PULLING THE PLUG ON FEDERAL AI LAWS

The problem with the proposed amendments to *AIDA*

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Contents

Executive summary | *sommaire*

In 2022, the federal government led by Prime Minister Justin Trudeau introduced a deeply flawed and extremely troubling piece of legislation intended to deal with a relatively new but fast-growing field, Artificial Intelligence (AI).

AI is an incredibly complex technology with the potential to literally change the world – for better and for worse. Given the high stakes, Canada should certainly not rush headlong into adopting new regulations that potentially put it at odds with other leading nations. Indeed, while the European Union has enacted its own legislation that will undoubtedly influence countries around the globe, many G7 countries have rejected the EU regulatory approach opting instead for enhancing interoperable governance processes.

For Canada, the wisest choice would be to take a wait-and-see approach and follow the lead of the powerful and influential trading partners like the United States, the United Kingdom, and others.

Unfortunately, it appears that Canada is stubbornly intent on going its own way with regards to AI legislation. As part of Bill C-27, known as the *Digital Charter Implementation Act, 2022*, the federal government proposed to regulate "high-impact" AI systems under the *Artificial Intelligence and Data Act* (*AIDA*).

After *AIDA* was widely panned by a host of experts, François-Philippe Champagne, the minister of Innovation, Science, and Industry, eventually produced a letter that contained a series of proposed amendments to *AIDA* – essentially, a series of clarifications and new regulations that would be part of *AIDA* 2.0.

While the minister's letter helped clarify some of the issues with *AIDA*, the proposed changes are still problematic and very concerning.

Indeed, if enacted, the amendments would impose many new regulatory requirements never even hinted at when *AIDA* was first tabled. Furthermore, the amendments still fail to address many of the key criticisms levied against Bill C-27, and raise a host of new problems, including:

- The initial list of "high-impact" systems is too broad and gives no clear guidance on what the government intends to regulate.

- *AIDA* undermines parliamentary sovereignty by placing too much power into the hands of bureaucrats at Innovation, Science, and Economic Development Canada (ISED). Under the proposed legislation, ISED would be able to establish regulations and then enforce the regime by imposing shut-down orders and administrative fines, with no rights of appeal.

- The amendments too are vague with regards to "harms" associated with the initial list of AI systems to be regulated. The minister offered some guidance in his letter, but it has no legal effect and does not constrain what can be regulated.

- *AIDA* increases bureaucratic confusion and enables ISED to potentially interfere in the jurisdictions of other government departments and agencies.

Moreover, *AIDA* threatens to hinder Canada's innovation ecosystem. We must recognize that AI will be essential to Canada's economic and security. A policy failure in this area could be catastrophic and plunge Canada into a third world-nation status. We cannot afford to get things wrong with AI.

Since most G7 countries are still debating the best ways to regulate AI, and since the agreed to G7 approach is to achieve interoperability in governance frameworks, the prudent choice for Canada would be to take a "wait-and-see" approach. There is simply no need for a middle country like Canada to move at breakneck speed to enact a law that could and likely will be out of step with those of our major trading partners – particularly when there has been scant public consultation and debate in Canada about how AI systems should be regulated.

Unfortunately, *AIDA*, as introduced into Parliament, is nothing but a shell of a law. It passed first and second reading in that form. And now, the committee that is studying the legislation has concluded its hearings and has already started a clause-by-clause review of Bill C-27.

The committee is now faced with assessing new amendments in a very short period that will regulate one of the most transformative technologies of our time. What Parliament does to regulate AI could have far-reaching implications on public safety and other potential harms and on innovation. We must get this right. This means taking adequate time for all stakeholders to properly assess the policy and technical aspects of amendments. **MLI**

En 2022, le gouvernement fédéral dirigé par le premier ministre Justin Trudeau a présenté une mesure législative profondément lacunaire et déconcertante sur un domaine relativement nouveau, mais en pleine expansion, l'intelligence artificielle (l'IA).

L'IA est une technologie extraordinairement complexe qui peut littéralement transformer le monde   pour le meilleur et pour le pire. À cause des enjeux majeurs qui en émergent, le Canada ne devrait certainement pas s'engager sans réfléchir dans de nouvelles réglementations qui pourraient le placer en porte-à-faux avec d'autres

grands pays. En effet, tandis que l'Union européenne a adopté sa propre loi, laquelle influencera sans aucun doute les pays du monde entier, de nombreux pays du G7 ont rejeté l'approche réglementaire de l'UE en choisissant plutôt de renforcer les processus de gouvernance interopérables.

Pour le Canada, la décision la mieux avisée serait d'adopter une approche attentiste et de s'inspirer des orientations de partenaires commerciaux puissants et influents comme les États Unis, le Royaume-Uni, et d'autres pays.

Malheureusement, le Canada semble s'entêter à suivre sa propre voie en matière de loi sur l'IA. Dans le cadre du projet de loi C-27, connu sous le nom de Loi de 2022 sur la mise en œuvre de la Charte du numérique, le gouvernement fédéral propose de réglementer les systèmes d'IA « à incidence élevée » en vertu de la Loi sur l'intelligence artificielle et les données (LIAD).

Comme la LIAD a été condamnée de façon générale par une multitude d'experts, François Philippe Champagne, ministre de l'Innovation, des Sciences et de l'Industrie, a fini par rédiger une lettre contenant un ensemble de propositions d'amendements à la LIAD – essentiellement divers éclaircissements et de nouveaux règlements dans le cadre d'une LIAD 2.0.

Bien que la lettre du ministre ait contribué à clarifier certaines questions liées à la LIAD, les modifications proposées demeurent problématiques et très préoccupantes.

En effet, s'ils étaient adoptés, les amendements imposeraient de nombreuses nouvelles exigences réglementaires qui n'ont même jamais été évoquées lorsque la LIAD a été présentée pour la première fois. En outre, les amendements ne répondent toujours pas à plusieurs critiques cruciales envers le projet de loi C-27 et soulèvent une série de nouvelles difficultés, notamment les suivantes :

• La liste initiale des systèmes « à incidence élevée » est trop large et ne donne pas d'indications claires sur ce que le gouvernement entend réglementer.

• La LIAD porte atteinte à la souveraineté parlementaire en accordant trop de pouvoirs bureaucratiques à Innovation, Sciences et Développement économique Canada (ISDE). Dans la loi proposée, on confie à ISDE la responsabilité d'élaborer les règles et de contrôler l'application du régime au moyen d'ordonnances d'arrêt et d'amendes administratives, sans droit d'appel.

• Les amendements sont également trop vagues en ce qui concerne les « préjudices » associés à la liste initiale des systèmes d'IA devant être réglementés. Le ministre a offert quelques indications dans sa lettre, mais elles n'ont aucune portée juridique et ne limitent pas ce qui peut être réglementé.

• La LIAD accroît la confusion bureaucratique et confère à ISDE une capacité d'ingérence dans les champs de compétences d'autres ministères et agences gouvernementales.

En outre, la LIAD risque de perturber l'environnement de l'innovation au Canada. Il est essentiel de réaliser l'importance de l'IA pour l'économie et la sécurité du Canada. Un

échec politique dans ce domaine pourrait être désastreux et réduire le Canada au rang de nation du tiers monde. On ne peut se permettre de commettre des erreurs en matière d'IA.

Puisque la majorité des pays du G7 débattent encore des meilleurs moyens de réglementer l'IA et que l'approche convenue au sein du G7 est d'atteindre l'interopérabilité dans les cadres de gouvernance, il est donc logique que le Canada adopte une approche « attentiste ». Il est manifestement inutile qu'un pays intermédiaire comme le Canada adopte à toute vitesse une loi qui pourrait ne pas être et ne sera probablement pas au diapason avec celles de nos principaux partenaires commerciaux   en particulier puisqu'il y a eu peu de consultations et de débats publics au Canada sur la façon de réglementer les systèmes d'IA.

Malheureusement, la LIAD, telle qu'elle a été présentée au Parlement, n'est rien d'autre qu'une coquille vide. C'est sous cette forme qu'elle a été adoptée en première et deuxième lecture. Et maintenant, le Comité qui étudie la mesure législative a terminé ses audiences et a déjà commencé un examen article par article du projet de loi C-27.

Le Comité se voit maintenant dans l'obligation de procéder, dans un délai très court, à l'examen de nouveaux amendements qui réglementeront l'une des technologies les plus transformatrices de notre époque. Ce que le Parlement fera pour réglementer l'IA pourrait comporter des incidences considérables sur la sécurité publique et d'autres préjudices potentiels, ainsi que sur l'innovation. On doit faire les choses correctement. Cela signifie qu'il faut laisser suffisamment de temps à toutes les parties prenantes pour évaluer correctement les aspects politiques et techniques des amendements. **MLI**

Introduction

In 2022, the Liberal government led by Prime Minister Justin Trudeau introduced a deeply flawed and extremely troubling piece of legislation intended to deal with a relatively new but fast-growing field, Artificial Intelligence (AI).

As part of Bill C-27, known as the *Digital Charter Implementation Act, 2022* (Parliament of Canada 2021), the government proposed to regulate "high-impact" AI systems (Sookman 2022; Sookman 2023) under the *Artificial Intelligence and Data Act* (*AIDA*) (Sookman 2023a; Government of Canada 2024).

Following significant and sustained criticism of *AIDA* – and after the Standing Committee on Industry and Technology (INDU) insisted that Innovation, Science, and Industry Minister François-Philippe Champagne table amendments to AIDA the minister stated were available – Champagne provided INDU with a letter that provided an overview of the proposed amendments and a draft of the amendments in Annex A (Sookman 2023b; Minister of Innovation, Science, and Industry 2023).

While the amendments provide more clarity on what the government intends with respect to *AIDA* 2.0, the proposed changes are still problematic and very concerning.[1]

The proposed amendments to *AIDA* are extremely significant and, if enacted, would impose many new regulatory requirements never even hinted at when *AIDA* was first tabled. Further, the amendments still fail to address many of the key criticisms levied against the Bill and raise a host of new problems.

In summary and as explained more fully below:

- One of the key criticisms of AIDA was that it was not "intelligible." I contend that it was an affront to parliamentary sovereignty. I stated this during an appearance before the INDU Committee in November 2023, and wrote about it in prior articles (Sookman 2023c). Champagne has attempted to overcome these widely held criticisms by providing a list of initial high-impact systems to be regulated, and by providing criteria to govern what AI systems can be added. However, the substance of these criticisms is left unaddressed for the following reasons:
   - The initial list of high-impact systems is extremely broad. One cannot discern from reading Annex A what the government really intends to regulate. Further, there is no requirement for any harm associated with the initial list of AI systems to be regulated. The minister provided some guidance on what is intended to be regulated (Minister of Innovation, Science, and Industry 2023), but this guidance has no legal effect and does not constrain what can be regulated.
   - Champagne's letter contains factors that must be considered when designating new systems as high-impact systems. But the factors mentioned are not conditions and do little to constrain what can be regulated. Further, the list of factors omits essential considerations such as the effects of the proposed regulations on trade or innovation and interoperability with the laws of our trading partners.
   - All the key obligations that will apply to high-impact systems, general-purpose systems, and machine learning models are to be established by regulation. However, there are no guiding principles that set out any parameters that must be met in establishing the regulations. As such all essential decisions regarding how AI systems will be regulated are not directly or indirectly made by or guided by Parliament.
- *AIDA* still reflects a centralized and inefficient regulatory and governance regime that leaves all authority under *AIDA* to Innovation, Science, and Economic Development Canada (ISED) and provides no means of enhancing sectorial regulation of AI systems. This includes establishing the regulations, enforcing the

regime including with shut down orders and imposing not yet established – and likely disproportionate – administrative monetary penalties, with no rights of appeal. Penalties for offences can result in a fine of up to $25,000,000 and 5 percent of the person's gross global revenues. (Sookman 2023d).

- The *AIDA* amendments do nothing to make the AI and Data Commissioner independent from ISED.

- The *AIDA* amendments are not compatible with the proposed regulatory regimes in the United States, or the European Union's *Artificial Intelligence Act* (European Union 2024). For example, *AIDA* would regulate some general-purpose AI systems not regulated in the EU or the US. It would also regulate machine learning models in circumstances in which they would not be regulated in the EU. And it would regulate content prioritization and moderation, something also not regulated under the EU's *AI Act*.

- Unlike under the *AI Act*, the *AIDA* amendments continue to ensnare whole ecosystems of AI model developers – including researchers, data scientists, and developers of open-source models.

- *AIDA* will very likely impede innovation and adoption of AI systems. If Canada doesn't get AI policy right, we risk a third world economic collapse.

- *AIDA* had very limited public debate prior to its introduction and the policy questions associated with *AIDA* (and the amendments) have not been and cannot be adequately assessed and debated in the mad rush to enact a law to regulate AI, whatever that law may be. It is possible that the government can explain and justify some of these apparent flaws in *AIDA*. However, it is doubtful that the appropriate study and debate can occur at the INDU Committee, especially now that Bill C-27 has started clause-by-clause review on April 8, 2024, even assuming that is the appropriate place for the study and debate to start.

- *AIDA* will lock Canada into a specific type of governance framework. It is premature to move Canada in this direction, particularly because other G7 nations are still studying the best way to regulate AI and have committed to interoperable governance frameworks. Canada

cannot achieve this without further collaboration with our other G7 partners (The White House 2024).

AIDA's many flaws are described below.[2]

"High-impact" AI systems to be regulated by *AIDA*

Initial list of high impact systems

In the minister's letter sent to the INDU Committee, Champagne provided a list of the proposed AI systems to be regulated under AIDA. The proposed amendments would now expressly permit the regulation of any of those systems as "high-impact" AI systems.

I provided an overview of those system in a blog post titled "Government proposals to amend *AIDA*: the challenges ahead Part 2" (Sookman 2023). As summarized in that post, the list is vague and is broader than similar categories that will be regulated by the EU's *AI Act*. Champagne provided a summary in Annex B to his letter explaining the justifications for each class. However, other than explaining that the classes are somewhat narrower than they appear to be – because they do not, unfortunately, apply directly to the public sector – the classes are still very broad.

Moreover, initial AI systems to be regulated are deemed to be "high-impact" with no requirement for any risk of harm to trigger regulations, thus potentially resulting in regulation that cannot be justified based on a standard that trades off the benefits of regulation with the adverse impacts on costs of compliance and innovation.

But, even if *AIDA* was amended to require that they likely cause harm before they could be regulated, even the slightest physical or psychological harm to an individual (including potentially "hurt feelings"), damage to an individual's property, or any economic loss to an individual, would meet the threshold.

Here are some examples showing the potential breadth of the initial "high-impact" systems, which as can be seen contain no threshold for risk of harm.

- **Determinations in respect of employment:** This category includes any AI systems involved in the entire lifecycle of employment, from recruitment to termination. Given that AI can be used for resume screening, job matching, performance analysis, and many other HR functions, the potential applications are vast. Almost any AI tool used by employers or employment services could be included.

- **Determination of service provision:** This could apply to any AI system that decides eligibility, type, or cost of services ranging from insurance, banking, and consumer and online services, to any federal, provincial, or municipal government service that uses AI systems made available from companies. It is particularly wide-ranging because "services" is a very inclusive term covering indefinite classes of industries and public services, many of which are already or could be regulated by a variety of human rights and employment laws as part of an overall regulatory scheme and not, as *AIDA* does, isolated attempts to regulate a technology divorced from the overall regulatory scheme and context.

- **Moderation and prioritization of online content:** This extends to AI systems that filter, rank, or recommend content on platforms such as social media, search engines, or any digital service that curates or moderates content. Considering the prevalence of personalized feeds and content filters, this could affect a wide array of platforms. The regulation of content moderation and prioritization is not subject to regulation under the EU's *AI Act*. Further, as noted in a prior blog post (Sookman 2023), this category is broad enough to conflict with regulation of online harms, and because of the need to balance these goals with freedom of speech rights, should be, but is not, separately regulated through the just tabled *Online Harms Act*. To be clear, I believe that misinformation propagated and prioritized over digital platforms poses one of the greatest risks to society and our democracies. However, any such regulation should be done by Parliament as part of the democratic process of balancing the urgent need to protect the public and protect freedom of speech.

- **Health care or emergency services:** Excluding specific devices covered by the *Food and Drugs Act*, this would still include AI

systems used in diagnostics, treatment recommendations, patient prioritization, or resource allocation in emergencies. Health care AI applications are diverse and evolving rapidly, making this category exceptionally broad and many of such systems are already regulated at the provincial level. Further, regulation at the federal level would leave unaddressed in-province developed AI systems potentially creating a scatter gun approach to health care regulation.

- **AI systems used by courts or administrative bodies:** This involves AI used in legal or administrative decision-making, which could range from risk assessment tools to automated decision systems used in areas from immigration to welfare eligibility. This category is also very broad and cuts across federal, provincial, and municipal bodies. As Canadian legal expert Teressa Scassa observed in her blog – which examined the initial list of AI systems – this category "is confusing because it identifies the context rather than the tools as high-impact." She notes that this class "should perhaps be reworded to identify tools or systems as high-impact if they are used to determine the rights, entitlements, or status of individuals."

- **Assistance to peace officers:** Any AI system that helps in law enforcement activities falls under this category. This could include predictive policing tools, facial recognition systems, or data analysis tools used in investigations.

The breadth of these categories suggests that the government is taking the widest possible berth of subject matter. However, the expansiveness of the language makes it difficult to discern what will really be regulated. Moreover, these broad categories are not limited by the principles that apply to the designation of new AI systems (discussed below). As a result, there are still no guardrails limiting what, within these broad classes of systems, will be regulated.

The breadth of these categories will pose a challenge for AI developers, deployers, and users who will not be able to assess when *AIDA* is enacted whether their AI systems will become subject to regulation or how they will be regulated. This uncertainty will be especially prevalent until the actual regulations are finalized. This could unnecessarily chill innovation in Canada including by companies that may be apprehensive of making their systems available to Canadians.

If the government knows what it really wants to regulate initially, it should refine the categories before *AIDA* is enacted. If, as may be the case, the government isn't sure what it really wants to regulate, there should be no rush to pass *AIDA* 2.0. The public is entitled to understand what exactly is intended and to debate *AIDA* 2.0 on the merits before it is enacted.

Additional high-impact systems that could be regulated

Under a new section in *AIDA 2.0*, the Governor-in-Council may, by regulation, add, vary, or delete a class or subclass of uses. In making a regulation, the Governor-in-Council must consider:

- the risk of adverse impacts that the class or subclass of uses of artificial intelligence systems may have on the economy or any other aspect of Canadian society and on individuals, including on individuals' health and safety and on their rights recognized in international human rights treaties to which Canada is a party;
- the severity and extent of those adverse impacts;
- the social and economic circumstances of any individuals who may experience those adverse impacts; and
- whether the proposed new uses are adequately regulated under another Act of Parliament or an act of a provincial legislature.

The addition of factors that should be considered when designating new AI systems as being "high-impact" is a significant improvement to Bill C-27. Notably absent from the list, however, are factors that would also consider whether these systems are being subject to like regulation among Canada's trading partners, the economic or trade impacts of regulating the AI systems, and the potential effects on innovation.

Another problem with these amendments is that they are only considerations that need not be given any weight. For example, there is nothing prohibiting ISED from regulating an AI system that is adequately regulated under another Act of Parliament, a provincial legislature, or a municipal government.

Further, the list of considerations provides little practical limitations on types of AI systems that could be regulated as high-impact systems. New AI systems could be regulated with no risk of harm to the public – and with no oversight by Parliament.

AIDA still reflects a centralized and inefficient regulatory regime

As many critics of *AIDA* have argued, a fundamental flaw in the proposed legislation is its centralized model that leaves all regulation of AI systems to be regulated by ISED. This is both inefficient and ineffective.

The government may argue that it has overcome this criticism because before a new AI system can be added the *AIDA* only requires considering whether the new use is adequately regulated under another Act of Parliament or an act of a provincial legislature. However, this addition does not correct *AIDA*'s fundamental flaws.

First, the new addition is only a "factor" and is not a precondition to the addition of a new class of AI system that could be regulated. Thus, it does not prevent ISED from usurping regulatory authority over the AI system from another federal or provincial regulatory authority or agency.

Second, even if the additional language was changed to be a condition, the proposal would still be an inefficient and ineffective way of dealing with AI systems that are not adequately regulated by another regime. The best regulatory model is a hub-and-spoke model that uses existing regulatory agencies and tools. If an existing agency that regulates a sector is not doing so adequately, it makes little sense to shift that regulatory authority to ISED. The much better approach is to provide the tools and knowledge to the agency to upgrade the regulation of the industry – but *AIDA* does not enable this. By way of example only:

- If Health Canada is not, in the sole opinion of Minister Champagne, adequately regulating medical devices under the *Food and Drugs Act*, *AIDA* would not permit the Minister of Health to enact further regulations to regulate medical devices. Instead, this regulation would need to shift to ISED, dividing up the regulation of medical devices.

- If Minister Champagne determined that other federal or provincial departments and ministries were not adequately regulating autonomous vehicles, the increased regulation would shift to ISED. This may, in fact, be part of what ISED envisages, as "autonomous driving systems" were specifically identified in the government's

Artificial Intelligence and Data Act (AIDA): Companion Document as AI systems of interest to ISED (Sookman 2023e).

- If ISED believes that financial institutions such as banks and insurance companies or credit unions are not being adequately regulated by the federal Office of the Superintendent of Financial Institutions (OSFI) or provincial counterparts, it could take over their regulation. This appears to be exactly what the government plans with its intention to regulate determinations in relation to services. Yet, OSFI and other regulators are much better placed, and know far more about financial institutions, than ISED when it comes to regulating financial institutions.

Third, the regulation of bias and discrimination using AI systems is now being grabbed by ISED rather that leaving it with Canadian Human Rights Commission and similar agencies across the country. In fact, the predominate focus of the initial list of AI systems involves regulating them for bias and discrimination. Yet, the proposal is to leave this to ISED rather than to commissions and bodies with expertise in dealing with these issues. This is a fundamental flaw in *AIDA* that likely cannot be fixed with new amendments. As I have argued in prior blog articles, *AIDA* unnecessarily divides the regulation of bias and discrimination. The much better approach is to have bias and discrimination issues addressed under the *Canadian Human Rights Act*. If amendments or regulations under that act are needed, this should be done, and should fall under the jurisdiction of the Minister of Justice and not the Industry Minister.

It may be argued that these federal and provincial agencies and commissions do not have the expertise or resources to regulate AI systems, including to address bias and discrimination at the design and development stage, or to engage in ongoing monitoring. This is expertise that will need to be developed and adequate resources invested to perform these activities. In my view, this expertise and resource building should be invested to build up – and keep in one place – the fight against bias and discrimination, whether visited upon the public by algorithms or human beings.

The same is true in other areas. If, for example, Health Canada needed additional expertise to regulate medical devices that use AI, this expertise should be built up within Health Canada. It has extensive experience in understanding the medical device ecosystem and it would be in a far better

position to continue to regulate medical devices with that bolstered expertise than ISED.

Fourth, the *AIDA* amendments do nothing to realistically make the AI and Data Commissioner independent from ISED.

Fifth, there is no basis to believe that ISED has the knowledge, experience, or personnel capable of regulating the multiplicity of applications and technologies that AI systems will pervade.

Sixth, the current proposal will likely require massive hirings by ISED, whose personnel will need to learn about a variety of sectors. The far better approach is the hub-and-spoke model that builds and enhances existing agency capacity. This makes the regulation part of, and work with, an overall regulatory regime that considers the goals and regulatory balances of the applicable law or regulatory regime.

Seventh, Canada has committed to collaborate with our G7 partners to "step up our efforts to enhance interoperability amongst our AI governance approaches to promote greater certainty, transparency, and accountability, while recognizing that approaches and policy instruments may vary across G7 members." While the EU had adopted a new AI law, this approach has been rejected by the UK, and so far, by the US. We simply cannot ensure interoperability until there are further international developments in AI governance frameworks.

AIDA lacks guiding principles

One of the key criticisms of *AIDA* was its affront to the principle of parliamentary sovereignty. Minister Champagne attempted to overcome this widely held criticism by providing a list of initial high-impact systems to be regulated and by providing criteria to govern what AI systems can be added. However, the substance of these criticisms is left unaddressed because, as noted above, the initial list of high-impact systems is extremely broad, and one cannot discern from reading Annex A what the government could regulate. The guidance in Annex B is helpful, but this guidance has no legal effect and does not constrain what can be regulated.

Further, and as noted above, Champagne's letter contains factors that must be considered in designating new systems to be high-impact systems. These factors do not apply to the initial list of classes that will be regulated. Moreover, since these factors are not conditions, they do little to constrain what can be regulated.

Beyond this, the proposed amendments do not address another key issue – that the regulations that will apply to high-impact systems (and general-purpose systems and machine learning models that will also be regulated by *AIDA* 2.0) will not be constrained or guided even by general principles.

Thus, the minister has virtually unconstrained authority to regulate the most fundamental technologies of the generation without any Parliamentary control or oversight, whether direct or indirect, via guiding principles (other than for the addition of new AI systems that can be regulated).

During my appearance before the INDU Committee (Parliament of Canada 2023), I mentioned examples of guiding principles that are in the draft UK AI bill. I also wrote about them in blog posts (Sookman 2023f, 2023g). The failure to include at least principles to guide the regulatory process is still a major flaw in *AIDA*.

AIDA may stifle innovation and adoption of AI

The government wants to rush ahead with *AIDA*. It wants to do this even before there is any international consensus on the best ways to promote public safety and prevent harms while promoting innovation. This includes identifying the best regulatory model that can include a mixture of voluntary compliance, reliance on and promoting best practice management standards such as the recent ISO/IEC 42001:2023 standard (ISO 2024), enforcing existing laws and leveraging existing regulatory models, or enacting a horizontal law – a one size fits all – regulatory framework, which is *AIDA* 2.0.

The government has emphasized that its regulatory approach is similar to the EU's *AI Act*. One can see this in the recent proposed amendments dealing

with GPAIs and the initial list of AI systems to be regulated. However, despite this and as illustrated below, there are major differences between what *AIDA* could regulate and what is covered by the EU *AI Act*, including the initial systems to be regulated and the proposals with respect to GPAI and machine-learning models. It also goes well behind regulation of AI systems in the US or the UK.

It is risky for a middle-power nation like Canada to set rules that are inconsistent with and more stringent than those of our trading partners. It is also out of step with our commitments to our G7 partners.

We must realize that *AIDA* will not only apply to Canadian organizations. Foreign entities seeking to make available or manage AI systems will have to navigate the Canadian rules. The territorial scope of *AIDA* will be assessed under the real and substantial connection test, a test adopted consistently by the Supreme Court of Canada and other courts including in the privacy context (Sookman 2023j).

AIDA will therefore apply to all the AI actors regulated by *AIDA*, which include persons that make high-impact systems or GPAI systems available or manage their operations, and persons who make available machine learning models for incorporation into a high-impact system, as long as those activities occur in the course of international or interprovincial trade or commerce.

> AIDA*'s scope, therefore, could impact whole international ecosystems of persons and entities.*

AIDA's scope, therefore, could impact whole international ecosystems of persons and entities. It will impose new governance obligations to which they may not otherwise be required to adhere. For example, it would impose obligations on open-source developers of GPAI and machine learning, domestic and foreign, which because of their decentralized organization may impose impractical barriers (Raden 2023), though under the EU *AI Act* providers of free and open-source models are exempted from most of obligations (Sookman 2023i).

While there are obvious benefits to protecting the public from harms visited on them by out-of-Canada AI actors, we can't ignore concerns about *AIDA* potentially hindering deployment of AI systems in Canada because the rules are out of step with those of our largest trading partners.

The regulatory framework governing AI will undoubtedly also affect investment in Canada in AI infrastructure and skills. While the EU is pressing ahead with legislation – a law that may put EU start-ups at a competitive disadvantage (Thornhill 2023), according to a recent report quoting from the UK Secretary of State – the UK has confirmed that it will not legislate on AI until the timing is right to avoid stifling innovation (Donovan 2023). The UK is working hard to understand the risks and is taking an evidence-based approach and will not "lurch to legislate" having "seen the impact that that can have." This may well be the reason that Microsoft will spend £2.5 billion (US $3.2 billion) to expand its next generation AI datacentre infrastructure in the UK and not the EU (Smith 2023) and, in part, may be why the UK is the tech hub of Europe with an ecosystem worth more than that of Germany and France combined (Hughes 2023).

Moreover, AIDA threatens to hinder Canada's innovation ecosystem. We must recognize that AI will be essential to Canada's economy and security. A policy failure in this area could be catastrophic and plunge Canada into a third-world-nation status. We cannot afford to get things wrong with AI.

As pointed out in a recent article (Corbeel 2023), the approach countries take to regulating AI can significantly affect their competitive advantages:

> The regulatory approaches nations adopt for Artificial Intelligence (AI) can significantly influence their trajectory in the global order. Countries that eschew stringent AI regulations are posited to gain a competitive edge, potentially spearheading innovations and setting international AI benchmarks. This paradigm shift could allow for a more agile integration of AI in critical sectors, fostering environments where technological breakthroughs are not impeded by protracted legislative processes.

Regulation of general-purpose systems

The Minister's proposed amendments would now introduce changes to regulate a new class of AI systems called "general-purpose systems." A general-purpose system is defined as: 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.

This new category of AI system – which is subject to many new regulatory requirements – is extremely broad and open ended. This sweepingly wide definition would regulate not only potentially high-risk AI systems but many low or no risk systems, potentially subjecting whole ecosystems of foundation models and generative AI systems to unnecessary and disproportionate regulation, and to regulation of systems not subject to regulation in other jurisdictions like the US or EU under the *AI Act* (Sookman 2023h).

There is currently no international consensus on the question of what types of general-purpose AI systems should be regulated or how they should be regulated. However, our trading partners have not proposed anything as extensive as what is being proposed in *AIDA* 2.0.

The US Executive AI Order instructs federal agencies to develop security and safety standards for certain artificial intelligence applications (The White House 2023). The order focuses on "dual-use foundation models," which the order defines as powerful general-purpose models that present significant security risks. The order defines "dual-use foundation models" as meaning:

> AI model that is trained on broad data; generally uses self-supervision; contains at least tens of billions of parameters; is applicable across a wide range of contexts; and that exhibits, or could be easily modified to exhibit, high levels of performance at tasks that pose a serious risk to security, national economic security, national public health or safety, or any combination of those matters, such as by:
>
> (i) substantially lowering the barrier of entry for non-experts to design, synthesize, acquire, or use chemical, biological, radiological, or nuclear (CBRN) weapons;
>
> (ii) enabling powerful offensive cyber operations through automated vulnerability discovery and exploitation against a wide range of

potential targets of cyber attacks; or

(iii) permitting the evasion of human control or oversight through means of deception or obfuscation.

The final definition in the EU *AI Act* of general-purpose AI (GPAI) models is:

an AI model including when trained with a large amount of data using self-supervision at scale, that displays significant generality and is capable to competently perform a wide range of distinct tasks regardless of the way the model is released on the market and that can be integrated into a variety of downstream systems or applications.

As can be seen, the definition of GPAI models in the EU *AI Act* is much narrower than the proposed definition in *AIDA*. It contains concepts that require training with a large amount of data, using self supervision at scale, that displays significant generality and is capable to competently perform a wide range of distinct tasks. GPAI models that could pose systemic risks are subject to more substantive regulation in the EU because they are very capable or widely used. Initially, these are general purpose AI models that were trained using a total computing power of more than 10^{25} floating point operations (known as FLOPs, it refers to how many operations a computer can perform per second). The threshold, which can be updated, is designed to capture the currently most advanced GPAI models, namely Open AI's GPT-4 and likely Google DeepMind's Gemini. The distinction between GPAI models (which carry a lower level of regulatory compliance) and those that carry systemic risks was agreed to in the EU to avoid over regulation of GPAI models, something about which Italy, Germany, France, and others were particularly concerned (Bertuzzi 2023, Chee 2023).

Under *AIDA* 2.0 there would be numerous obligations on persons that make GPAI models systems available or who manage their operations. No distinction is made in the regulatory obligations between systems that carry little, if any, risk (which would not be subject to any regulation in the US or EU), those that may carry some or limited risk, and those that may have systemic risk. The impact of the proposed regulatory regime, summarized in my blog (Sookman 2023g), will likely result in disproportionate regulation that could well impede innovation and Canadian access to some GPAI models.

Regulation of machine learning models

The minister's proposed amendments would now also introduce amendments to regulate a new class of AI systems called "machine learning models."

These amendments are also very concerning. Machine learning models are fundamental components of AI technology, used widely across industries and developed by a diverse range of entities. They serve as the backbone of many AI applications, including image recognition, natural language processing, recommendation systems, autonomous vehicles, and more.

Machine learning models are developed by, among others, academic institutions and research organizations, tech companies like Google, Facebook, Microsoft, and Amazon, start-ups that focus on developing specialized machine learning models for specific applications or industries, and individual researchers and data scientists who may, for example, create machine learning models for personal projects or open-source contributions.

Machine learning models are made available through many different means. These include open source through platforms such as GitHub, commercial products or offerings, models that are integrated into AI development frameworks, and cloud service providers that offer APIs (application programming interfaces, a type of "software intermediary" that helps applications to talk to each other) for various machine learning models enabling developers to integrate them into their applications.

The government's proposal to regulate machine learning models would apply to all persons who make such models available for use for the first time for incorporation into a high-impact system during interprovincial trade and commerce. This is, effectively, regulation of a technology, rather than an application. As summarized in my blog (Sookman 2023g), it would create obligations on whole ecosystems of developers including individual researchers and data scientists.

The decision to regulate machine learning models per se is a major departure from the approach being taken in the EU under the *AI* Act, which does not directly target models themselves (*Forbes* 2023). Instead, it will seek to regulate the people and the processes for how organizations deploy their AI use cases, based on the risk classification associated with the AI system.

AIDA may intrude on or overlap with provincial jurisdiction

AIDA's breadth will inevitably intrude into, or significantly overlap with, provincial jurisdiction. *AIDA* tries to limit its scope to activities carried out during international or interprovincial trade and commerce. Yet, the reality is that AI systems including machine learning models will ubiquitously be included in products and services that will invariably and almost universally cross provincial and national borders or be offered or managed from public clouds that are accessible throughout Canada. Even the initial list of AI systems to be regulated such as AI used in employment, to offer services, or for healthcare are matters that frequently fall into provincial jurisdiction.

Parliament has enacted comprehensive regulatory schemes before based on its trade and commerce powers. This has been the basis for federal laws on competition policy, bankruptcy and insolvency, intellectual property and for consumer protection including regulation of medical devices and dangerous consumer products. Parliament has increasingly been expanding its jurisdiction over digital technologies bolstered by the interprovincial and international uses of network-based technologies. Examples are the *Personal Information Protection and Electronic Documents Act* and Canada's anti-spam legislation (Sookman 2017), and now the *CPPA* and *AIDA*.

The government will undoubtedly defend its jurisdiction to enact *AIDA* based on its trade and commerce power pointing to the need to regulate AI systems that could cause harm. However, while *AIDA* has a definition of harm, there is a complete absence of any materiality threshold, which may call into question the need for a national law that could potentially regulate a ubiquity of products and services, whether they pose a likelihood of harm or not.

These developments are bound to result in challenges to jurisdiction and calls for a reformulation of the principles applied to federal provincial division of powers to consider the expansive and intrusive potential of digital delivery of products and services. *AIDA* well be the basis for this challenge. Parliament has never tried to regulate a specific and ubiquitous technology (such as electricity or the micro chip), thus raising real questions as to how the trade

and commerce power would be interpreted by the Supreme Court if *AIDA* is challenged on constitutional grounds.

Even if *AIDA* will not tread onto provincial jurisdiction, or depending on the applicable regulations, always do so, the government has not published anything on how the overlaps in regulatory authority will be coordinated. This is no small issue considering just that the initial list of AI systems predominantly will regulate activities currently subject to provincial regulation.

New transparency obligations

The *AIDA* amendments include a new transparency obligation that would require individuals to be informed when an AI system is being used in certain circumstance. New Section 6 would read as follows:

Informing individuals of artificial intelligence system

6 (1) If it is reasonably foreseeable that, in the circumstances, an individual communicating with an artificial intelligence system could believe that they are communicating with another individual, the person who manages the system's operations must ensure that the system, without delay, clearly advises the individual that they are communicating with an artificial intelligence system.

Exception — physical product

(2) The person need not comply with subsection (1) if

- ◉ the system is a consumer product, as defined in section 2 of the *Canada Consumer Product Safety Act*;
- ◉ every individual using the system needs to use a physical product to communicate with it; and
- ◉ a written statement is placed prominently on each such physical product or its packaging stating that, in using the product, the individual is communicating with an artificial intelligence system.

There are also proposed transparency obligations in connection with GPAI systems. In particular, before a GPAI system is made available to the public the person who makes it available for the first time must ensure that "best efforts have been made so that members of the public, unaided or with the assistance of software that is publicly available and free of charge, are able to identify the output as having been generated by an artificial intelligence system," and "all measures prescribed by regulation have been taken so that members of the public are able to identify the output as having been generated by an artificial intelligence system."

The new transparency obligation addresses current ethical considerations ensuring that individuals are aware when they are communicating with an AI system. As AI systems become more sophisticated and indistinguishable from human operators, this transparency could become crucial for maintaining trust in digital ecosystems.

While this goal may be laudable and have positive benefits, it could also be impractical or difficult given the state of the art of watermarking and the pervasive use of AI in products. First, as international IT law expert Martin Ebers pointed out (Ebers 2024), watermarking techniques still have technical limitations and drawbacks in terms of technical implementation, accuracy, robustness, and standardisation. Second, the sheer volume and variety of AI interactions may make it difficult to enforce consistently. Users frequently encounter AI in contexts where such disclosure may interrupt or complicate the interaction. Third, as AI becomes more integrated into daily life, its presence in these interactions could become so commonplace that users may not require or even appreciate constant reminders that they are not interacting with a human. This obligation could potentially lead to "warning fatigue," where users become desensitized to the notifications.

The need for this new transparency obligation may be rooted in a historical bias against AI, where there is a clear distinction between human and machine interaction. This bias may reflect concerns about deception or the authenticity of interactions. However, as AI systems improve and public familiarity with them grows, societal norms are likely to evolve, and interactions with AI systems could become as accepted as interactions with human-operated systems. Consumers may come to understand and accept that many routine communications are AI-powered, considering them a standard part of the technological landscape.

A way of addressing these concerns could be to add the possibility of further exceptions in Section 6(2) should these concerns materialize.

The transparency obligations also do not include the protection for copyright owners under the EU *AI Act*. Although the final text is not yet available, the compromise agreement reached in the EU would include a newly introduced article on "Obligations for providers of general-purpose AI models." This would include two distinct requirements related to copyright.

The new transparency provisions in *AIDA* 2.0 also do not address the harms associated with the use of individuals' names, likeness, or voice by AI systems that are increasingly being used to disseminate fake audiovisual images including pornographic videos, or used for cyberbullying, the circulation of false information about the individual, and other types of deepfake recordings and videos. These are threats increasingly being visited upon public figures and celebrities as well as ordinary individuals.

AIDA will create duplicative regulatory regimes and contain disproportionate penalties

I explained in a prior blog post (Sookman 2023a) how *AIDA* would:

- create conflicting obligations for AI actors that seek to use anonymized information for AI system purposes with the new provisions in the *CPPA* that deal with anonymization;
- create double jeopardy risks under the *CPPA*, *CCPSA*, and *AIDA*; and
- treat offences under *AIDA* much more harshly than offences under analogous legislation such as the *CCPSA*, the *Food and Drugs Act*, and other hazardous products laws or sanctions for violating the *Canadian Human Rights Act*.

None of these criticisms have been addressed by *AIDA* 2.0.

Conclusion

***AIDA*, as introduced into Parliament,** is nothing but a shell of a law. It passed first and second reading in that form. The INDU Committee is now through its hearings on Bill C-27, hearings which already included many witnesses whose appearances focused on *AIDA* before *AIDA* 2.0 was made public (including my appearance). It has just started the clause-by-clause review of the Bill.

The Committee is now faced with assessing new amendments in a very short period that will regulate one of the most transformative technologies of our time. What Parliament does to regulate AI could have far-reaching implications on public safety and other potential harms and on innovation. We must get this right. This means taking adequate time for all stakeholders to properly assess the policy and technical aspects of amendments (Wylie 2023). This will not be a short exercise as there are so many policy issues associated with regulating AI. The reality, as recently observed by Bianca Wylie and Martin McDonald in an article published by the Centre for International Governance Innovation: "The bill is a poorly conceived and rushed piece of attempted legislation. As many have argued (Faguy 2023), *AIDA* is so weak, both due to the process used to create it (Clement 2023) and its governance constructs (Witzel 2023), that it should be stopped entirely" (Wylie and McDonald 2023). **MLI**

About the author

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Endnotes

1   To facilitate a review of the government's proposed amendments, I have completed a redline edit indicating how *AIDA* would read if all the amendments were adopted (Sookman 2023j).

2   In addition to the information contained within this paper, I have written extensively about *AIDA*'s flaws on my website, BarrySookman.com. For further information, read the following blog posts: "*AIDA*'s regulation of AI in Canada: questions, criticisms and recommendations," "*AIDA* Companion Document: overview and questions," "Government proposals to amend *AIDA*: the challenges ahead Part 2," "*AIDA*: my appearance before the INDU Committee," "Minister provides proposed amendments to *AIDA*," and "UK AI Regulation Bill."