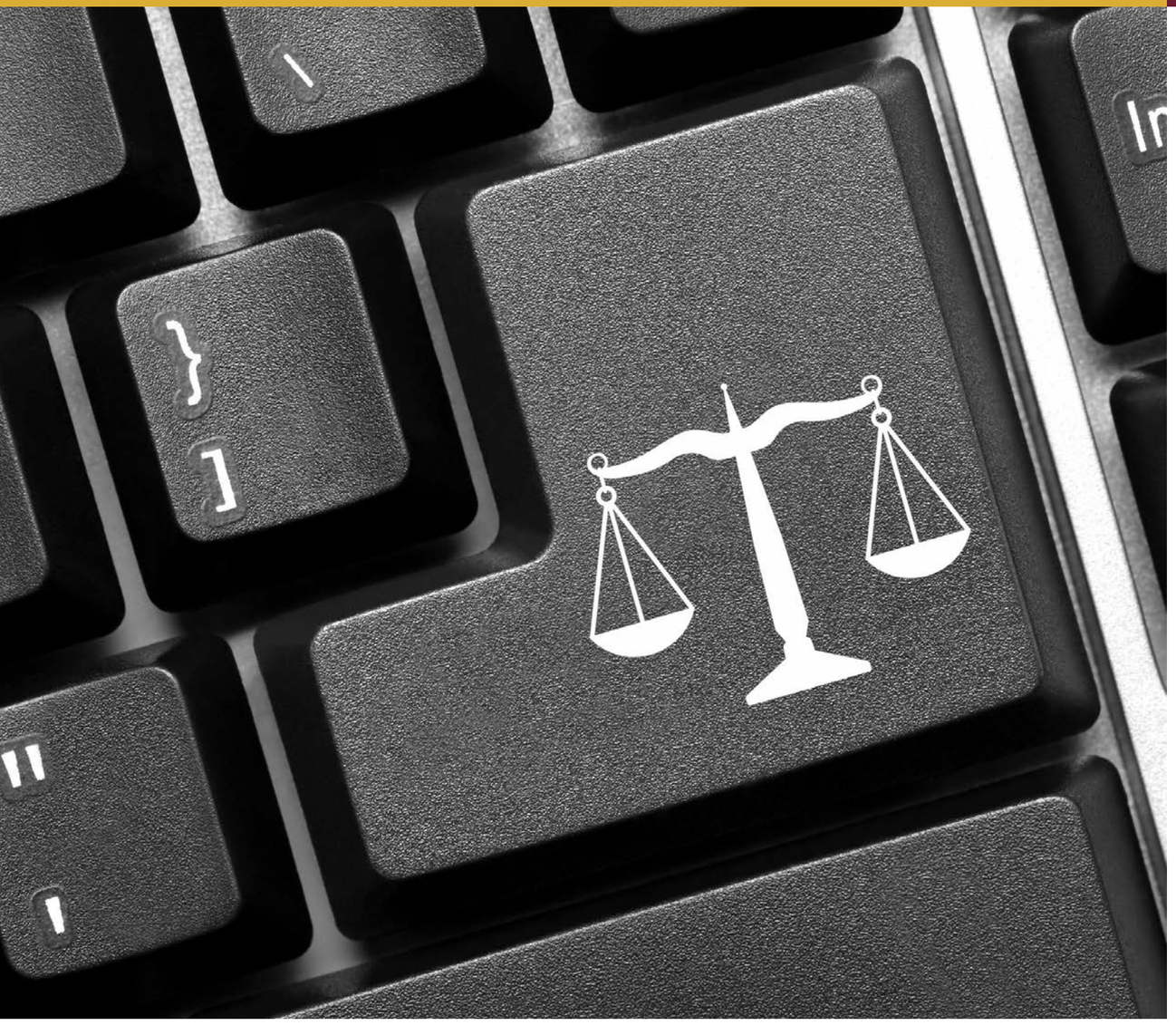
- **Individuals no longer feel in control of their "digital self."** There is growing awareness that information is being used beyond the control or even the knowledge of most people. A person's "digital footprint", while often invisible, can have far-reaching consequences. It can potentially influence 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**.

LAW AND TECHNOLOGY

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

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