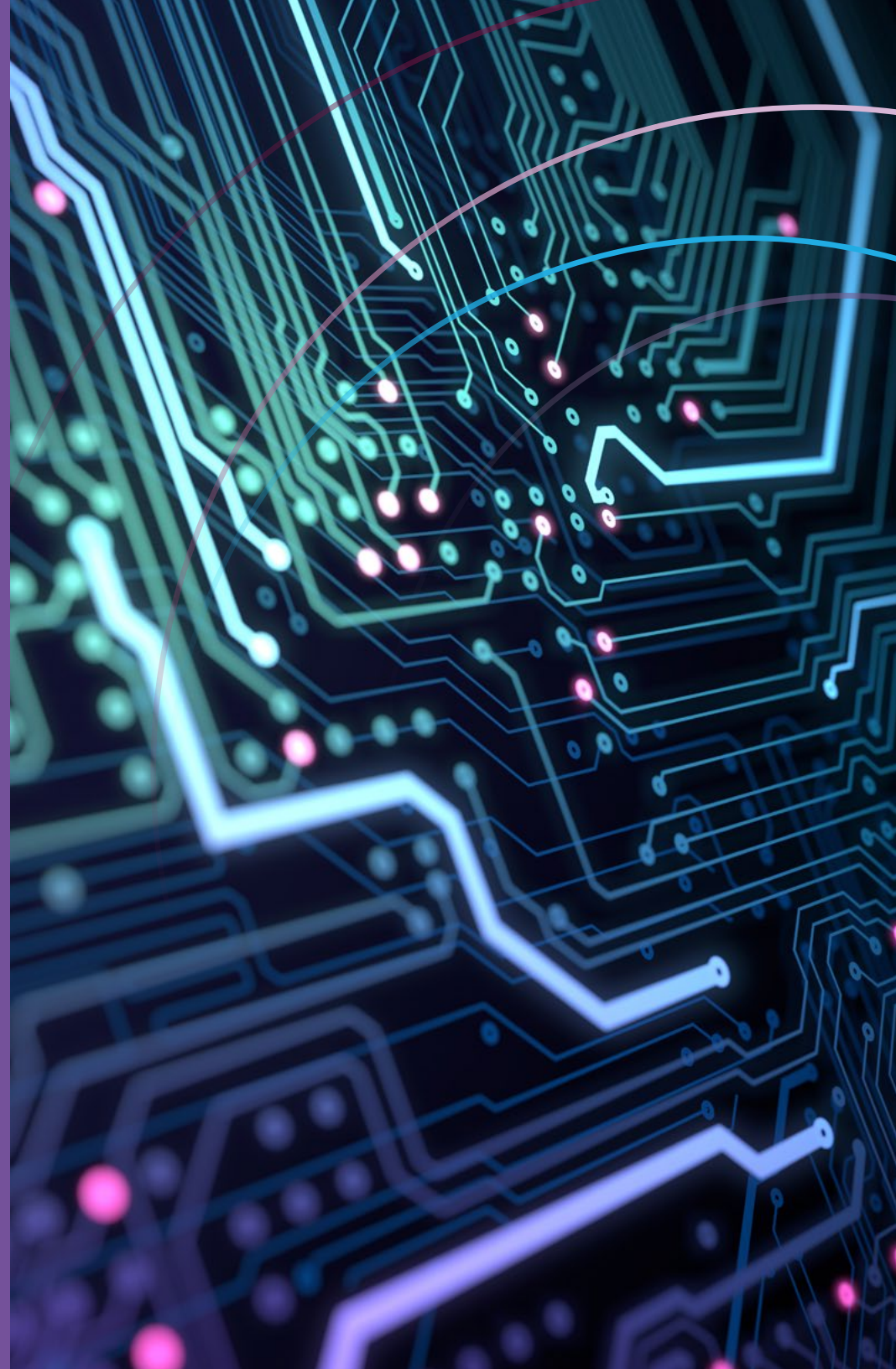


Gowling WLG Primer on AI Regulation in Canada

Decoding Canada's Artificial Intelligence and Data Act (AIDA)

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Overview & scope



Overview

Name

An Act Respecting Artificial Intelligence Systems and Data Used in Artificial Intelligence Systems (the “Artificial Intelligence and Data Act” – “AIDA”)*, including [the proposed amendments sent by Minister Champagne on November 28, 2023](#), forms part of [Bill C-27](#) currently before the House of Commons.

Gowling WLG's consolidated version of AIDA

Gowling WLG's timeline of Bill C-27

Purposes

AIDA aims to establish common requirements for the design, development and use of AI systems, and prohibit certain conduct that may result in harm to individuals.

Requirements

AIDA includes various requirements for AI systems before being put on the market, including assessing potential adverse impacts, taking measures to assess and mitigate risks, enabling human oversight, reporting serious incidents, and keeping relevant records.

Enforcement

AIDA would be administered and enforced by the Minister of Innovation, Science, and Industry, and the (newly formed) Artificial Intelligence and Data Commissioner.

Penalties

AIDA provides two types of penalties for regulatory non-compliance—administrative monetary penalties and prosecution of regulatory offences—as well as a separate mechanism for true criminal offences.

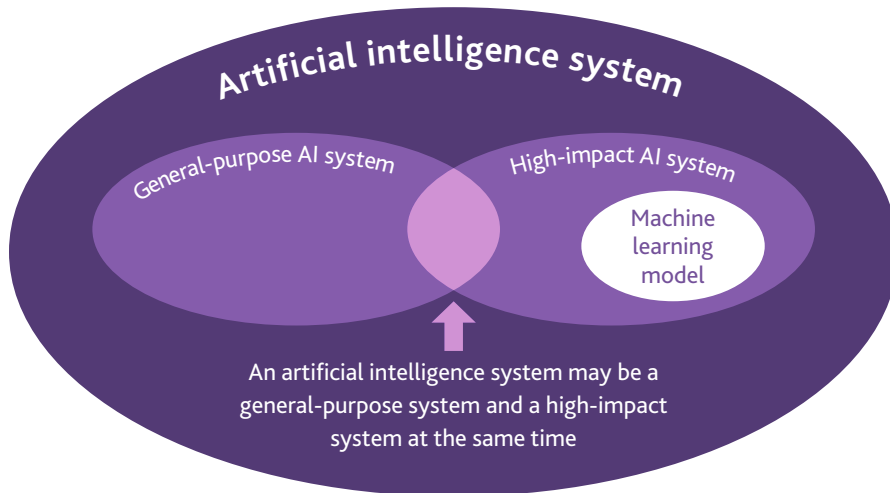
*AIDA is not yet in force and subject to further amendments.

Scope

Material

"Artificial intelligence system" (or "AI system"), which may include general-purpose system and/or high-impact system.

(arts. 2 and 5(2) AIDA)



Organizational

"Person" (e.g., trust, joint venture, partnership, unincorporated association or any other legal entity) in the private sector, excluding:

(art. 2 and Part 1 AIDA)

- Government institutions as defined in section 3 of the Privacy Act (departments, ministries of state, bodies listed in the Schedule and Crown corporations and their subsidiaries).
(art. 3(1) AIDA)
- Product, service or activity under the direction or control of (a) the Minister of National Defence; (b) the Director of the Canadian Security Intelligence Service; (c) the Chief of the Communications Security Establishment; or (d) any other person who is responsible for a federal or provincial department or agency and who is prescribed by regulation.
(art. 3(2) AIDA)

Directive on Automated Decision-Making

Guide on the Use of Generative AI

Algorithmic Impact Assessment Tool

Temporal

New and existing AI systems (for the latter, the deadline for compliance will be prescribed by regulation).

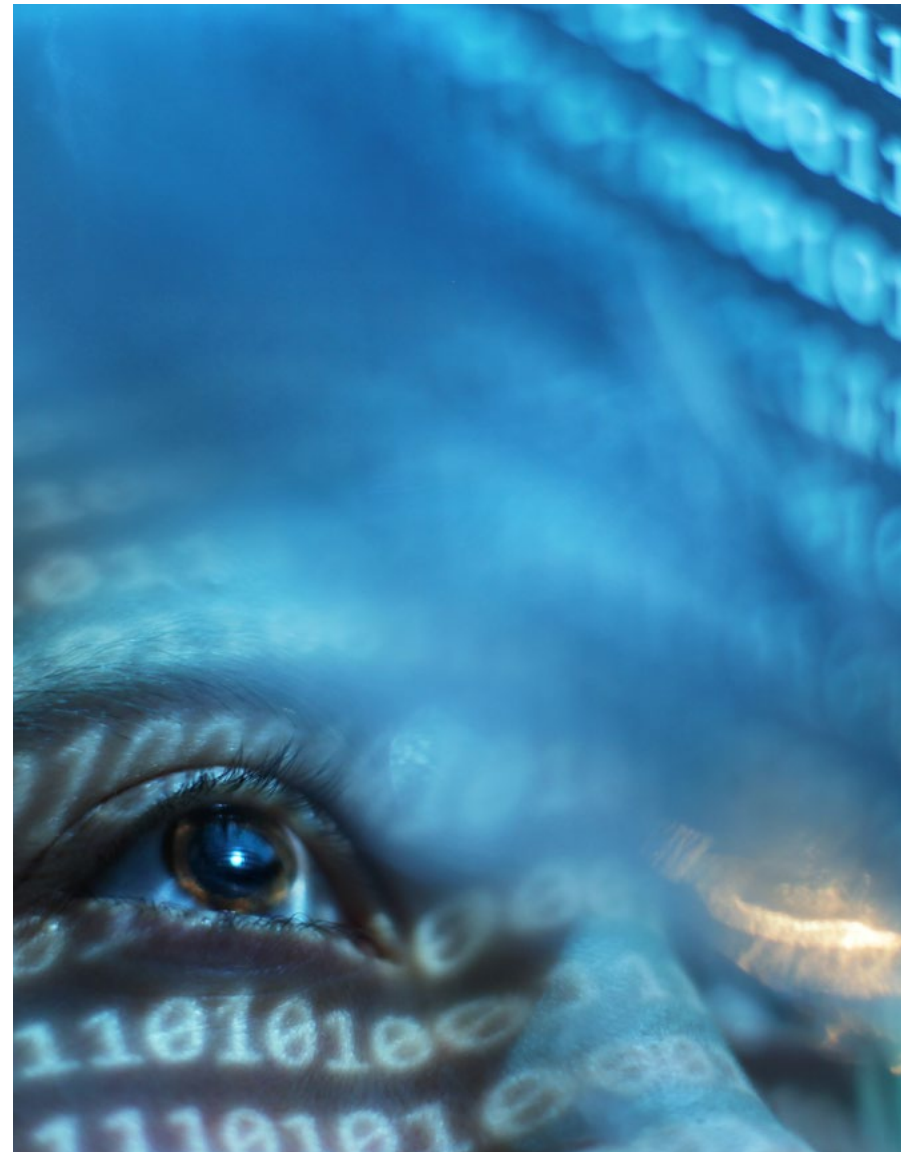
(arts.7(3), 8(2), 8.2(2), 9(3), 9.1(2), 10(3), 10.1(2), 11(2), 12(2) and 12(4) AIDA)

Territorial

“In the course of international or interprovincial trade and commerce across Canada.”

(art. 4 AIDA)

Unlike the EU AI Act, which broadly applies to providers or deployers outside the EU, AIDA has a similar territorial scope of application as Canada's Personal Information Protection and Electronic Documents Act (PIPEDA) and therefore can be expected to be interpreted to have application to organizations with a “real and substantial connection to Canada”. This could include the development, design or management of an AI system in Canada or its use in Canada in a manner that is deemed to create a real and substantial connection to Canada. Foreign organizations doing business in Canada or providing AI services to Canadians should be mindful of their potential compliance responsibilities under AIDA.



AI system





Definitions



"Artificial Intelligence System" (or "AI system") means a technological system that, using a model, makes inferences in order to generate output, including predictions, recommendations or decisions.

(art. 2 AIDA)

- The Organisation for Economic Co-operation and Development (OECD)'s definition reads as follows: "An AI system is a machine-based system 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. Different AI systems vary in their levels of autonomy and adaptiveness after deployment."
- The proposed amendments would revise the definition of an "AI system" to better match the definition set by the OECD. AIDA's updated definition would not be based on the use of enumerated models such as machine learning, or on the specific data used in the development of the system. Instead, it would emphasize the concept of 'inference' as a key characteristic that sets AI systems apart from other computer systems.



"Biased Output" means content that is generated, or a decision, recommendation or prediction that is made, by an artificial intelligence system and that adversely differentiates, directly or indirectly and without justification, in relation to an individual on one or more of the prohibited grounds of discrimination set out in section 3 of the Canadian Human Rights Act, or on a combination of such prohibited grounds. It does not include content, or a decision, recommendation or prediction, the purpose and effect of which are to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds.

(art. 5(1) AIDA)



"Harm" means (a) physical or psychological harm to an individual, (b) damage to an individual's property, or (c) economic loss to an individual. Harms may be experienced by individuals independently or may be experienced broadly across groups of individuals.

(art. 5(1) AIDA)



Obligations

Transparency. The person who manages the AI system must clearly and without delay inform individuals that they are communicating with an AI system if they believe they are communicating with another individual.

(art. 6(1) AIDA)

- **Exception.** This does not apply if the system is a consumer product requiring the use of a physical product with a written statement indicating that the individual is communicating with an AI system.

(art. 6(2) AIDA)

Other Obligations. An AI system may be subject to other obligations if it involves a general-purpose system, and/or a high-impact system, and/or machine learning model. See the following pages for more details.

General offence

Personal Information. Possessing or using personal information knowing or believing that the information is obtained or derived directly or indirectly as a result of an offence for the purpose of designing, developing, using or making available for use an AI system.

(art. 38 AIDA)

Harm or Loss. Without lawful excuse and knowing that or being reckless as to whether the use of an artificial intelligence system is likely to cause serious physical or psychological harm to an individual or substantial damage to an individual's property, makes the artificial intelligence system available for use and the use of the system causes such harm or damage; or with intent to defraud the public and to cause substantial economic loss to an individual, makes an AI system available for use and its use causes that loss.

(art. 39 AIDA)

Punishment. There is also the possibility of summary conviction, which includes a fine of not more than the greater of **\$20,000,000** and **4%** of the person's gross global revenues in its financial year before the one in which the person is sentenced, in the case of a person who is not an individual.

(art. 40b) AIDA)

General-purpose AI system





Definitions



“General-Purpose System” (or “GPAI”) means an AI 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.

(art. 5(1) AIDA)





Obligations

Person who makes GPAI available (for the first time)

(art. 7 AIDA)

- a) Measures respecting the data used in system's development*
- b) Assessment of adverse impacts from reasonably foreseeable system use*
- c) Measures to assess and mitigate risks of harm or bias output ("mitigation measures") *
- d) Effectiveness test of the mitigation measures
- e) Human oversight feature*
- f) Plain-language description of system capabilities and limitations, risks of harm or biased output*
- g) Public's ability to identify system-generated digital output, either with or without using free or publicly available software*
- h) Qualified third-party compliance assessment*
- i) Records of compliance, data and processes used in developing the system and in system assessments*

Person who makes GPAI available (not for the first time)

(art. 8 AIDA)

- a) Plain-language description of system capabilities and limitations, risks of harm or biased output, adjusted for timing and format as needed, for users or the public (as applicable)*

Person who manages GPAI

(art. 8.2 AIDA)

- a) Compliance and record keeping, when reasonable to believe that obligations haven't been fulfilled by the person who makes the system available
- b) Mitigation measures*
- c) Effectiveness test of the mitigation measures*
- d) Human oversight feature*
- e) Assessment of system when suspected serious harm or the failure of mitigation measures. If either situation occurred:
 - i. Cease the system's operations,
 - ii. Report to Commissioner,* and
 - iii. Notify Commissioner when system resumes
- f) Records of compliance and any other information

Accountability. Establish and maintain a written accountability framework.

(arts. 12(1) and (2) AIDA)



Changes

If changes to GPAI could impact the compliance with the above obligations (e.g., different risks of harms or biased output, less effective mitigation measures, no longer accurate plain-language description), GPAI is considered to be a distinct GPAI subject to the same obligations identified above.

(art. 8.1 AIDA)

High-impact AI system





Definitions



"High-Impact System" means an AI system of which at least one of the intended uses may reasonably be concluded to fall within a class of uses set out below:
(art. 5(1) AIDA and Schedule 2 Bill C-27)



Employment

The use of an AI system in employment related determinations, including recruitment, referral, hiring, remuneration, promotion, training, apprenticeship, transfer or termination.



Services

The use of an AI system in determining (a) whether to provide services to an individual, (b) the type or cost of services, or (c) the prioritization of services for individuals.



Biometric

The use of an AI system to process biometric information for (a) identifying an individual, except when done with their consent for authentication, or (b) assessing an individual's behaviour or state of mind.



Content Moderation

The use of an AI system for (a) moderating content on an online platform, including search engines or social media, or (b) prioritizing the presentation of such content.



Health Care

The use of an AI system in health care or emergency services.*



Justice

The use of an AI system by a court or administrative body to make a determination about an individual who is party to proceedings.



Law Enforcement

The use of an AI system to assist a peace officer, as defined in section 2 of the *Criminal Code*, for law enforcement purposes.



Other

Uses added, varied or deleted by the Governor in Council through regulation, subject to consideration of associated risks and adverse impacts of such uses, and the applicability of existing federal or provincial law. (art. 36.1 AIDA)

*Excluding a use referred to in any of paragraphs (a) to (e) of the definition device in section 2 of the *Food and Drugs Act* that is in relation to humans.



Obligations

Person who makes high-impact system available (for the first time)

(art. 10 AIDA)

- a) Assessment of adverse impacts from reasonably foreseeable system use*
- b) Mitigation measures*
- c) Effectiveness test of the mitigation measures*
- d) Human oversight feature*
- e) Reliable and robust performance of the system *
- f) Compliance with underlying obligations when machine learning model is incorporated into the system
- g) Manual on the system's operations*
- h) Records of compliance, data and processes used in developing the high-impact system*

Person who makes high-impact system available (not for the first time)

(art. 10.1 AIDA)

- a) Available manual for any person managing the system's operations*

Person who manages high-impact system

(art. 11 AIDA)

- a) Compliance and record keeping, when reasonable to believe that obligations haven't been fulfilled by the person who makes the system available
- b) Mitigation measures*
- c) Effectiveness test of the mitigation measures*
- d) Human oversight feature*
- e) User feedback on system's performance*
- f) Plain-language description, available on public website, of system use, types of generated outputs, mitigation measures*
- g) Assessment of system when suspected serious harm or the failure of mitigation measures. If either situation occurred:
 - i. Cease the system's operations,
 - ii. Report to Commissioner,* and
 - iii. Notify Commissioner when system resumes
- g) Records of compliance and any other information

Accountability. Establish and maintain a written accountability framework.

(arts. 12(3) and (4) AIDA)



Changes

If changes to high-impact system could impact the compliance with the above obligations (i.e., different class or subclass of uses, different risks of harms or biased output, or less effective mitigation measures), high-impact system is considered to be a distinct high-impact system subject to the same obligations identified above.

(art. 10.2 AIDA)

Machine-learning model





Definitions



“Machine learning model” (or “machine learning”) means 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.

(art. 5(1) AIDA)

The updated definition of AI System introduces potential ambiguity in that it covers all systems that use models that are used to make inferences. In general, it is machine-learning models that are used to make inferences; however, machine learning models are not specifically referenced in the definition, suggested that GPAI and high impact AI Systems may still be subject to regulation when using a model that does not fall within the strict definition of “machine learning model” as defined in the Act. Further, the only models to which specific regulatory requirements attach (i.e., in relation to the model itself) are machine learning models.



Obligations

Person who makes machine learning model available (for the first time)

(art. 9 AIDA)

for incorporation into a high-impact system

- a) Measures respecting the data used in model's development*
- b) Mitigation measures*
- c) Model card with prescribed information*
- d) Records of compliance, date and processes used in developing machine learning model *

Person who makes machine learning model available (not for the first time)

(art. 9.1 AIDA)

for incorporation into a high-impact system

- a) Model card available to any person that makes the model available*

Accountability framework





Principle

A person who makes a GPAI or high-impact system available or who manages the operations of one must establish and maintain a written accountability framework.

(arts. 12(1) and (3) AIDA)



Content

The accountability framework must, in accordance with the regulations, include:

(art. 12(5) AIDA)

- (a) a description of the roles and responsibilities and reporting structure for all personnel who contribute to making the artificial intelligence system available or who contribute to the management of its operations;
- (b) policies and procedures respecting the management of risks relating to the system;
- (c) policies and procedures respecting the data used by the system;
- (d) a description of the training that the personnel referred to in paragraph (a) must receive in relation to the system and the training materials they are to be provided with;
- (e) if the person establishing and maintaining the framework manages the operations of the system, policies and procedures on how the personnel referred to in paragraph (a) are to advise the person of any use of the system that results, directly or indirectly, in serious harm or of any mitigation measures that are not effective in mitigating risks of serious harm; and
- (f) anything that is prescribed by regulation.



Proportionality

In establishing and maintaining the accountability framework, the person must take into account the nature and size of their business and the risks of harm or biased output that could result from the use of the artificial intelligence system.

(art. 12(6) AIDA)



Powers

The AI Commissioner may require to obtain the accountability framework or recommend corrective measures to it.

(art. 13 AIDA)

Governance & enforcement





Powers

AIDA would be enforced by the Minister of Innovation, Science, and Industry, and the Artificial Intelligence and Data Commissioner and Public Prosecution Service of Canada. (arts. 5(1) and 33 AIDA)

Minister of Innovation,
Science, and Industry

Artificial Intelligence
and Data Commissioner

Order-making power

The Minister **may**, by order, require that a person:

- Implement measures to comply with AIDA or, if not achievable, require ceasing making an AI system available/operational (art. 16 AIDA)
- Require ceasing making a general-purpose AI system or high-risk AI system available/operational if the system gives rise to a risk of imminent and serious harm (art. 17 AIDA)
- Publish, on a publicly available website, any information related to the compliance with AIDA (excluding confidential business information) (art. 18 AIDA)

The Commissioner **may**, by order, require that a person:

- Provide the accountability framework (art. 13(1) AIDA)
- Provide the assessment of the system/model (i.e., general-purpose AI system, high-risk AI system, or machine learning model) (art. 14 AIDA)
- Conduct an audit on its own initiative or at the request of the Minister, directly or through the person or an independent auditor (arts. 15 and 15.1 AIDA)

A person who is the subject of an order made by the Minister or Commissioner must comply with the order. The Minister or Commissioner may file a certified copy of an order in the Federal Court and, on the certified copy being filed, the order becomes and may be enforced as an order of the Federal Court. (arts. 19 and 20 AIDA)

Other prerogatives

The Minister **may**:

- Disclose information (including confidential business information) in response to subpoena or warrant (art. 24 AIDA)
- Publish, on a publicly available website, information about a contravention if considered in the public interest (excluding confidential business information) (art. 27 AIDA)
- Publish, on a publicly available website, information about an AI system giving rise to a serious risk of imminent harm and where the publication of the information is essential to prevent the harm (excluding confidential business information) (art. 28 AIDA)
- Promote public awareness of AIDA and provide education with respect to it; make recommendations and cause to be prepared reports on the establishment of measures to facilitate compliance and establish guidelines with respect to compliance (art. 32 AIDA)
- Delegate to the Commissioner any power, duty of function conferred on the Minister, except the power to make regulations (art. 33(2) AIDA)
- Designate any individual or class of individual as analysts for administration and enforcement, as well as establish a committee to provide advice on any matters (arts. 34 and 35 AIDA)
- Make regulations for the prescription of information; of records and of the time and the manner in which description are to be published (art. 37 AIDA)

The Commissioner **may**:

- Disclose information (including confidential business information) in response to subpoena or warrant, to designated analysts, or to other regulators for the purposes of the administration and enforcement of AIDA, subject to confidentiality measures (arts. 24 to 26 AIDA)
- Receive information from other regulators for the purposes of the administration and enforcement of AIDA (art. 26.1 AIDA)
- Enter into arrangements with a number of persons and entities in respect of artificial intelligence systems to assist them in the exercise of their powers or the performance of their functions and duties (art. 33.1 AIDA)

The Commissioner **must**:

- Prepare a report on the administration and the enforcement during the previous calendar year before July 1 of each calendar year and publish it on a publicly available website (art. 35.1 AIDA)



Penalties

AIDA outlines two types of penalties for **regulatory non-compliance**: administrative monetary penalties and regulatory offences. These penalties address unreasonable failures to meet regulatory obligations. A distinct process is in place for separately addressing **true criminal offences**.

| Penalty | Amount | Enforced by | Explanation |
|--|---|---|--|
| Administrative monetary penalties (AMP) (art. 29 AIDA) | To be determined by a regulation by the Governor in Council | Minister of Innovation, Science, and Industry | Flexible compliance tool used directly by the Minister in response to any violation of regulatory compliance To promote compliance and not to punish |
| Regulatory offences (art. 30 AIDA) | On conviction on indictment: maximum \$10,000,000 and 3% of the person's gross global revenues On summary conviction: maximum \$5,000,000 and 2% of the person's gross global revenues | Public Prosecution Service of Canada | For more serious cases of contraventions with regulatory obligations under articles 6 to 12 AIDA Due to the gravity of the process, it must be proven beyond a reasonable doubt that a specific act was committed and done so intentionally |
| General offences (art. 40 AIDA) | On conviction on indictment: maximum \$25,000,000 and 5% of the person's gross global revenues and/or imprisonment of up to five years less a day On summary conviction: maximum \$20,000,000 and 4% of the person's gross global revenues and/or imprisonment of up to two years less a day | Public Prosecution Service of Canada | Separate from regulatory obligations in AIDA Relate only to prohibiting knowing or intentional behaviour where a person causes serious harm |

Compliance & next steps





Compliance

Having an AI framework is essential as it offers structure and clarity, guiding an organization's decision-making and ensuring a consistent approach.

Several important steps must be taken to ensure AI systems are developed, implemented, and used responsibly. Here is an outline of a basic compliance plan:

1



Understand and stay updated on AIDA and global requirements

- Familiarize yourself with key regulatory requirements, especially around high-impact AI systems, data management, and transparency.
- Keep track of any updates or amendments to the Act, as well as any additional guidance provided by the Government of Canada or other applicable regulatory bodies.

2



Classify and assess AI systems

- Identify each AI system used and its purpose, as well as whether they fall under the "high impact" category.
- Conduct a risk assessment to evaluate potential impacts on health, safety, rights and the economy.

3



Establish governance and leadership

- Assign a compliance officer or create a governance committee responsible for overseeing compliance with AI regulations. This team should coordinate efforts across data scientists, legal teams, and leadership.

4



Establish measures to assess and mitigate risk

- Ensure that data usage complies with other legal regime including privacy laws, IP regimes and contractual obligations at each stage of the lifecycle of the AI system.
- Identifying potential risks associated with AI systems, such as data breaches, biases or ethical concerns and implement strategies to reduce their impact.

5



Monitor, audit, and report

- Regularly audit AI systems for compliance, focusing on transparency and fairness.
- Establish internal and external reporting mechanisms for potential non-compliance or security issues.
- As AI systems evolve and new technologies emerge, regularly update your compliance plan to ensure ongoing adherence to AIDA and global frameworks.



Next steps

If adopted, AIDA would likely come into force at least two years after Bill C-27 receives Royal Assent, particularly considering the initial implementation of the initial set of AIDA regulations.

(art. 40 AIDA)

AIDA Companion document

Gowling WLG's timeline of Bill C-27



Key contacts



Gowling WLG offer an international team of experienced, technically strong artificial intelligence (AI) lawyers to help you identify and navigate the practical, legal, regulatory and ethical challenges presented by AI. We have experience across the key practice areas for AI, including corporate, commercial, financing, competition law, cyber security, data protection, employment, intellectual property and product liability. We provide our clients with in-depth knowledge of the applicable law and regulations in Canada and beyond. Our diverse expertise and local insights ensure we effectively navigate and address industry-specific needs and regulatory challenges.

For more information, contact us and let's explore how we can help you stay ahead of the curve.

Stay up to date

Receive insights on the latest legal changes and developments.



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