

# Automated Decision-Making in the Criminal Justice System



## Background Information for Forum Attendees

March 22, 2019 — Toronto



The Law Commission of Ontario is funded by:



and supported by the Faculties of Law at:

**Lakehead University, Queen's University, University of Ottawa (Common & Civil Law Sections), University of Toronto, University of Windsor, and Western University.**

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# Automated Decision-Making in the Criminal Justice System

Law Commission of Ontario

The Citizen Lab

International Human Rights Program, U of T  
Criminal Lawyers Association

**MARCH 22, 2019 • 9AM – 5PM**

## Location

Upper & Lower Barristers Lounge, Law Society of Ontario  
130 Queen Street West  
Toronto, ON

Please enter through the east side door facing City Hall. Allow some time to proceed through security. The Upper & Lower Barristers Lounge is located on the second floor, accessible via elevator or stairs.

## Transit

Subway Line 1 – Osgoode Station or Queen Station  
Streetcar – Route 501, Queen Street West stop  
Underground paid parking available at 100 Queen Street West

## Contacts

If issues arise on the day of the consultation, contact the following:

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via text: 416-998-3727

## Breakfast & Registration

Beginning at 8:15AM

## Proceedings

Commence at 9:00AM sharp







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**130 Queen Street West • Toronto**

## AGENDA

- 8:15**            **Registration & Light Breakfast**
- 9:00**            **Welcome & Opening**  
Presenter        Nye Thomas, Law Commission of Ontario
- 9:15**            **Understanding Automated Decision Making for Lawyers: Code and Data**  
Presenter        Prof Maura Grossman, University of Waterloo & Vector Institute
- 10:15**           **Break**
- 10:30**           **The American Experience**  
Presenters       Prof Farhang Heydari, The Policing Project, NYU  
                      Logan Koepke, Upturn  
                      Stephanie Lacambra, Electronic Frontier Foundation  
                      Rashida Richardson, AI Now
- 11:30**           **Current and Potential Uses of AI in Criminal Law in Canada**  
Presenters       Cynthia Khoo, The Citizen Lab  
                      Yolanda Song, Intl Human Rights Program, UToronto  
                      Babita Ramlal, MAG Innovation Office  
                      Ian Williams, Toronto Police Service
- 12:15**           **Lunch**

- 1:00**            **Analysis and Discussion of Legal Rights and System Implications: Cases, Due Process and Lived Experience in Access to Justice**  
**Presenters**     Jill Presser, Criminal Lawyers Association  
                     Kate Robertson, Markson Law  
                     Mabel Lai, Crown Law Office - Criminal  
                     Jonathan Rudin, Aboriginal Legal Services Toronto
- 2:00**            **Workshop 1 – Predictive Policing**  
**Facilitators:** The Citizen Lab & International Human Rights Program
- 3:25**            **Break**
- 3:40**            **Workshop 2 – Litigating Algorithms: Disclosure, Design, and Due Process**  
**Facilitators:** Criminal Lawyers Association & Law Commission of Ontario
- 5:00**            **Closing**

### **Chatham House Rules**

The forum will be conducted under the Chatham House Rule. The rule states that “participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.”

The Chatham House Rule provides a way for speakers to openly discuss their views in private while allowing the topic and nature of the debate to be made public and contribute to a broader conversation. As a result, when participants are discussing or reporting on the forum, it is inappropriate to identify either the identity or affiliation of any speaker without their explicit consent. The organizers will respect this rule in all their reports, briefings, or other communications discussing this forum.





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## WELCOME

On behalf of the [Law Commission of Ontario](#), [The Citizen Lab](#), the [International Human Rights Program](#) at the University of Toronto, and the [Criminal Lawyers Association](#), we appreciate your participation among a diverse group of key informants in this first-of-its-kind interdisciplinary forum addressing the potential impact and regulation of automated decision-making (ADM) in the Canadian criminal justice system.

## THE IMPACT OF ADM IN JUSTICE – AND BEYOND

There has been significant growth in the use of automated decision-making in the US criminal justice system. Early experiences in Canada seem to be following similar trend lines. ADM systems – which may include the use of algorithms, machine learning, and artificial intelligence systems – are being used or proposed for use in areas as diverse as immigration and refugee proceedings, police profiling, and to determine sentencing, bail and parole conditions.

We anticipate that ADM represents a new frontier for access to justice. These technologies pose new and significant challenges to traditional models of human rights, legal regulation, dispute resolution, and due process.

Crucially, these impacts are not limited to the criminal justice sector. Experience and research in Canada, the US, and elsewhere has demonstrated the growing use, and influence, of automated decision-making in a surprisingly broad range of legal decision-making:<sup>1</sup>

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<sup>1</sup> See generally, AI Now Institute, [Algorithmic Accountability Policy Toolkit](#), pages 7-8 and the specific examples cited below.

- **Child Welfare:** Automated decision-making has been used to assess risk of current or future harm to a child.<sup>2</sup>
- **Access to Government Benefits/Fraud Detection:** Automated decision-making is being used to determine eligibility for access to government benefits,<sup>3</sup> including algorithms designed to detect fraudulent applications.<sup>4</sup>
- **Access to Housing:** Automated decision-making is being used to prioritize and determine eligibility for permanent or temporary housing.
- **Education:** Automated decision-making is being used to predict whether students are a high risk for school-related violence.
- **Surveillance Technologies:** Automated decision-making is being used by law enforcement agencies to support police surveillance.
- **Predictive Policing:** Automated decision-making is increasingly being used to analyze data to help predict either *where* criminal will occur or *who* will be involved in crime.<sup>5</sup>
- **Bail:** Automated decision-making is being used to develop “public safety assessments” that evaluate the suitability of releasing criminal accused on bail.<sup>6</sup>
- **Sentencing:** Automated decision-making is being used to recommend sentencing for the criminally convicted, including whether the individual is at high or low risk of reoffending.<sup>7</sup>
- **Inmate Housing Classification:** Automated decision-making is being used to recommend prison classification and conditions for inmates.<sup>8</sup>
- **Parole:** Automated decision-making is being used to recommend parole eligibility or conditions.
- **Immigration:** Automated decision-making is being used to recommend immigration eligibility or status.<sup>9</sup>

What’s notable about these examples is that they are the areas of greatest concern to access to justice advocates: “poverty law”, human rights law, child welfare law, criminal law, and refugee/immigration law.

Importantly, this is an *early* list of potential applications. The AI Now Institute states:

<sup>2</sup> See, for example, examples in the [UK](#) and [US](#).

<sup>3</sup> Examples include eligibility for [welfare in Denmark](#) and [healthcare eligibility fraud detection](#) in the US

<sup>4</sup> An agency review found a [70% error rate in jobless fraud findings](#) in Michigan

<sup>5</sup> See generally, Andrew Guthrie Ferguson, [Policing Predictive Policing](#) (Washington University LR, 2017) and CBC News, “‘Predictive policing’: Law enforcement revolution or just new spin on old biases? Depends who you ask” (September 2018, [online](#)). For an AI developer perspective, see Accenture, [US Police & Public Safety Services](#).

<sup>6</sup> See, for example, Arnold Ventures, [“Pretrial Justice.”](#) and the ACLU [Statement on the Use of Pretrial Risk Assessment Instruments](#).

<sup>7</sup> See [Wisconsin v. Loomis](#) (881 N.W.2d 749).

<sup>8</sup> See [Ewert v. Canada](#) (2018 SCC 30).

<sup>9</sup> See Citizen Lab, [Bots at the Gate: A Human Rights Analysis of Automated Decision-Making in Canada’s Immigration and Refugee System](#) (September 2018).



*Automated decision systems can exist in any context where government bodies or agencies evaluate people or cases, allocate scarce resources, focus scrutiny or surveillance on communities, or make nearly any sort of decision.<sup>10</sup>*

Many of the examples listed above are American. *There is no reason to believe that these applications will not be considered or developed in Ontario and Canada.* Canadian governments, regulators, private companies, law firms, academics, and others have placed a high priority on developing automated decision-making for government services and entitlements,<sup>11</sup> private sector applications,<sup>12</sup> and within law firms and the legal system.<sup>13</sup>

LCO has learned, for example, that these technologies are spreading rapidly across the country: Citizen Lab, an interdisciplinary research institute located at the University of Toronto, recently released a widely-reported study, *Bots at the Gate*, that revealed the use of automated decision making in Canada's immigration and refugee system.<sup>14</sup> Citizen Lab and other organizations also report that automated decision-making systems are being used or considered in criminal and mental health contexts in Ottawa, Vancouver, Toronto, Alberta, and Saskatchewan.

Even before the advent of automated decision-making, access to justice in these areas is frequently criticized for being too complex, expensive, inaccessible, or biased against low-income, racialized or other vulnerable individuals and communities.

Early experience with automated decision-making in these contexts appears to be mixed. On the one hand, automated decision-making has notable potential to improve access to justice and reduce discrimination. For example, these systems can be used to reduce costs, and promote speed, efficiency and consistency in decision-making.<sup>15</sup> Unfortunately, experience also demonstrates the potential for these technologies to be opaque, inexplicable, and discriminatory.<sup>16</sup>

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<sup>10</sup> Algorithmic Accountability Policy Toolkit, *supra* 1, page 9.

<sup>11</sup> See generally [About the Vector Institute](#) and the [CIFAR Pan-Canadian AI Strategy](#).

<sup>12</sup> See, for example, Accenture, [“The New Normal: Exponential Growth Powered by AI”](#)

<sup>13</sup> See generally Canadian Lawyer Magazine, [“Artificial Intelligence”](#) (April 2017); ROSS Intelligence, [“Current Adoption of AI in the Legal Industry”](#) (April 2018); and the Centre for Public Impact, [“How AI can improve access to justice”](#) (October 2017).

<sup>14</sup> *Supra* 9.

<sup>15</sup> See generally, Harvard Business Review, [“How AI Could Help the Public Sector”](#) (January 2018); and Deloitte, [“AI-augmented Government”](#) (April 2017). For an interesting analysis regarding the benefits and drawbacks of algorithms in bail, see NYTimes, [“Even Imperfect Algorithms Can Improve the Criminal Justice System”](#) (December 2017). See also a discussion between a [California district attorney \(pro-algorithm\)](#) and [judge \(anti-algorithm\)](#).

<sup>16</sup> See generally, NYTimes, [“Review: Automating Inequality by Virginia Eubanks”](#) (May 2018). Specific critiques include: ProPublica, [Machine Bias](#) (May 2016) and the ACLU Statement, *supra* 6.

The “digital rights,” legal, and technology communities are increasingly focussed on questions regarding the transparency, accountability and impact of these systems.<sup>17</sup> More specifically, questions are being asked about how to ensure these systems are disclosed, how to ensure these systems conform with human rights laws and principles, and how to ensure an effective remedy in the event of a rights violation. These are difficult and complex issues, particularly in light of rapidly changing technology. The law reform options for addressing these issues are neither interchangeable nor trivial. Each option has benefits/drawbacks and the choices are consequential.

Critically, there is no legal framework in Canada to guide the use of these technologies or their intersection with foundational rights related to due process, administrative fairness, human rights, and justice system transparency.

## WHY CRIMINAL LAW?

Criminal justice routinely adjudicates fundamental Canadian rights and freedoms in context of a high standard for due process, accountability, and transparency, while balancing freedoms, risk, and public safety. Criminal proceedings also invite consideration of a related network of legislation, such as data privacy considerations described in the *Municipal Freedom of Information and Protection of Privacy Act* or the ambit of discrimination protections in Ontario’s *Human Rights Code*. Subjecting ADM to this analysis will likely contribute to a rigorous foundation upon which any necessary criminal, administrative, or other regulatory law reform effort may rely on.

We also want to learn about the potential use, impact and regulatory issues and options related to automated decision-making tools in Ontario and the Canadian criminal justice system. Topics discussed will include predictive policing, use of automated decision-making tools to assist in bail, sentencing and parole, experiences and lessons from the US, and options to design tools and process to respect legal rights, transparency, and accountability.

## WHAT MATERIAL SHOULD I REVIEW?

This package includes several documents we selected to provide an introductory primer to existing debates and work underway. This includes the following:

- AI Now Institute, *Litigating Algorithms* (September 2018) (extracts)

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<sup>17</sup> See, for example, the discussions at [RightsCon 2018](#), the “world’s leading conference on human rights in the digital age.”

- Electronic Frontier Foundation, Policy Guide for Judges and Judicial Officers (September 2018)
- Koepke & Robinson, “Danger Ahead: Risk Assessment and the Future of Bail Reform” (93 Washington Law Review 1725 (2019))
- Nesta, “Does the public sector really need a code of AI ethics?” (February 2019)
- Desmarais & Lauder, Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense Attorneys (February 2019)
- Pisquale, “Secret Algorithms Threaten the Rule of Law” (MIT Technology Review, June 2017)
- AccessNow, The Toronto Declaration: Protecting the right to equality and non-discrimination in machine learning systems (May 2018)

## WHAT OTHER MATERIAL MAY BE OF INTEREST?

We are also pleased to provide links to a selection of additional information and material you may find of interest. This includes the following:

### *Data Sources*

- Vice Motherboard, “Police in Canada Are Tracking People’s ‘Negative’ Behavior In a ‘Risk’ Database” (February 2019, [online](#))
- The Guardian, “Councils use 377,000 people's data in efforts to predict child abuse” (September 2018, [online](#))
- GCN, “Saving children, one algorithm at a time” (July 2016, [online](#))
- Wired, “If you drive in LA the cops can track your every move” (November 2018, [online](#))
- MIT Technology Review, “Prisons are using face recognition on visitors to prevent drug smuggling” (March 2019, [online](#))
- MIT Technology Review, “Facial Recognition has to be regulated to protect the public, says AI report” (December 2018, [online](#))

### *Examples of ADP in Practice*

- CBC News, “‘Predictive policing’: Law enforcement revolution or just new spin on old biases? Depends who you ask” (September 2018, [online](#))
- ProPublica, “Machine Bias” (May 2016, [online](#))
- ROSS Intelligence, “Current Adoption of AI in the Legal Industry” (April 2018, [online](#))

- Lacambra et al., “Opening the Black Box: Defendants’ Rights to Confront Forensic Software” (The Champion, Magazine of the Natl Assoc Criminal Defense Lawyers, May 2018, [online](#))
- UK Serious Fraud Office, “AI powered ‘Robo-Lawyer’ helps step up the SFO’s fight against economic crime” (April 2018, [online](#))
- Liberty Human Rights, Policing By Machine in the UK (February 2019, [online](#))

#### *Frameworks, Standards, and Guidelines*

- Canada, Directive on Automated Decision-Making (February 2019, [online](#))
- Michael Karlin, “The Government of Canada’s Algorithmic Impact Assessment: Take Two” (Medium, August 2018, [online](#))
- Ontario IPC, “Guidance on the Use of Automated License Plate Recognition Systems by Police Services” (July 2017, [online](#))
- US National Science and Technology Council, National Artificial Intelligence Research and Development Strategic Plan (October 2016, [online](#))
- EU, “EU Releases plan to foster the development and use of AI in Europe” (December 2018, [online](#))
- AI Now, Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability (April 2018, [online](#))

#### *Policy Considerations*

- Citizen Lab, Bots at the Gate: A Human Rights Analysis of Automated Decision-Making in Canada’s Immigration and Refugee System (September 2018, [online](#))
- AI Now, Litigating Algorithms: Challenging Government Use of Algorithmic Decision Systems (September 2018, [online](#))
- AINow, AI Now Report 2018 (December 2018, [online](#))
- Richardson et al., Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice (forthcoming NYU LR, March 2019, [online](#))
- Upturn, Stuck in a Pattern: Early evidence on "predictive policing" and civil rights (August 2016, [online](#))
- Stevenson, “Assessing Risk Assessment in Action” (103 Minnesota Law Review 303, [online](#))
- CivilRights.org, Shared Statement on the use of Pretrial Risk Assessment Instruments ([online](#))
- Mayson, Bias In, Bias Out (128 Yale LJ, forthcoming, [online](#))

- Barabas et al., Interventions over Predictions: Reframing the Ethical Debate for Actuarial Risk Assessment (Proceedings of Machine Learning Research 81:1-15, 2018, [online](#))
- NYTimes, “Even Imperfect Algorithms Can Improve the Criminal Justice System” (December 2017, [online](#))







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## WORKSHOP 1

### Workshop 1

### Predictive Policing: Exploring the Tough Questions

#### Facilitators

The Citizen Lab

International Human Rights Program

#### Time

85 mins

#### What is the context for this workshop?

This workshop features deep dives into questions regarding the growing use of artificial intelligence and predictive analytics in the Canadian criminal justice system, particularly by Canadian police services, and the resulting human rights implications. It will provide participants with a critical opportunity for cross-disciplinary discussion about key issues within this area. The goal is to bring together experts from civil society, the community, government, law enforcement, academia, and legal practice to talk about the problems and solutions that predictive policing may present for their fields.

Participants will be divided into 6 interdisciplinary groups for the duration of the workshop. During the first 50 minutes, each group will discuss three of the following topics, as assigned to them. Question prompts are provided for each topic in order to guide the discussion. In the final 30 minutes, groups will present key points from their discussion to the larger participant body.

## **Discussion topics and questions:**

### **A. Bias and Discrimination**

- a. How can we mitigate concerns about bias when developing predictive algorithms using crime data? Is it possible to eliminate concerns about bias completely?

### **B. Privacy and Equality**

- a. Are there privacy concerns with respect to data involved in predictive policing (whether training data, input data, or results), and how should they be addressed?
- b. Can potential discrimination concerns with predictive policing be entirely captured through privacy law and policy? What is the impact of adding an equality analysis, that a privacy lens alone may not or cannot do?

### **C. Algorithmic Accountability and Transparency**

- a. What are some transparency and accountability concerns around predictive policing algorithms, and how might that impact either policing practices or defendants and communities that are often policed?

### **D. What Has Really Changed?**

- a. In some ways, policing has always been “prediction-based”, only with human hunches, intuitions, research, experience, and/or bias. What makes predictive prediction different? Do those differences make it necessarily inferior or superior to human predictions? What implications does this have for law or regulation?

### **E. Private and Public Space**

- a. What should be the limits (if any) on police use of open source/publicly available data (e.g. social media, smart cities sensors)?

### **F. Legal Practice and Standards/Thresholds**

- a. How might predictive policing algorithms impact legal concepts such as reasonable suspicion and presumption of innocence?
- b. How might widespread knowledge and implementation of predictive policing tools impact the practice of criminal law and criminal procedure?

### **G. Private Sector & Law Enforcement**

- a. Are there concerns with third-party private vendors becoming involved in law enforcement and policing through dependence on their tools and proprietary

software? Is it possible to mitigate those concerns?

#### H. The New Experts

- a. Is there a concern that criminal law may be shifting from traditional experts (criminal lawyers, criminologists, judges, and criminal psychologists) to new experts who may not know criminal justice, but have expertise with data, machine learning, engineering, statistics, and computer programming?

#### I. Lines in the Sand

- a. Are there any situations where we should *never* use predictive policing or algorithmic decision-making? What might those be, and why (or why not)?

#### Suggested Reading Materials

- Busted by Big Data <https://thewalrus.ca/will-big-data-in-crime-fighting-create-a-new-era-of-racial-profiling/>
- What Big Data Means for the Fourth Amendment: <https://crim.jotwell.com/what-big-data-means-for-the-fourth-amendment/>
- Facebook Banned This Canadian Surveillance Company From Accessing Its Data [https://motherboard.vice.com/en\\_us/article/yp3jw5/instagram-banned-this-canadian-surveillance-company-from-accessing-its-data-media-sonar](https://motherboard.vice.com/en_us/article/yp3jw5/instagram-banned-this-canadian-surveillance-company-from-accessing-its-data-media-sonar)
- Amazon's Home Surveillance Chief Declared War on "Dirtbag Criminals" as Company Got Closer to Police <https://theintercept.com/2019/02/14/amazon-ring-police-surveillance/>
- Bias detectives: the researchers striving to make algorithms fair <https://www.nature.com/articles/d41586-018-05469-3>
- Police Are Sweeping Up Tweets and Friending You on Facebook, Whether You Know It or Not <https://mic.com/articles/128299/how-police-use-twitter-and-facebook-to-predict-crime#.DOcZs3SXr>
- How Cities Are Reining in Out-of-Control Policing Tech <https://slate.com/technology/2018/05/oakland-california-and-other-cities-are-reining-in-out-of-control-police-technologies.html>





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## WORKSHOP 2

### Workshop 2

### Litigating Algorithms: Disclosure, Design, and Due Process

#### Facilitators

Law Commission of Ontario  
Criminal Lawyers Association

#### Time

80 mins

#### What is the context for this workshop?

This workshop addresses the crucial and growing issue of automated decision-making (ADM, including algorithms and artificial intelligence) in Ontario's justice system. ADM technologies pose new and significant challenges to traditional models of human rights, legal regulation, dispute resolution, and due process. Notwithstanding the rapid development of ADM, there is no legislative or regulatory framework governing ADM accountability in Ontario. There are many law reform options to regulate these systems in whole or in part. Each option has benefits and drawbacks and the choices between them are consequential.

The goal of this workshop is to explore intersections between ADM and the criminal justice sector. Criminal justice routinely adjudicates fundamental Canadian rights and freedoms in context of a high standard for due process, accountability, and transparency, while balancing freedoms, risk, and public safety. Criminal proceedings also invite consideration of a related network of legislation at both the Federal and Provincial levels. This may prompt thinking about the impact or intersection of ADM on aspects of the *Criminal Code of Canada* or the *Evidence Act*; the data privacy considerations described in the *Municipal Freedom of Information and Protection of Privacy Act*; the ambit of discrimination protections in Ontario's *Human Rights Code*; as well as "soft law" sources including Crown prosecutorial guidelines and policies. Subjecting ADM to this analysis will likely contribute to a rigorous foundation upon which any necessary criminal, administrative, or other regulatory law reform effort may rely on.

## What are some of the intersections between ADM and criminal justice to keep in mind?

Preliminary consultations conducted by the LCO and CLA suggest considerations that are both broad and specific to the criminal justice sector. These include concerns for:

- **Disclosure.** At present there is no existing policy, legislation, or regulation directing disclosure of existence or use of ADM in Ontario. How do we define “algorithm” or ADM for disclosure purposes? What disclosure is necessary to meet a legal standard of transparency, accountability, redress or remedy? And what is being disclosed: an independent impact assessment, source code, data, a decision-making heuristic, the simple existence and use of the tool, or something else?
- **Design & Accountability.** How can ADM systems be designed to ensure transparency in their use and operation, legal accountability in their inputs and outputs, and compliance with human rights law and principles? How will ADM tools account and plan for sub-national jurisdictional legal consistency and interoperability? Are existing legal instruments and/or rules enough, or is new legislative or regulatory direction needed?
- **Due process.** This raises concerns for fundamental procedural fairness, including issues like notice, hearing, disclosure of all evidence and the right to challenge it, reasons for decisions, appeals and remedies at individual and systemic level. How will one “litigate algorithms?”

Considerations that are specific to the criminal justice sector might be concerned with how ADM is – or is not – anticipated by, or accommodated within, existing litigation tools, norms, and practices. For example:

- **The Charter of Rights and litigation tools.** What is the adequacy of Charter s 7 in addressing risk assessment concerns? Of s 8 in responding to surveillance concerns? Of s 15 in responding to discrimination concerns? How and when will the process rely on remedies incl s 24.1, 24.2, s 52, natural justice to address challenges with ADM?
- **Due process in practice.** Practically speaking, how will the criminal justice process litigate issues related to:
  - notice that ADM is being used (based on what threshold? In every circumstance? Considering the complexity of the ADM and/or the severity of the consequences? Is there a distinction in using ADM for a process as opposed to a decision?)
  - disclosure of evidence (data relied upon by an ADM?); the rules of evidence (what is in/admissible? What data constitutes hearsay?); and when will expert evidence about ADM be necessary, and admissible?
  - in what circumstances does ADM trigger a right to counsel, to what extent, and how should this be funded? We assume ADM-related rights issues will be litigated and challenged, but what resources will be required to do so, where will these come from, and in what circumstances should they be available?



- **Human rights considerations.** Data and decisions are prone to bias and discrimination. Data is also “sticky”: once in a database it may follow someone for life. How well equipped is the criminal process to address data integrity and currency? How will risk factors be ascribed, validated, and tested? What new due process considerations arise to accommodate these concerns? How is Charter s 15 in/adequate in responding to them?
- **Litigation as a systemic tool.** In what ways other than litigation should the criminal justice system seek to address systemic and structural concerns with ADM? How and who is in a position to contribute to designing processes that take into account disclosure, accountability, and due process?
- **Other laws and litigation tools:** Given that criminal law is split Federal / Provincial jurisdiction, what are the impacts or intersections of ADM on aspects of the *Criminal Code of Canada* or the *Evidence Act*; the data privacy considerations described in the *Municipal Freedom of Information and Protection of Privacy Act*; the ambit of discrimination protections in Ontario’s *Human Rights Code*; as well as “soft law” sources including Crown prosecutorial guidelines and policies?

Considering the foregoing, and for the purposes of participating in this workshop, we accept a couple of preliminary assumptions:

- It’s OK that aspects of this exercise may be forward looking, speculative, or extrapolated
- It is equally as helpful to identify critical questions even (or especially) where there are yet no clear answers or certain conclusions
- Feel free to draw on examples elsewhere, such as US, UK, or other provincial jurisdictions, and consider how those examples may play out in Ontario
- Examples and analysis may also be generated by analogy. Consider, for example, how risk and needs assessment instruments are already in use for mental health proceedings, or sentencing guidelines. Other examples will be found in the Introduction to this package highlighting the use of ADM in various administrative and criminal contexts.

## What is the group activity?

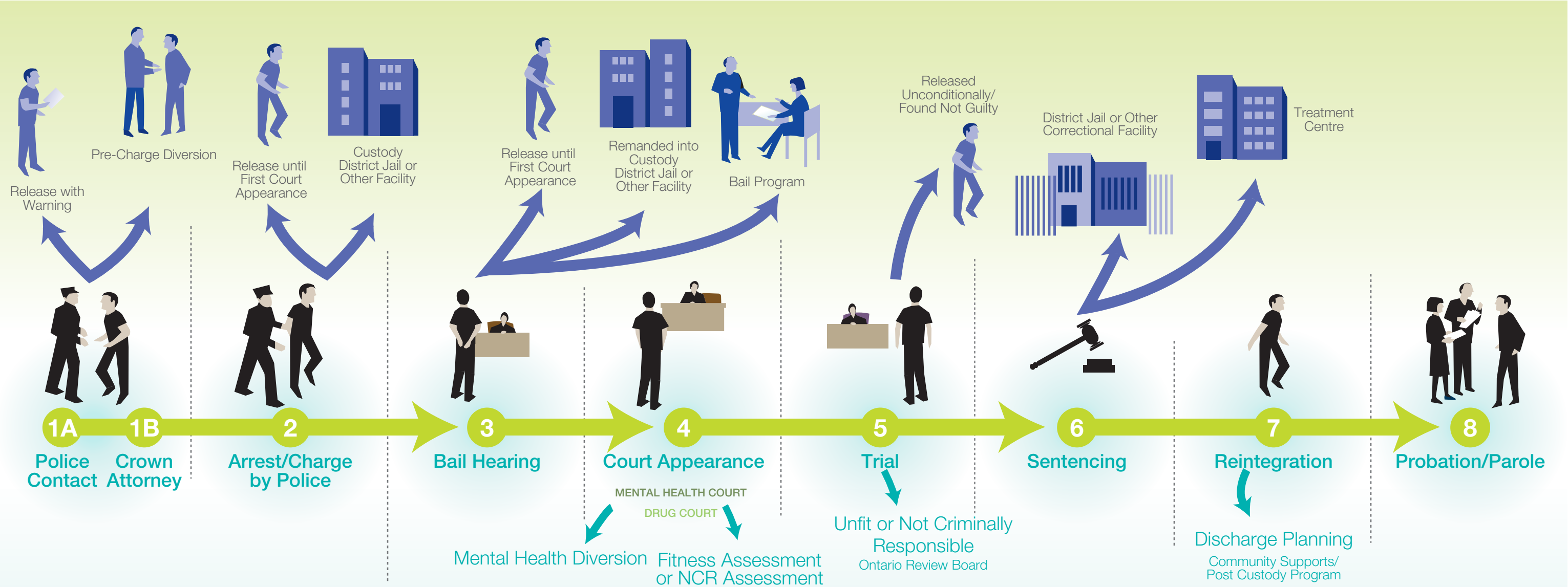
Participants will be organized into six groups to discuss and explore the following.

Time	Question	Considerations
15 mins	<b>Brainstorm:</b> What are the existing or potential intersections you see between automated decision-making and the criminal justice process?	For each step along the Criminal Justice Process Map (next page) consider: <ul style="list-style-type: none"><li>• how might data be generated about the accused, or where is it drawn from or aggregated?</li><li>• What kinds of ADM tools, policies, or standards are you aware of, or are your organization / sector considering or developing?</li><li>• What kinds of ADM tools or systems are you specifically excluding or avoiding? Where would you NOT want ADM systems used? Why?</li></ul>
35 mins	<b>Gap analysis:</b> What are the legal needs, gaps, complications, and uncertainties arising from the examples you brainstormed?	Your critical reflection and analysis may consider: <ul style="list-style-type: none"><li>• Do existing norms of litigation and due process adequately account for ADM concerns for bias, redress, disclosure and transparency, etc.? Do ADM systems create gaps you can identify?</li><li>• What existing legislation or case law may apply, or which provides guidance? How is it limited or unclear in application to ADM? What law reform opportunities or questions can you identify from this?</li><li>• Are there clear areas where “ethical AI” guidelines are obviously inadequate and require stricter and more formal regulatory structure?</li><li>• What needs more research? What are the key questions that need answering before deploying an ADM system? Who do you feel a need to collaborate with to develop substantive frameworks and principles to govern ADM?</li></ul>
30 mins	<b>Plenary Report Back</b>	Each of the six groups will have 5 minutes to report back with highlights of their discussion and findings

The “Criminal Justice Process Map” on the next page may help guide your brainstorm and analysis. Consider the specific technologies, “use cases”, or due process challenges that arise at each step, and how consequences ripple through the process from one step to another.



# Conceptual Map: Criminal Justice Process



## BRAINSTORM EXAMPLES: ADM TOOLS, LEGAL ISSUES RAISED, CONCERNS

Police AI tools: drone surveillance, license plate & facial recognition

Private entities using facial recognition (stores, malls)

Predictive policing & profiling

Ontario "situation tables" sharing health, policing, social service data

Right to disclosure of AI surveillance or profiling tools?

Is there criminal liability for death by autonomous vehicle?

ADM risk assessment profiling to recommend (determine?) bail eligibility / conditions

Crown policy on interpreting ADM recommendations?

Right to disclosure of ADM code / data?

Do bail timelines prejudice disclosure & challenge of profile?

Does ADM represent a "specific decision" and "animus" to trigger racial profiling concerns?

Will compliance with an ADM risk assessment become precondition to pleas?

ADM expert witnesses?

How cross-examine an algorithmic decision?

Do we get a warrant for proprietary source code?

Who funds these kinds of challenges for the defense?

Facial recognition on jail visitors; voice capture of inmates

Ewert SCC decision: are parole and other eligibility assessments biased?



# LCO Digital Rights Project

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