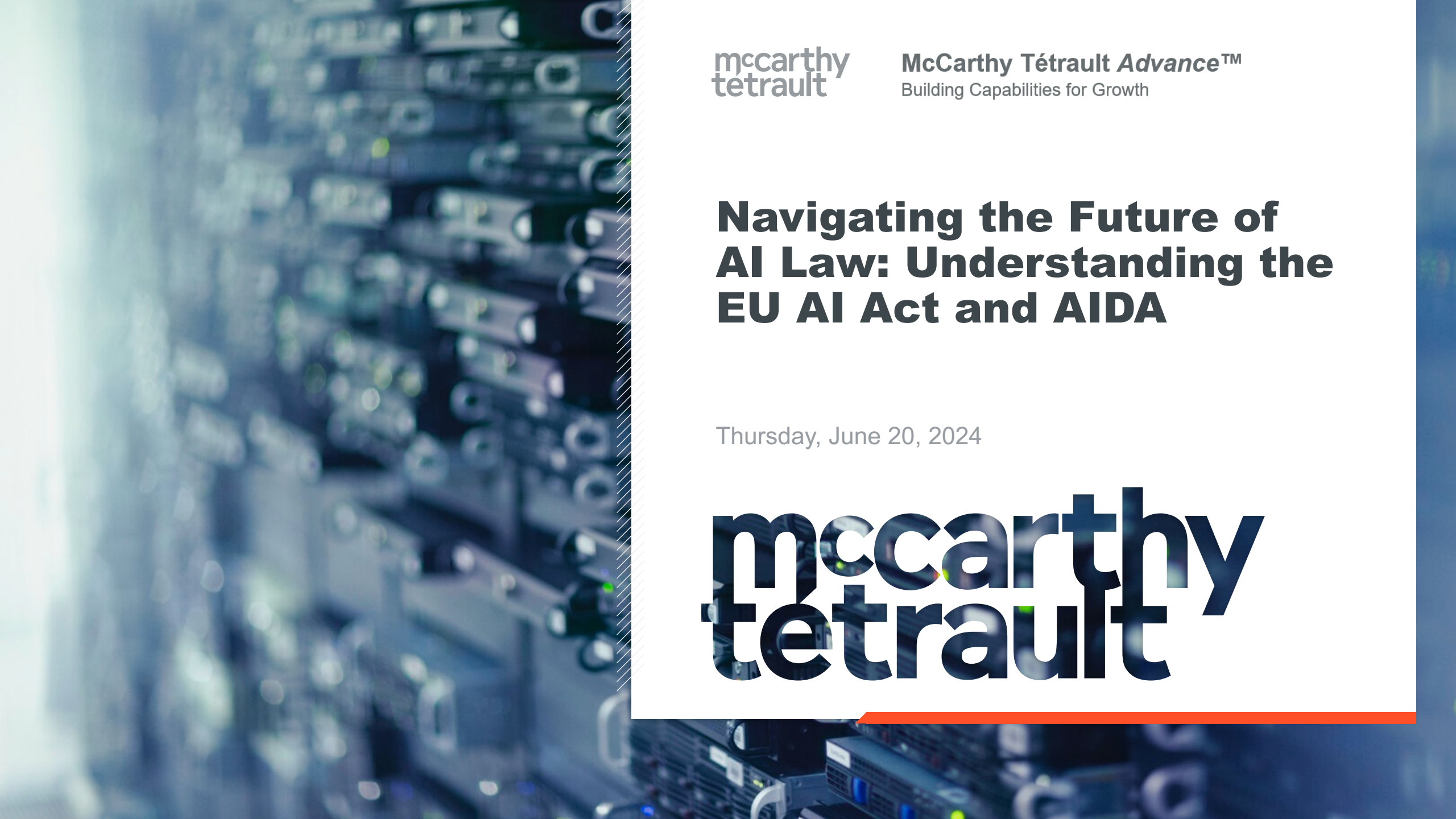

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# Navigating the Future of AI Law: Understanding the EU AI Act and AIDA

Thursday, June 20, 2024

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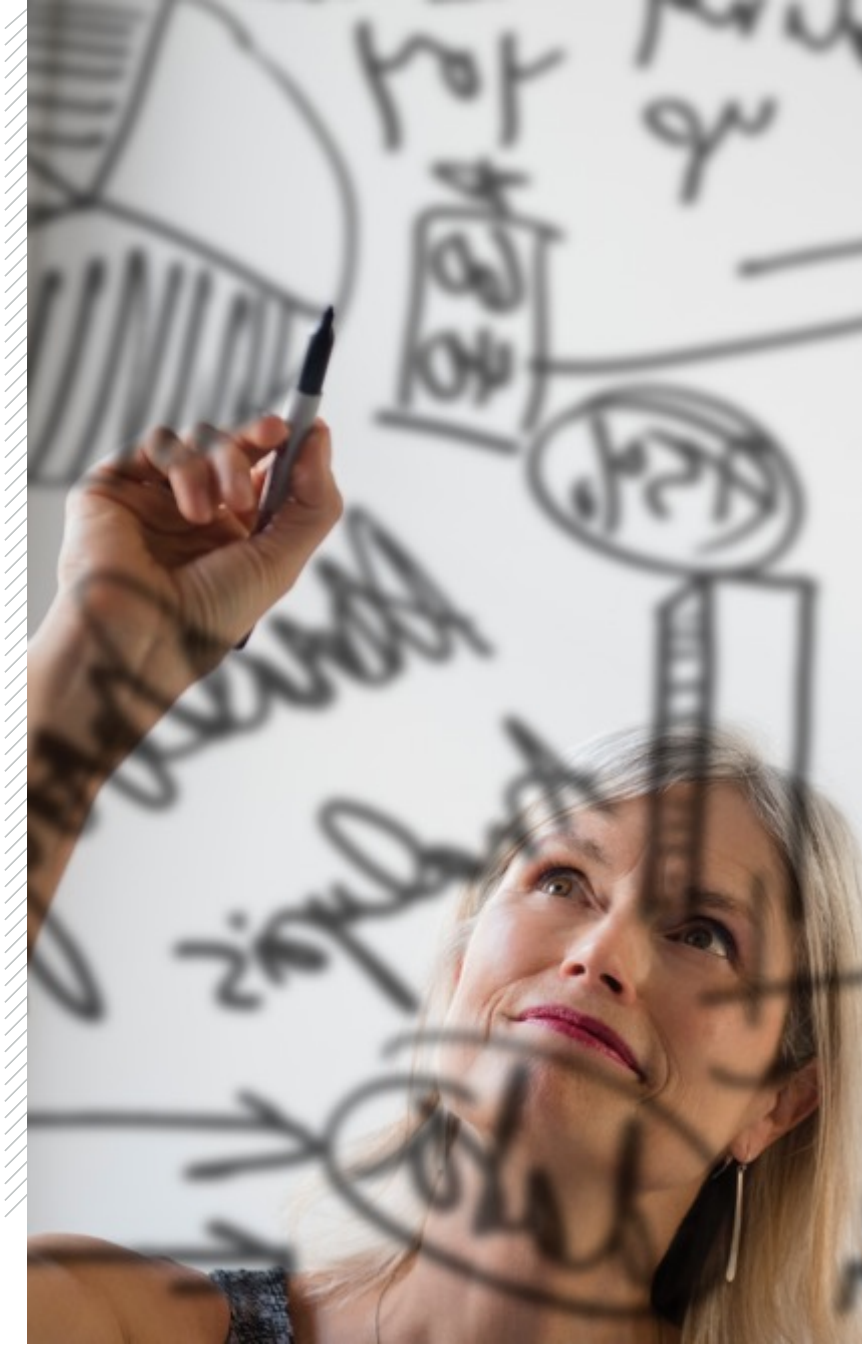
# Agenda

- Introduction
- EU AI Act: Implications for Canadian businesses (John Buyers & Charles Morgan)
- Comparative Overview: EU contrasted with Canada, UK and US (David Crane)
- Professionals using AI (Alexandra Cocks)
- Privacy and AI (Daniel G.C Glover)
- Quebec Civil Law Litigation (Karine Joizil)
- AI Contracting Implications (Barry Sookman)
- Closing Remarks



# Today's Speakers

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# EU AI Act: Implications for Canadian Businesses

John Buyers & Charles Morgan

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# Comparative Overview: EU contrasted with Canada, UK and US

David Crane

# Current Regulatory Landscape

| | Canada | EU | United States | United Kingdom |
|---|---|---|---|---|
| **Current State of Regulation** | Expected federal regulation of AI, through the **Artificial Intelligence and Data Act (AIDA),** which forms part of Bill C-27<br><br>AIDA would supplement existing federal laws (e.g., Canada Consumer Product Safety Act and proposed Consumer Privacy Protection Act)<br><br>Some provincial privacy and online harms laws address some aspects of AI (e.g., BC's Intimate Images Protection Act)<br><br>Potential for provincial AI specific laws | **Artificial Intelligence Act (AI Act)** – comprehensive regulation of development and use of AI across the EU and is the most robust AI legislation in the world to date<br><br>Proposed **AI Liability Directive**<br><br>Applies to all sectors<br><br>Supplements existing laws (e.g., GDPR and General Product Safety Regulation) | Patchwork of rules, legislation and executive orders<br><br>President Biden issued an **Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence** and a **Blueprint for an AI Bill of Rights**<br><br>Over 25 states have introduced laws addressing AI:<br><br>• Some privacy, consumer protection, employment and other laws in states addressing use of AI (e.g., automated decision-making and AI transparency)<br><br>• Colorado first state enact comprehensive AI law (i.e., Consumer Protections for Interactions with Artificial Intelligence) | **AI Regulation White Paper (**March 2023) and response (February 2024) based on consultation feedback<br><br>The **UK Government's Office for Artificial Intelligence**, which was set up to oversee the implementation of the **UK's National AI Strategy**<br><br>Sector-specific regulation expected |

# Regulatory Approach

| | Canada | EU | United States | United Kingdom |
|---|---|---|---|---|
| **Regulatory Approach** | **AIDA**:<br>• horizontal approach<br>• partially risk-based<br>• life-cycle approach<br>• framework –details left to regulation | **AI Act**:<br>• horizontal approach<br>• fully risk-based - risk-based classification of AI<br>• life-cycle approach<br>• prescriptive<br>• emphasis on fundamental human rights<br>• proportionality objective<br><br>**AI Liability Directive** – aims to adapt non-contractual civil liability rules to AI and facilitate redress claims by consumers for harm caused by AI | More decentralized and sector-specific approach, with a focus on guidance at the federal level<br><br>Executive Order on AI - more advisory in nature, promoting principles and encouraging voluntary industry standards without imposing specific legal requirements<br><br>Blueprint for an AI Bill of Rights - principles to "guide the design, use and deployment of automated systems to protect the American public"<br><br>States to likely lead the way | Vertical sector guidance: no overarching regulation of AI<br><br>Context-based approach instead of categorizing AI systems according to risk<br><br>AI White Paper:<br>• identifies risk that the principles-based AI framework seeks to mitigate with proportionate interventions<br>• establishes five cross-sectoral principles for existing regulators to interpret and apply within their respective domains<br><br>Allow existing regulators to respond to the risks posed by AI systems in a proportionate and sector-tailored manner |

# EU AI Act vs AIDA (Canada)

| | EU AI Act | AIDA (Canada) | Key Difference(s) |
|---|---|---|---|
| **Purpose** | Ensure a "high level of **protection of health, safety, [and] fundamental rights** […] against **harmful effects** of artificial intelligence systems" and at the same time "**support innovation**".<br><br>Focuses on five main priorities: AI use should be **safe**, **transparent**, **traceable**, **non-discriminatory**, and **environmentally friendly** | • Regulate international and interprovincial **trade and commerce** in AI systems by establishing common requirements, applicable across Canada, for the design, development and use of those systems<br><br>• Prohibit certain conduct in relation to artificial intelligence systems that may result in **serious harm to individuals or harm to their interests**<br><br>"**Harm**" means (a) physical or psychological harm to an individual; (b) damage to an individual's property; or(c) economic loss to an individual | AIDA has a narrower purpose limited to trade and commerce and with a on focus harm (rather than rights of individuals) |
| **Regulatory Approach** | Horizontal regulation<br><br>Risk-based and proportionate approach<br><br>Very prescriptive - intersection between technical product safety legislation and legislation intended to protect fundamental rights<br><br>Covers AI lifecycle | Horizontal regulation<br><br>Less risk-focused, with no clear proportionality objective<br><br>More "principles-based"<br><br>More of framework legislation with a lot left to regulations<br><br>Covers AI lifecycle | AI Act is more comprehensive and prescriptive with full risk-based approach |

# EU AI Act vs AIDA (Canada)

| | EU AI Act | AIDA (Canada) | Key Difference(s) |
|---|---|---|---|
| **Extraterritorially** | Expressly applies extraterritorially (e.g., placing on EU market, deployers located in the EU, output produced by the AI system is intended to be used in the EU) | Not expressly extraterritorial - but if components of global AI systems are used, developed, designed or managed in Canada (in international and interprovincial trade and commerce) | Only the EU AI Act is expressly extraterritorial |
| **Who is regulated?** | Applies to all sectors (including public sector), not sector specific<br><br>Some law enforcement exceptions | Private sector entities designing, developing, or deploying AI systems in trade and commerce<br><br>Does not regulate government<br><br>Some consideration of sector regulation (e.g., medical devices) | Both cross-sector, but AIDA does not apply to public sector |
| **AI Value Chain** | Applies to:<br>• Providers<br>• Deployers<br>• Product Manufacturers<br>• Importers<br>• Distributors<br>• Authorized Representatives<br><br>Each role carries different levels of compliance obligations<br><br>Majority of obligations fall on providers (developers), especially of high-risk AI systems | Person, in the context of international or interprovincial trade and commerce:<br><br>• making available, with additional requirements for the first time; or<br><br>• managing the operations<br><br>Each role has many stacking compliance obligations | Both Acts apply across the AI value chain, but the AI Act is more nuanced in how obligations are applied to each role, with a focus on high-risk AI systems |

# EU AI Act vs AIDA (Canada)

| | EU AI Act | AIDA (Canada) | Key Difference(s) |
|---|---|---|---|
| **Definition of AI System** | "a machine-based system designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments" | "a technological system that, using a model, makes inferences in order to generate output, including predictions, recommendations or decisions" | AIDA definition is broader without including "autonomy" |
| **Scope of AI Systems / Models Regulated** | Classifies AI systems in accordance with levels of risk:<br>• **Unacceptable risk** - prohibited<br>• **High risk** - bulk of requirements<br>• **Limited risk** – focus on transparency (e.g., GenAI)<br>• **Low or minimal risk** – no obligations (suggested to follow general principles)<br><br>Also regulates **general-purpose AI (GPAIs) models** - tiered approach depending on whether systemic risk | **High-Impact System** - "an artificial intelligence system of which at least one of the intended uses may reasonably be concluded to fall within a class of uses set out in the schedule" [or which is added later]<br><br>**Machine Learning Model** (for incorporation into a high-impact system for the first time) - "a digital representation of patterns identified in data through the automated processing of the data using an algorithm designed to enable the recognition or replication of those patterns "<br><br>**General-Purpose System** - an "artificial intelligence system that is designed for use, or that is designed to be adapted for use, in many fields and for many purposes and activities, including fields, purposes and activities not contemplated during the system's development", which can also be a high impact system | AI Act takes a more risk-based approach to regulating AI systems and models |

# EU AI Act vs AIDA (Canada)

| | EU AI Act | AIDA (Canada) | Key Difference(s) |
|---|---|---|---|
| **Prohibited AI Systems** | Closed list of prohibited (unacceptable risk) AI systems:<br><br>• subliminal, manipulative, or deceptive techniques<br>• exploiting vulnerabilities (e.g. disability and age)<br>• biometric categorization systems<br>• social scoring<br>• assessing the risk of an individual committing criminal offenses<br>• compiling facial recognition databases<br>• inferring emotions in workplaces or educational institutions<br>• 'real-time' remote biometric identification (RBI) in publicly accessible spaces for law enforcement (some limited exceptions) | None | Only the AI Act has prohibited AI systems |

# EU AI Act vs AIDA (Canada)

| | EU AI Act | AIDA (Canada) | Key Difference(s) |
|---|---|---|---|
| **High-risk/impact AI System - Scope** | • Deployed in a specific use-case with the areas of use identified in Annex III as high-risk (e.g., non-banned biometrics, employment, critical infrastructure); or<br>• Safety component/product already subject to third- party conformity assessment under existing EU law<br><br>Risk-based exceptions<br><br>Preconditions to adding (use-cases) | Intended for use in matters relating to any area of use identified in Schedule, which includes:<br><br>• determinations in respect of employment;<br>• determinations of whether to provide services to an individual or the prioritization of the services to be provided to individuals<br>• health care or emergency services<br><br>No risk-based exceptions<br><br>No preconditions to adding, just prescribed factors | AIDA regulates a much broader scope of high-risk/impact AI systems, with a less risk-based approach<br><br>Some high-impact systems regulated under AIDA are not regulated as high-risk under the AI Act<br><br>Delta may expand over time |
| **High-risk/impact AI System – Compliance Obligations** | High risk AI providers must:<br><br>• establish a risk management system<br>• conduct data governance.<br>• draw up technical documentation to demonstrate compliance<br>• design for record-keeping<br>• provide instructions for use to downstream deployers to enable compliance.<br>• design to allow human oversight<br>• design to achieve appropriate levels of accuracy, robustness, and cybersecurity<br>• establish a quality management system<br><br>May require registration in central EU database | Makes available for first time:<br>• assessment of the adverse impacts<br>• measures to assess and mitigate any risks of harm or biased output<br>• test mitigation measures<br>• permit human oversight of the AI system<br>• ensure system performing reliably and as intended<br>• maintain an operations manual<br>• kept records<br><br>Manages the operations:<br>• ensure above requirements met<br>• ensure human oversight where required by regulation<br>• establish measures allowing users to provide feedback on the system's performance<br>• publish on a publicly available website a plain-language description of the system<br>• monitor for actual and suspected harm caused by the system<br>• if actual and suspected harm, cease operation of the system and report to the Commissioner<br><br>* Details to be set out in regulations | Both Acts have detailed and similar requirements, but potential for large expansion of requirements under AIDA through regulations |

# EU AI Act vs AIDA (Canada)

| | EU AI Act | AIDA (Canada) | Key Difference(s) |
|---|---|---|---|
| **General-purpose systems** | "**general-purpose AI (GPAIs) model**" – "displays significant generality and is capable of competently performing a wide range of distinct tasks regardless of the way the model is placed on the market and that can be integrated into a variety of downstream systems or applications, except AI models that are used for research, development or prototyping activities before they are placed on the market"<br><br>Dedicated transparency requirements (along the value chain), including drawing up technical documentation, complying with EU copyright law and providing detailed summaries of the content used for training<br><br>**High-impact GPAI models** which may create systemic risks have additional obligations (e.g., model evaluations, systemic risks assessment and mitigation, adversarial testing, reporting to the Commission on serious incidents, cybersecurity and energy-efficiency reporting)<br><br>Exceptions for free and open license GPAI models | ***"general-purpose system"*** – "designed for use, or that is designed to be adapted for use, in many fields and for many purposes and activities, including fields, purposes and activities not contemplated during the system's development"<br><br>Before made available for first time:<br>• measures respecting the data used in development in accordance with the regulations<br>• assessment of the adverse impacts<br>• measures to assess and mitigate any risks of harm or biased output<br>• tests of the effectiveness of the mitigation measures<br>• include features prescribed by regulation that permit human oversight<br>• plain-language description of capabilities and limitations, risks and other prescribed by regulation<br>• if generates content, meet certain content AI identification requirements<br>• compliance assessment<br>• keep records of compliance<br><br>Person who manages:<br>• ensure above requirements met<br>• establish risk measures and test effectiveness<br>• ensure human oversight<br>• if actual and suspected harm, cease operation of the system and report to the Commissioner<br><br>Other measures prescribed regulations and details in regulations | AIDA requirements for general-purpose systems apply to a much broader range of AI systems compared to GPAI models under the AI Act<br><br>The AI Act takes a more risk-based approach to regulating GPAI<br><br>Potential material expansion of AIDA requirements under regulation |

# EU AI Act vs AIDA (Canada)

| | EU AI Act | AIDA (Canada) | Key Difference(s) |
|---|---|---|---|
| **Models** | Only **general-purpose AI models** are regulated<br><br>See above for requirements | All **machine learning models** are regulated if made available for incorporation into a high-impact system<br><br>Person making available must (in addition to the high-impact system requirements):<br><br>• establish measures for data used in development in accordance with the regulations<br>• establish measures to identify, assess and mitigate the risks of biased output that could result from the use of the model<br>• prepare a model card<br>• keep compliance records showing compliance and relating to development data and processes | Wider regulation of models under AIDA<br><br>Under AIDA, risk of model does not matter<br><br>Risk-based approach for requirements under the AI Act (i.e., more where systematic risk) |
| **Third-party conformity assessments** | Only **high-risk AI systems** | Any **general-purpose system** for first time | AIDA requires more third-party conformity assessments, notwithstanding the level of risk associated with the AI system |
| **Quality / Accountability Frameworks** | Quality management systems required for **high-risk AI systems** | Accountability frameworks required for **high-impact systems** and **general-purpose systems** | Quality management systems and accountability frameworks are similar, but AIDA requires for broader scope of AI systems |

# EU AI Act vs AIDA (Canada)

| | EU AI Act | AIDA (Canada) | Key Difference(s) |
|---|---|---|---|
| **Right to Complain** | Any person can lodge a compliant with a market surveillance authority with respect to infringement of the AI Act<br><br>Non-compliance actionable based the Representative Actions Directive | None | Only the AI Act grants a complaint right |
| **AI System Changes** | A new conformity assessment is required where:<br><br>• A substantial modification to a high-risk AI system<br><br>• A modification of intended purpose of an AI system that has not been classified as high-risk in such a way that the AI system becomes high-risk | AI system changes can retrigger obligations (e.g., assessments and updating descriptions)<br><br>A changed AI system is considered a distinct new AI system for purposes of compliance<br><br>Changes: change of use, different risks of harm or biased output, less effective mitigation measures and for general-purpose system the plain-language description no longer accurate | AIDA's requirements with respect to AI system changes are much more comprehensive |
| **Role of regulation** | Act AI is comprehensive<br><br>Only guidelines expected to support requirements in the AI Act | Many details left to regulation | AIDA could be expanded significantly by regulation (without Parliamentary Oversight) |

# EU AI Act vs AIDA (Canada)

| | EU AI Act | AIDA (Canada) | Key Difference(s) |
|---|---|---|---|
| **Regulators** | **European Commission** - overall responsibility and some exclusive powers<br><br>**AI Office (**within the Commission) - oversee the advanced AI models, foster new standards and testing practices, and enforce the common rules<br><br>**Market surveillance authorities** established by each member state will report to the Commission and have investigative and enforcement powers<br><br>Also:<br>• scientific panel of independent experts to advise the AI Office<br>• AI Board, as a coordination platform between member states<br>• advisory forum for stakeholders | **Minister of Innovation, Science, and Industry** has overall responsibility for administration and enforcement<br><br>**AI and Data Commissioner** (a senior official of the department of the Minister) with powers, duties and functions set out in AIDA or delegated by the Minister – not independent | AI Act has a more complicated regulator structure, with multiple layers of regulators and advisors<br><br>AIDA does not establish expert, industry or stakeholder advisory bodies to assist with regulation |
| **Enforcement powers and penalties** | EU AI Act provides for decentralized enforcement of the provisions by empowering member states to establish their own rules on penalties, including administrative fines for non-compliance<br><br>European Commission will be at the center of enforcement<br><br>Fines ranging from €7.5 million or 1.5% of global turnover to €35 million or 7% of global turnover | Offences: Regulatory and some criminal offences which include imprisonment<br><br>Orders: production of records, audits/testing, imposition of measures and cease use<br><br>Financial penalties:<br>• Fines for regulatory offences: Up to greater of $10M and 3% of year's gross global revenues<br>• Administrative monetary penalties for regulatory violations to be set out in regulations | Wider scope of enforcement legal risk under AIDA |

# Cautionary Tale: Professionals Using AI

Alexandra Cocks

# *Zhang v. Chen*, 2024 BCSC 285

## Background

- Party sought costs against counsel (personally) for citing ChatGPT generated cases in filed application
- ChatGPT had “hallucinated” the cases, i.e. the cases were fake
- Opposing counsel spent time and resources to try to locate cases, and asked for copies
- Counsel retracted cases before hearing and did not ultimately rely on them

# *Zhang v. Chen*, 2024 BCSC 285

## Court Ruling

- Lawyer ordered to personally pay costs for wasted time (but not at elevated level for misconduct)
- Lawyer ordered to review files and report to court on use of AI in other materials provided to court
- Court cited legal study that found that legal hallucinations are occurring between 69% of the time with ChatGPT 3.5 and 88% with Llama 2.
- Court cautioned:

> "generative AI is still no substitute for the professional expertise that the justice system requires of lawyers. Competence in the selection and use of any technology tools, including those powered by AI, is critical. The integrity of the justice system requires no less."

# *Zhang v. Chen*, 2024 BCSC 285

## Implications

- Caution in using AI for professional services
- Be mindful of professional obligations, and any guidance from professional bodies
- Disclosure of use may be required (see e.g. Federal Court)

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# Privacy and AI

Daniel G.C. Glover

# AI & Privacy – Square Peg, Round Hole?


- Privacy Commissioners acknowledge that strict compliance is difficult, but they expect **meaningful efforts**
- **Providers** incur risks, but so do **users,** especially ones that provide training data
  - **Platform defences** may protect providers, not users
- Training data scrapes the Internet and private data sources without a clear pathway to **consent** under Canadian law
  - But don't search engines do that too?
- **"Appropriate purposes"** opens up second-guessing over development and use of AI
- **Accuracy/Access** hard to fulfil: Large Language Models (LLMs) require randomness and hallucinations continue
  - Are **transparency** and **take-downs** the answer?
- **Privacy by design** required by Law 25

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# Quebec Civil Law Litigation

Karine Joizil

# I. AI in the context of Quebec civil law

- Quebec civil law has evolved in its own way in many aspects but shares similarities with other provinces.
- Few substantial legal decisions on AI
- The Quebec superior court has issued a formal notice regarding the use of AI, specifically language models, in court submissions.
- The court :
  - advises caution when referencing legal sources or analyses from such models to ensure the integrity of submissions.
  - recognizes both opportunities and challenges presented by new technologies, the court encourages ongoing discussion and collaboration within the legal community to adapt effectively.

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*SUPERIOR COURT OF QUEBEC*

October 24, 2023

**NOTICE TO THE LEGAL COMMUNITY AND THE PUBLIC**

**Integrity of court submissions using large language models**

The potential manufacture of legal sources through large-scale language models[1] raises significant concerns. This opinion addresses the question of legal references in submissions to the courts, in the light of these issues. Our shared commitment to strengthening the integrity and credibility of judicial proceedings is crucial.

**Caution:** The Quebec Superior Court invites practitioners and litigants to exercise caution when referring to legal sources or analyses emanating from major language models.

**Reliability**: For any reference to case law, statutory text or commentary in court submissions, it is essential that parties rely exclusively on sources from court websites, commonly referenced commercial publishers or well-established public services.

**Human intervention**: To meet the highest standards of accuracy and authenticity, AI-generated observations must undergo rigorous human verification. This can be done by cross-checking with reliable legal databases to confirm that the references and their content stand up to scrutiny. Such an approach is in line with long-standing practice among legal professionals.

The Quebec Superior Court recognizes that new technologies present both opportunities and challenges. The legal community must adapt accordingly. As such, we encourage ongoing discussion and collaboration to address these issues effectively.

Marie-Anne Paquette
Chief Judge

Catherine La Rosa
Associate Chief Judge

Jean-François Michaud
Deputy Chief Judge

*Unofficial translation

# I. AI in the context of Quebec civil law

- Injury caused by AI can be assimilated as:
  - injury resulting from the autonomous act of a thing, in which case its custodian shall be held in liable (Art 1465 C.c.Q.)
  - and/or injury by reason of a safety defect in the thing, in which case its manufacturer or any person who distributes the thing or the supplier shall be held liable (Art 1468 C.c.Q.)

# II. Autonomous act of thing (1465 C.c.Q.) and Product Liability (1468 C.c.Q.)

— **Autonomous act of thing** (1465 C.c.Q.) and **Product liability** (1468 C.c.Q.) are two different concepts but can but applied simultaneously in the context of AI.

— There are several important differences between the two concepts and especially who will be held responsible and the effective means of exemption.

# II. Autonomous act of thing (1465 C.c.Q.) and Manufacturer's responsibility (1468 C.c.Q.)

| Autonomous act of thing | Manufacturer's responsibility |
| --- | --- |
| 1465. The **custodian of a thing** is bound to make reparation for injury resulting from the autonomous act of the thing, **unless he proves that he is not at fault.** | 1468. **The manufacturer of a movable thing** is bound to make reparation for injury caused to a third person by reason of a safety defect in the thing, even if it is incorporated with or placed in an immovable for the service or operation of the immovable.<br>The same rule applies to **a person who distributes the thing** under his name or as his own and to **any supplier** of the thing, whether a wholesaler or a retailer and whether or not he imported the thing. |

# Autonomous act of thing (1465 C.c.Q.)

- **Who?** There is a presumption that **the custodian of a thing** is at fault for injury resulting from the autonomous act of the thing, even if he is not the owner. (In the case of AI, it causes problem to identify who is the custodian of this thing.)
  - Rebuttable presumption: Said custodian can exonerate himself by refuting this presumption: he can prove that he did not commit a fault by establishing “that he took all reasonable means to prevent the fact which caused the injury” (J.-L. Baudouin, P. Deslauriers et B. Moore, La responsabilité civile, vol. 1, note 265, paragr. 1-982, p. 898)
- **Means of exemption : absence of fault**
  - The concept of fault: if any prudent and diligent person placed in the same situation would have acted like that person, then the person is not at fault.

# Product liability (1468 C.c.Q.)

- **Who?**
  - The manufacturer, the person who distributes the thing and the supplier.
- **Means of exemption :**
  - The absence of fault is not one of the means of defense available to the manufacturer sued under article 1468 C.c.Q. (*Imperial Tobacco Canada ltée c. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358 para 382)
  - The extra-contractual liability of the manufacturer, under article 1468 C.c.Q. is a liability without fault, a strict liability, subject only to the means of exemption of article 1473 C.c.Q. (or, potentially, article 1470 C.c.Q.). (*Desjardins Assurances générales inc. c. Venmar Ventilation inc.*, 2016 QCCA 1911)

# Is AI really a “thing” ?

- No application of these concepts yet to AI
- The existing legal framework that can be used to tackle AI:
  - C.c.Q.
  - C-1.1 - Act to establish a legal framework for information technology
  - Jurisprudence from other jurisdictions

# Example of AI

- **Text analyzing software**
  - The Superior court of Québec granted the application of the class action and condemned the attorney general of Canada to pay the Plaintiff and each class member for each translation contract to which the weighed word clause applied and that the software created fuzziness or miscalculation in the counting of already translated text and thus underpaid the contractor.

  *9069-3946 Québec inc. (Traduction Quattro) c. P.G. Canada* 2020 QCCS 1249

- **Trading bots or Automated Market Making**
  - Financial Markets Tribunal determined that AI was a tool and that the person who uses it to sell investments practices illegally as a broker in contravention of the LVM

  *Autorité des marchés financiers c. Gestion Itradecoins inc.* 2020 QCTMF 57; A*utorité des marchés financiers c. Coinex Global Limited*, 2023 QCTMF 75; *Autorité des marchés financiers c. XT.com Exchange* (XT Exchange et XT.com), 2023 QCTMF 62.

# Practical advice

- AI has entered many aspects of our society
- Before marketing a product, determine the nature of the product and its potential risks
- Identify the actors and the means of exemption in the event of litigation
- Additional decisions will be released soon and new laws and statutes regulating AI will soon come into effect

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# AI in Commercial Transactions

Barry Sookman

- AIA, AIDA (including uncertainty of what it will look like) and other laws ➔Sea change in contracting: regulatory compliance, norms, standards and evolving interoperable best practices for commercial transactions including:
  - Procurements, e.g., SAAS, service agreements, outsourcing, software licensing
  - AI model purchases and licenses
  - Supply chain ecosystems, developers, providers deployers and others in the AI value chain, flow down and flow ups
  - Consulting agreements
  - Customer agreements and services
  - Access to and uses of data for training
  - M&A

- Use of AIA and statutory frameworks to inform risks and standards e.g.
  - AI governance obligations including terms related risk management, data governance/hygiene, data quality,  accountability frameworks,  record keeping, logs, and technical documentation, testing and validation, bias, training, human oversight, mitigation of risks, cyber-security, robustness, reliability, monitoring and dealing with incidents
  - Risk level determinations (for compliance) e.g. high impact, high risk, automated decision-making systems
  - Compliance with general and AI specific laws including privacy and AIDA/AIA/other laws
  - Focus on bias/discrimination, safety, transparency and explainability, (including under privacy and AI laws)
  - Use of established and future standards e.g., ISO/IEC 42001:2023: (AI Management System)  NIST AI Risk Management Framework, ISO/IEC CD 27090 (cybersecurity)

- Use of AIA and statutory frameworks to inform risks and standards e.g.
  - Assurances and compliance verification
  - Allocations of responsibilities including deployers obligations
  - Allocations of risks of liability for fines
  - Limits of liability, disclaimers, indemnities
- All of this is over and above many other issues including:
  - Privacy protection
  - IP including copyright issues including rights to use training materials, re-use of materials by AI models, ownership and use inputs and outputs; EU AIA extra-territorial reach for GenAI training in foreign countries.
  - Confidentiality

# Further readings @ barrysookman.com

- Analyzing AIDA 2.0: the problems with the proposed amendments to AIDA
- Government proposals to amend AIDA: the challenges ahead Part 2
- Minister provides proposed amendments to AIDA
- AIDA's regulation of AI in Canada: questions, criticisms and recommendations
- Proposals to amend CPPA and AIDA: the good, the bad, and the challenges ahead Part 1
- Legality of search engines and AI systems under PIPEDA and CPPA: Google v Privacy Commissioner
- EU AIA: agreement on Europe's new AI regulatory opus
- AIDA: my appearance before the INDU Committee
- Resolving GenAI copyright infringement questions: 4 court decisions
- Do generative AI inventions and works qualify for patents and copyrights? The Thaler and SURYAST decisions
- Copyright and Generative AI: Understanding Recent Chinese Court Decisions
- Understanding the AIA Copyright Provisions in the EU Artificial Intelligence Act
- Exploring the Definitions of AI for Legal Purposes

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# Thank you.

## Contact us to discuss how our team can help you.


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# We appreciate your feedback