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Artificial Intelligence, Administrative Law, and Privacy

BC Council of Administrative Tribunals

October 11, 2023

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Overview

1. Admin law principles and AI

   a. Notice / disclosure / participatory rights
   b. Fair hearing
   c. Absence of bias
   d. Rule against sub delegation
   e. Reasons and appeal rights

2. Privacy concerns of use of AI in administrative decision-making

   a. Application of the *Freedom of Information and Protection of Privacy Act*
   b. Challenges of AI and FIPPA
   c. Overlap of human rights and fairness mandates

3. Discussion

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Notice/Disclosure/Right to Participate

- Without notice of what key issues are or what information is being considered by a decision-maker, a person's right to know the case to be met is impaired
- Opacity of AI systems, or complete lack of disclosure of their use will impact the fairness of a hearing

Fair hearing

- Opportunity to be heard, to understand the case to meet, and right to impartial decision-maker
- Is a review by an AI system an adequate opportunity to be heard?
- Over-reliance on an AI system to assist with decision-making could mean a closed mind

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Absence of bias

- Automation bias – a preference for an automated response
- Algorithmic bias can lead to inaccurate and discriminatory results
- Risk of institutional-level bias if too much emphasis placed on like tools such as risk assessment scores

"[s]imply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so"

Wewaykum Indian Band v Canada, 2003 SCC 45

Human in the Loop

Shift in responsibility for human decision maker: performing tasks directly → designing, selecting, applying, and overseeing the technology

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Challenges with the Human in the Loop: Processes and Human Biases

Appropriate amount of reliance on AI?
- Too little reliance = algorithmic aversion
- Too much reliance = automation bias
- Inconsistent reliance = selective adherence

Types of Algorithmic Bias

There are three types of bias in AI that can lead to inaccurate and discriminatory results:

1) bias in the process of building the algorithmic model.
2) bias in the sample that is used to train the algorithm.
3) societal biases captured and amplified by the algorithm.

Algorithmically-driven decisions disproportionately impact:

- Black and Indigenous persons,
- persons with disabilities,
- persons with precarious citizenship status, and
- people living in poverty.

COMPAS example…

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Rule against sub-delegation

- Decisions must be made by officials legally responsible for reaching an outcome, and cannot redelegate that power unless clearly authorised by law to do so
- Is an algorithmically-driven tool making a "decision"?
- Extreme automation bias may offend this rule

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Reasons

- The *opacity* issue with AI systems is often inconsistent with reasons in administrative law?
- Even partially relying on an AI-generated recommendation will engage this issue
- Appeal or JR rights are also impacted

Reasons are the primary mechanism by which administrative decision makers show their decisions are reasonable – both to the affected parties and to the reviewing courts

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, para 127

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Opacity

Three types of opacity:
1) intentional opacity
2) literacy-driven opacity
3) inherent opacity

Substantive Fairness

- Where a court reviews a decision on the reasonableness standard, a lack of reasons due to an AI system's opacity could hinder a court's ability to substantively review an admin system
- *Barre v Canada*, 2022 FC 1078
- In that case the Federal *Privacy Act* was used to shield investigative techniques from the decision-maker, but the very same could occur with commercial trade secrets

Privacy

FIPPA

- Applies to all public bodies in BC
- Two acts in one: access and privacy
- Privacy provisions deal with collection, use, and disclosure of "personal information"
- Personal Information: information about an identifiable individual
- <u>Not</u> (generally) consent based

Collection, use, and disclosure

- Most common collection authority requires "relates directly to and necessary for a program or activity" (s.26(c))
- Collection may only be indirect with authority (s.27)
- Use must generally be for a consistent purpose for which it was collected (s.32)
- Disclosure authorities limited to list in s.33

Other relevant FIPPA provisions

- Service providers have same privacy obligations as public bodies (s.3(2))

- Most common collection authority requires "relates directly to and necessary for a program or activity" (s.26(c))

- Requirements for retention of PI when used to make a decision about an individual (s.31)

- Right to request correction and ensure accuracy of PI (ss. 28-29)

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Personal information and AI

- Mosaic effect: "fields of seemingly unidentifiable information, when combined, can enable a knowledgeable reader to identify the individual to which the information relates"

- AI takes the meaning of knowledgeable reader to a whole new level, potentially expanding the scope of what is considered PI

- Training requires massive amounts of accurate information, much of it personal information

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Challenges with AI and FIPPA

- FIPPA is based on individual (paper)transactions and individual rights, not group harms or impacts

- Even if a public body purchases a commercial AI system and only uses it "in-house" unclear if authorized under FIPPA

- Not a good fit for responsible adoption

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Human rights and fairness

- Beyond judicial review of administrative decisions, challenges to less formal use of AI in the public sector

- Ensuring **fairness** of systems that may produce discriminatory or biased results, have limited accountability, and are opaque makes oversight difficult

- Protecting **human rights** when AI systems often amplify existing inequalities and to the extent those are based on protected grounds may negatively impact human rights

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Thinking about it?

- Privacy impact assessments – especially if and when contemplating an automated system

- Understand your data flows

- Only consider systems you can understand and describe, meeting your obligations in admin law but also privacy impacts

- Free services collect information you input, which is unlikely to be authorized

- Provide clear notice, oversight, rights to review to people

- Ask us! We are here to help

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Thank you!
Questions?

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