THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Council of Europe Treaty Negotiations on Artificial Intelligence

CANADIAN BAR ASSOCIATION
PRIVACY AND ACCESS LAW SECTION, IMMIGRATION LAW SECTION,
ETHICS AND PROFESSIONAL RESPONSIBILITY SUBCOMMITTEE

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Privacy and Access Law Section, Immigration Law Section and Ethics and Professional Responsibility Subcommittee with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Policy Committee and approved as a public statement of the CBA Privacy and Access Law Section, Immigration Law Section and Ethics and Professional Responsibility Subcommittee.

TABLE OF CONTENTS

Council of Europe Treaty Negotiations on Artificial Intelligence

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The Canadian Bar Association's Privacy and Access Law Section, Immigration Law Section and Ethics and Professional Responsibility Subcommittee (CBA Sections) welcome this opportunity to offer their views on Canada's participation in international negotiations in the Council of Europe (COE) for a treaty on artificial intelligence (AI), human rights, democracy, and the rule of law. The CBA Sections support the proposed approach and offer a useful perspective in answering the survey questions in the consultation document Preliminary Discussions with the Government of Canada on Council of Europe Treaty Negotiations on Artificial Intelligence.

1. What are the key outcomes that you would like to see from this Treaty? This may include considerations in relation to:

- **a. the application of the Treaty to the public and private sectors;**
- **b. the focus on the design, development, and use of AI;**
- **c. use of risk-based approaches to the regulation of AI;**
- **d. rights, safeguards and redress mechanisms;**
- **e. monitoring and supervisory authorities; and**
- **f. proposed moratoria or bans to address AI posing an unacceptable level of risk.**

The short response is all the above. AI is rapidly altering our concept of reality.[1] Its recent ascension to the mainstream, the proliferation of government and private use, and its impact on daily life are relatively new developments. Hence, the call for effective, universal legislation to govern it. The ask of lawmakers is enormous as AI uses change and expand each day. The *Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law* (Treaty) is a critical effort. It is important for Canada to participate in the evolution of a careful, thoughtful and deliberate process that culminates in a Convention that applies equally.

It is imperative that the Treaty and its principles apply to the public sector. Relationships between citizens and their governments are non-voluntary. In contrast to dealings with private

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1 Lennox, John C., (2020) *2084 Artificial Intelligence and the Future of Humanity*, Zondervan Reflective, p. 50.

sector businesses, a citizen unsatisfied with the use of AI by their government is not able to select an alternative. This this creates a heightened duty of care and diligence.

The Treaty must also apply to the private sector. The law must play a pivotal role to bridge the growing divide between the ethical and the legal and breathe new life into our fundamental legal rights, freedoms and protections as we reorient our existence in a digital world.

From an immigration lens, the Treaty fails to highlight migrants as a vulnerable segment of the global population who are significantly impacted by AI deployment. AI has worsened entrenched racial, socio-economic and political divides and discrimination for migrants.[2] AI systems across the European Union (EU) have a broader application than in Canada at present and are used to assess "risk profiles" of all visitors. Similar Canadian application may not be far behind. The necessity to screen valid claims for migration can lead to discriminatory practices. There is evidence that visa rejections are rooted in discriminatory, colonial histories.[3]

The potential of AI integration depends on a seamless transition of transparent, responsible and equitable incorporation of tools, and on the focus of the design, development and use of AI used to this end. This is particularly important in the context of migrants, where each case requires an in-depth analysis of its intricate nature and the underlying factors that influence decisions. Effective incorporation of AI requires a "just transition" – not necessarily implementing entirely new procedures or functions but improving existing programs and tools. The first step to a just transition to AI involves ensuring fairness and inclusivity and the use of risk-based approaches to AI regulation.

This also means ensuring everyone has equal access to tools, like reliable phones, computers and the internet. **Article 20** speaks to digital literacy and skills. It should also mention access to the tools needed to accomplish digital literacy and skills. Access is crucial to uphold the fundamental principles of fairness and equality under the law and prevent a digital divide. The biases, discrimination and inequalities flowing from algorithmic biases can be addressed by implementing AI frameworks grounded in rights, safeguards and redress mechanisms. There is also need for external monitoring and supervisory authorities. Algorithmic audits demonstrate accountability by assessing the procedure's fairness, accuracy and potential biases. They can be

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2 See brief by Mario Bellissimo to the House of Commons Standing Committee on Industry and Technology re Bill C-27, *Digital Charter Implementation Act, 2022* and *Artificial Intelligence and Data Act* (*AIDA*) (Ottawa, April 11, 2022) for international examples: online

3 *Ibid,* at para 11.

accessible and reviewed regularly by authorized officials to address and reduce the negative experiences caused by algorithms. Ethical review boards can reduce biases by reviewing the algorithms and evaluating the impacts on society. The boards ensure that every step of the procedure is monitored to avoid discrepancies or gaps in the evaluations.

Because of the complexity of each immigration case, a procedure that openly discusses the reasons and steps taken to evaluate the matter can help gain applicants' trust in these platforms to evaluate their cases. Under the transparency mechanism, algorithms should be designed to allow for explanations of their process and decisions. Through this, users can see the reasoning and challenge decisions if a step or procedure is contrary to law. **Article 7,** that speaks to transparency and oversight, must also address explicability**.**

2. Do you see additional risks to the development and use of AI in relation to the protection of human rights, democracy and rule of law other than those already addressed in the draft Treaty?

A good reference point on risk is the EU *Artificial Intelligence Act* (*AI Act*),[4] which has some overlap with the Treaty. The *AI Act* seeks to establish a standard for AI legislation globally with rules on facial recognition, biometric surveillance and other AI applications, and with extraterritorial reach to countries like Canada and the US. The purpose is to establish "a new legal framework that aims to significantly bolster regulations on the development and use of artificial intelligence."[5] The *AI Act* "focuses primarily on strengthening rules for data quality, transparency, human oversight and accountability."[6] The *AI Act* aspires to the "development of an ecosystem of trust by proposing a legal framework for trustworthy AI. The proposal is based on EU values and fundamental rights and aims to give people and other users the confidence to embrace AI-based solutions, while encouraging businesses to develop the tools."[7]

The EU proposed a regulatory framework on AI with the following objectives: safe AI systems respecting existing law on fundamental rights and Union values; legal certainty to facilitate AI investment and innovation; enhanced governance and effective enforcement of existing law on fundamental rights and AI systems' safety requirements; developing a single market for lawful,

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4 2021/0106(COD) European Parliament,

5 Feingold, S. (2023, March 28). The European Union's AI Act - Explained. *World Economic Forum*, online.

6 *Ibid.*

7 Directorate-General for Communications Networks, Content and Technology. (2021 Apr 21). Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, Document No. 8115/21. European Commission online, p 1. [EU Proposal for AI legislation].

safe and trustworthy AI applications and prevent market fragmentation."[8] To achieve these goals, the *AI Act* proposes assessing the "level of risk an AI technology could pose to the health and safety or fundamental rights of a person."[9]

"The framework includes four risk tiers: unacceptable, high, limited and minimal."[10] The intent is to future-proof AI legislation in Europe, requiring "ongoing quality and risk management by providers."[11] The Treaty should include a clear definition of harm that is reflected in the **Preamble.** Earlier this year, experts in the field called for a moratorium on AI development, explaining that its rapid evolution is "out of control" and in an open letter published in March, IT specialists encouraged a collective pause to regain the focus required for the responsible use of AI.[12] Figures such as Stephen Hawking[13] expressed fear that this technology will become *human competitive* or have the potential to become more powerful than humans.

Language models, for example, are capable of human interaction "on multiple levels, producing assurances about how its plans are benign while coming up with different reasoning about how its goals will harm humans."[14] Machine learning,[15] though, is deprived of common sense, so the data it produces abounds with simple errors "about the world … [and tends to] assert false things unhesitatingly."[16] We will likely keep making progress on many of the present-day problems created by AI like bias and discrimination. "But as hard as that will likely prove, getting AI systems to behave themselves outwardly may be much easier than getting them to pursue our goals and not lie to us about their capabilities and intentions."[17]

Yuval Noah Harari posits that, given AI's mastery of language, democracies will falter when confronted with the chaos unleashed by this technology.[18] His prediction is based on the ability of AI to "manipulate and generate language." Harari recommends greater cooperation when

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8 *Ibid,* p. 3.

9 *Ibid.*

10 *Ibid.*

11 (2022, Sep 29). *Regulatory framework Proposal on Artificial Intelligence*. European Commission, online.

12 *Ibid.*

13 Cellan-Jones, R. (2014, December 2). Stephen Hawking warns artificial intelligence could end mankind. *BBC*, online.

14 *Ibid.*

15 Brown, S. (2021, April 21). *Machine Learning, explained*. MIT Sloan School, online.

16 *Ibid.*

17 *Ibid.*

18 Harari, Y. (2023, April 28). Yuval Noah Harari argues that AI has hacked the operating system of human civilization. *The Economist*, online.

trying to resolve the issues. The first step is to buy time to upgrade 19th-century institutions for an AI world and to learn to master AI before it masters us.[19]

Deep fake and the spread of digital disinformation are incredible threats. While shallow fakes are easily identifiable and can be debunked, deepfakes will have an increasingly detrimental impact on society. As deepfake technology improves and authenticity becomes harder to discern, it could erode the basis of law as well as society. One area of focus that may require more attention in Treaty at **Article 4** is the threat posed by deepfake and the spread of digital disinformation and the need for a moratorium on this type of technology.

3. Do you see the Council of Europe's draft Treaty on AI, human rights, democracy and rule of law as compatible with Canadian interests and values?

The Treaty is compatible with Canadian interests and values. Canada would be well served to enact comprehensive legislation reflecting the human rights, democratic and rule of law provisions in the Treaty. As AI increasingly influences meaningful immigration decisions, prioritizing individual well-being and rights becomes important. The AI definition in **Article 5** is comprehensive and captures many nuances of the technology as we understand them today.

Overall, the Treaty offers a comprehensive lens through which AI integration into Canadian law must be viewed. Upholding fairness, accountability and inclusivity ensures the demonstration of AI's full benefits and reduces potential risks. Understanding the changing risks is a starting point for just and effective guardrails.

4. Are there other values, principles, or perspectives that you would like to see Canada advocate for during these negotiations that are not addressed in the draft Treaty?

Given Canada's close trading relationships among CoE members, an important consideration would be reciprocal recognition of CoE members' regulatory mechanisms, provided they are consistent with the Treaty. For example, if a company from France seeks to market AI products in Canada and France has adopted AI regulation in accord with the Treaty, the company should be permitted to market its products in Canada provided it abides by the French AI regulation.

Migrants must be recognized independently as a vulnerable group in **Article 17.** Technology's impact on migrants discussed above warrants inclusion in the Treaty's language. This is critical

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19 Harari, Y., Harris, T., & Raskin, A. (2023, March 24). You Can Have the Blue Pill or the Red Pill, and We're Out of Blue Pills. *New York Times*, online [Harari, Harris, and Raskin, "*You Can Have the Blue Pill or the Red Pill*"

because AI can turbocharge discrimination. Furthermore, migrants depending on status, lack of status or status being sought (refugees as one example) do not have access to all democratic processes in **Article 6.** They can be legally disenfranchised but should still benefit from the protections of harmful AI uses the Treaty strives to tackle. The negative impact of AI use on migrants of colour, migrant children and migrants with disabilities is well documented. The need for special considerations and special protections must be espoused and expressed in the Treaty. For example, the definition of a minor must be plainly identified in **Article 18.**

Protections of explicability and AI under user control

Until we are all on a relatable informational plane, users are at a disadvantage in understanding how parts of their lives may be reordered. AI must remain under user control to ensure that the tools cannot decide by themselves and do not prescribe anything, including the ability to easily deviate from the outcome of the algorithm when needed.[20] Those who train AI processes must have clear roles and responsibilities to allow a governance system at the highest level. **Articles 7 and 15** may benefit from fuller expression of the need for explicability.

AI Legal training requirement should be enacted

Article 9 (Equality and non-discrimination) and **Article 16** (Training) should call for legislated personnel allocations to maintain diversity and inclusion balances for those who train and drive the technology. Training must reflect and be responsive to vulnerable persons and groups such as racialized workers, LBGTQA+, women, persons with disabilities, ethnic minorities and children.

Civil and criminal liability

Digital harm and discrimination cannot be restricted to civil sanctions. Penal consequences must be developed and applied where needed. The misuse of digital power can strip a person of their privacy, dignity and choices. A tribunal with jurisdiction to pursue criminal liability, much like the *Immigration and Refugee Protection Act* [21] allows, would help create deterrence and proper messaging about consequences of AI and digital mismanagement, exploitative

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20 McEvenue, P. & Mann, M. (2019). *Case Study: Developing guidance for the responsible use of artificial intelligence in decision making at Immigration, Refugees and Citizenship Canada*. Law Society of Ontario, Special Lectures 2019. [McEvenue and Mann, *"Case Study"*].

21 SC 2001, c. 27

targeting, harassment, privacy breaches and other harms. Ultimately digital rights should be akin to physical rights and mentioned in **Article 6** (Scope) and **Article 13** (Remedies).

5. Are there any key rights, principles, or obligations that should be included that are not currently reflected in the draft Treaty? Conversely, are there any elements that raise potential concerns?

Canada should advocate for reciprocal recognition of regulatory schemes that are compatible with the Treaty. A Canadian developer of AI systems would have access to other CoE members' markets provided they comply with Canadian regulatory requirements, without having to undergo expensive regulatory analyses and possible changes to their products.

AI literacy and foundational legal principles will support the benefits of automated systems that align with democratic values while safeguarding civil rights, civil liberties and individual privacy. Central to these core rights and freedoms is the need for notice, explicability, reducing algorithmic biases, ensuring safety and efficacy of AI systems, and providing practical human alternatives and fallbacks for those impacted by AI-influenced determinations. A requirement for plain language algorithmic impact assessments (AIA) and privacy impact assessments (PIA) for AI use should be incorporated at **Article 12** (Safe Innovations)**.** These principles should be codified as core rights and freedoms in the Treaty as well as Canadian legislation.

Legislative requirement for transparent triaging and decision-trees

We highlighted above that, without a proper level of human oversight both internal and external to the organization, systemic problems can go undetected and unchallenged, resulting in long term negative impacts.[22] **Article 12** should also require transparent triaging and decision-trees which are integral to understanding the application, scope and impact of AI use.[23] Again, AI use should enable individual freedoms, not put them at a disadvantage.[24]

6. From your perspective, what impact could the obligations, rights or principles in the draft Treaty have on industry and innovation in Canada?

Our understanding of industry and innovation are changing. The *Fourth Industrial Revolution* is a term coined by Klaus Schwab, chair of the World Economic Forum, to refer to the current

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22 McEvenue and Mann (2019), *Case Study*.

23 Lyon, D. (2003) "Social Sorting" In D. Lyon (ed.) *Surveillance as Social Sorting. Privacy, Risks, and Digital Discrimination*, 13-28

24 European Commission (8 April 2019). "Ethics Guidelines for Trustworthy AI", online.

stage of technological development. In the current stage, "physical, digital and biological worlds [are combined], impacting all disciplines, economies and industries, and even challenging ideas about what it means to be human."[25] We have unprecedented access to the digital world which makes possible new products and services to increase efficiency and pleasure of our personal lives. In the future, technological innovation could also lead to a supply-side miracle, with long-term gains in efficiency and productivity opening new markets and driving economic growth.

Schwab recognizes the potential for disorder in AI: "organizations might be unable to adapt; governments could fail to employ and regulate new technologies to capture their benefits; shifting power will create important new security concerns; inequality may grow; and societies fragment."[26] Success depends on greater global collaboration. While still assessing the changing strengths and weakness of this new technology, we are simultaneously confronted with the *Fifth Industrial Revolution*, a result of the former's ability toward stacked innovation, a kind of feedback loop that allows AI development to beget further AI development.[27]

GPT platforms such as large language models (LLMs) have been unimodal, limited to text and therefore "limited to interacting with the world through a single sensory channel."[28] Only recently, this technology acquired the ability to recognize both speech and images. Incorporating sensory data "into traditionally cognitive machines … [allows] the machine to 'perceive' the world in a manner that is more congruent with human experience, thereby narrowing the ontological gap between human and machine."[29]

This technology also introduces mechanical contributions that offer "a more nuanced understanding of reality, one that is not solely dependent on human cognition."[30] Mechanical contribution would call into question the uniqueness of human perception and give alternative means of understanding and perceiving reality, thus, challenging the superiority of human intelligence. The Treaty's attempt to build and foster global cohesion will enhance rather than stifle industry and innovation. An expression of the ontological implications of this new reality in the **Preamble** would better communicate the need for a legal and international response.

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25 Schwab, K. (2015, December 17). The Fourth Industrial Revolution. *World Economic Forum*, online.

26 *Ibid.*

27 Nosta, J. (2023, October 6). *The 5th Industrial Revolution: The Dawn of the Cognitive Age*. Psychology Today, online.

28 *Ibid*.

29 *Ibid*.

30 *Ibid*.

7. In your view, are there any uses of AI that merit special treatment in the Treaty?

The growing use of digital profiling requires immediate attention. To begin, machine learning has been defined as "teaching machines to extract and apply patterns that exist in data."[31] The resurgence of physiognomy in the realm of AI, particularly in machine learning, is of great importance. The historical context forms the backdrop for the examination of how rapid developments in AI and ML usher in a new era of scientific racism. An understanding of the technology's limits and the historical root of physiognomy is required to acknowledge the need to address these issues in a society increasingly reliant on ML. Scholars contend that machine-learned models, intentionally or not, perpetuate biases ingrained in the human behavior used for model development, presenting a troubling "laundering" of human prejudice through computer algorithms. The fundamentals of ML for image understanding detail how computers analyze physical features using precise calculations based on images, with a focus on the supervised learning approach involving labeled examples. Technical nuances such as parameter tuning, overfitting, and the intricate relationship between the number of parameters and the required training data are also some considerations.

Greater use of these platforms is also evident in other fields, such as criminal law. The use of AI in law enforcement and government decision-making that directly affects citizens and non-citizens poses a risk of harms to fundamental human rights. Systems such as ML models use features like risk assessment algorithms to identify existing patterns in individuals' behaviour to determine future criminal behaviours.[32] Risk assessment algorithms are used in the criminal justice process, from pre-trial decisions to sentencing, such as the predictive policing ML-based *COMPAS*. However, investigations demonstrated potential biases in the system, mainly around instances where individuals with different racial backgrounds received drastically different risk assessments.

Studies also found racial disparities in the risk assessment process. Black defendants were more likely to be labelled as high-risk,[33] suggesting the algorithm may perpetuate existing biases in the criminal justice system. Algorithms were only 20% accurate in predicting violent crimes.[34] This demonstrates the challenges in developing algorithms capable of making precise

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31 Thain, N. (2023). *Fairness in Machine Learning*. Google Research [slide deck]. [Thain, "*Fairness in Machine Learning"*].

32 Angwin, J., Larson, J., Kirchner, L., & Mattu, S. (2016, May 23). *Machine bias*. ProPublica, online.

33 *Ibid*.

34 *Ibid*.

predictions in the complex realm of criminal behaviour. Amnesty International has applauded the *AI Act*'s effort to prohibit live biometrics, but believes many concerns linger:

> Banning live remote biometric identification systems is a significant step forward. Although the text does not outlaw retrospective mass surveillance, it does limit its use to law enforcement only and within strict legal boundaries. The draft law would also ban several harmful uses of AI systems that discriminate against marginalized communities. These include technologies that claim to 'predict' crimes, social scoring systems that prevent people from accessing essential public and private services, and emotion recognition technologies used by law enforcement and border officials to 'identify' suspicious individuals.[35]

The *AI Act* also fails to ban discriminatory profiling systems that flag people on the move as a 'risk' and forecasting systems used for interdicting, curtailing and preventing migration, despite calls by Amnesty International and others to ban these technologies.

Another area needing special consideration in the Treaty is the threat in integrating AI with brain imaging technology. Many researchers, including those at Meta, Neuralink and Synchron, are working on implantable and non-invasive technologies that can decode and reconstruct information from brain activity with considerable accuracy.[36] Although this technology is still under development, it raises questions about threats to fundamental freedoms (in particular mental privacy), democracy and the rule of law.

8. Are there any domestic or international efforts to regulate AI that Canada should take into consideration in its participation in the negotiations of this Treaty?

Given that Canadian developers of AI systems seek access to international markets and many leaders in the real-world deployment of AI systems are based outside of Canada, multilateral approaches that harmonize regulation internationally should be encouraged, in the CoE and in other multilateral international fora, such as USMCA, the OECD, ASEAN, the G7 and the G20.

Building on recent discussions at the G7, OECD and Global Partnership on AI, the United Kingdom will host its first global summit on AI in November 2023.[37] In the US, the Blueprint for an AI Bill of Rights (AIBOR) and related executive actions, the AI Risk Management Framework,

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35 Hakobyan, M. (2023, May 11). *EU: Ban on most harmful use of AI moves a step closer*. Amnesty International, online.

36 See Benchetrit Y., Banville, H., & King, J.R. (2023 October 18). *Towards a Real-Time Decoding of Images from Brain Activity.* Meta, online; Neuralink. (2023, September 19). *Neuralink's First-in-Human Clinical Trial is Open for Recruitment*, online; and Synchron. (2021, July 28). *Press Release: Synchron Receives Green Light from FDA to Begin Breakthrough Trial of Implantable Brain Computer Interface In US*, online.

37 Charlotte Trueman (2023, August 24), UK government confirms November global AI summit. Computerworld, online.

and a roadmap to set up a National AI Research Resource were recently released to promote responsible innovation. The AIBoR aims to respond to the unrestrained potential of automated systems and is based on the preservation of five fundamental rights:[38]

- Safe and Effective Systems to safeguard the public from the dangers of automated systems, independent evaluation and reporting on the system's safety and efficacy should be performed regularly.
- Algorithmic Discrimination Protections as the Office of Science and Technology Policy (OSTP) maintains that individuals should be free from digital discrimination, and that data should be deployed in an equitable manner.
- Data Privacy, the OSTP highlights that the public "should be protected from abusive data practices through built-in protections," just as it should be informed as to how personal data is being used.
- Notice and Explanation, widespread deployment of automated systems is too often coupled with the individual being denied the knowledge necessary "to address the impact of automated systems on their lives."
- Human Alternatives, Considerations and Fallback, "the public deserves the assurance that, when rights, opportunities, or access are meaningfully at stake and there is a reasonable expectation of an alternative to an automated system . . . and will not be disadvantaged for that choice."

New Zealand's *Algorithm Charter* offers guidelines on the use of AI by their institutions.[39] Its principal objectives are to provide transparency in AI implementation and ensure that citizens' rights and freedoms are upheld despite the use of automation technologies in decision-making.

These governing organizations and bodies are similarly guided by the emergence and development of digital rights and freedoms, such as respect for human dignity, freedom of the individual, respect for democracy, justice and the rule of law, equality, non-discrimination, and solidarity, and citizens' rights (i.e., human autonomy, prevention of harm, fairness, and explicability).[40] These are instruments worthy of consideration, and we expect they have been consulted in the formulation of Canada's position on the Treaty.

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38 The White House. (2022, October 22). *What Is the Blueprint for an AI Bill of Rights?* White House Office of Science and Technology Policy, online: [*What is the Blueprint*].

39 New Zealand Government. (2020, July). *Algorithm Charter for Aotearoa New Zealand,* online: [*Algorithm Charter for Aotearoa New Zealand*]

40 Directorate-General for Communications Networks, Content and Technology. (2019, April 8). *Ethics Guidelines for Trustworthy AI*. European Commission, online [EU, "*Ethics Guidelines"*].

9. Please identify any other concerns or considerations you would like Canada to consider while negotiating this treaty.

There is reference throughout the document to the rule of law (for example, in **Article 2**, Risk-based approach). It may be useful to define rule of law, perhaps using definition developed by the United Nations. References to "observance" of rule of law (for example in **Article 16** and **Article 24**) may be better stated "adherence to the rule of law."

Point no. 2 in **Article 4** states that the Convention shall not apply to research and development activities regarding AI systems unless they are tested or used in ways that potentially interfere with human rights and fundamental freedoms, democracy and the rule of law. Consider addressing what those interferences might look like. The article is broadly worded and seemingly it would be left to the Parties to determine that systems have the potential to interfere with those principles.

Article 6 (Integrity of democratic processes and respect for rule of law): As respect for the rule of law is fundamental to a properly functioning democracy and democratic processes, any uses of AI systems that may "undermine the integrity, independence and effectiveness of democratic institutions and processes, including respect for judicial independence and the principle of separation of powers" merits special treatment in the Treaty.

In **Article 13** (Remedies), paragraph (a) sets out the obligation to take "appropriate measures to ensure the relevant usage of the artificial intelligence system is recorded, provided to bodies authorized in accordance with its domestic law to access that information and, where appropriate and applicable, made available or communicated to the affected person concerned." It may be useful to give direction as to when it may not be appropriate or applicable to make the information available to the affected person.

Article 15 (Risk and impact management framework): paragraph 2 sets out a person's right to know that one is interacting with an AI system rather than a human (unless obvious) and, where appropriate, shall provide the option of interacting with a human in addition to, or instead of, the system. Guidance on when it would be appropriate to provide that option may be useful. In the context of the justice system, decisions affecting a person's human rights including liberty rights ought to be determined by a human.

Paragraph 2.c sets out that measures shall consider a risk-based approach and integrate the perspective of all relevant stakeholders, including any person whose rights may be potentially

impacted through the design, development, use and decommissioning of the AI system. Recent reports on unmet legal needs and the access to justice crisis, including the CBA's Reaching Equal Justice report,[41] speak of the importance of using a people-centered design approach. It would be desirable for the design and development of AI systems to be user centered.

In the **Preamble** at number 11**,** consider an addition to the language following "*further instruments to address specific issues relating to . . .",* to include the concept of harm*.*

The exception at the beginning of Chapter III for those already permitted under domestic law etc. in relation to the protection of national security, defence and public safety is extremely broad and not qualified no matter the level of potential harm**.** This could serve as a precedent for global and domestic non-adherence to the fundamental legal rights and freedoms the Treaty espouses. It requires further reflection.

Article 4(2) (Scope) and **Article 12** (Safe Innovation) seem inconsistent. **Article 4(2)** speaks to the Treaty applying only if there is potential to interfere with human rights and fundamental freedoms, democracy ,the rule of law etc. **Article 12** is restricted to having a view to avoiding adverse impacts on human rights, democracy and the rule of law etc. There is no mention of fundamental freedoms in Article 12, and it derogates from the overall import of adverse outcomes contemplated in Article 4(2). This inconsistency warrants further exploration.

Article 24 (International Cooperation) should require the *transparent* [and explicable] *exchange of relevant and useful information between the parties*.

10. Conclusion

To close, as the global community navigates the evolving AI landscape, a shared commitment to ethical AI development and comprehensive regulatory frameworks like those espoused in the Treaty will help to harness AI's potential while minimizing its risks. Until all parties are on a relatable and contemporaneous informational plane and the legal entrenchment of explicable, transparent and accountable AI in international and domestic law exists, a piecemeal and more arduous evolution for harnessing AI could have devasting results. In all, no legal instrument or series of legal instruments are a panacea and much attention is rightfully given to the serious harms. Damaging though these outcomes may be, "they are not inevitable."[42]

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41 Canadian Bar Association (2013), Reaching Equal Justice: An Invitation to Envision and Act, online.

42 *"Blueprint for an AI Bill of Rights." The White House, 22 Oct. 2022,* online *Accessed 4 Jan. 2023.*