

# Artificial Intelligence

Principal Risks and How to Mitigate Them

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## Artificial Intelligence: Principal Risks and How to Mitigate Them

Increasingly, our clients are finding disruptive and transformative use cases for artificial intelligence (“AI”) within their organization. At the same time, major actual and proposed reforms in privacy and AI law are creating a complex, punitive, cross-border regulatory framework.

We understand deploying AI requires a comprehensive, principles-based approach that incorporates legal, ethical, and societal considerations. Our **Cyber/Data Group** at McCarthy Tétrault is at the forefront of legal developments in this fast-moving space. Over the past several years, we have demonstrated consistent global thought leadership in relation to the responsible deployment of AI, as well as active participation in shaping the rapidly evolving legal and regulatory environment governing AI.

Our unique combination of hands-on AI implementation experience, combined with our deep expertise in privacy, cybersecurity, intellectual property, and commercial transactions will provide you with an approach that leverages the benefits of AI, minimizes potential risks, and keeps you ahead of the regulatory curve.

**A summary of some key risks involved in developing or deploying AI systems, and mitigation strategies applicable to AI is set out below:**

Risk Area	Mitigation Strategies
<p><b>Governance</b> – Although many businesses have adopted information governance, privacy and cybersecurity compliance programs to reduce risk, relatively few organizations have fully implemented a responsible AI governance program. Without AI governance, organizations cannot properly assess risks or adopt processes to help ensure the responsible legal use of AI. As new laws are passed, such organizations face tremendous potential statutory penalties as well as litigation risks if employees make unauthorized use of AI systems.</p>	<p>McCarthy's can help your organization develop a governance structure for the responsible development, use and deployment of AI systems by your organization and its personnel, including:</p> <ul style="list-style-type: none"> <li>• AI governance policy</li> <li>• Responsible AI Impact Assessment</li> <li>• Acceptable use policy</li> <li>• Employee monitoring policy</li> <li>• Training in responsible AI principles</li> </ul>
<p><b>Confidentiality and privacy</b> – Organizations risk losing control of their data if they fail to consider confidentiality and privacy risks associated with AI. Privacy law reforms restrict the use of personal information in AI systems or the making available of data to build such systems, particularly for automated decision-making systems. Existing privacy laws can impose significant fines for unlawful processing of personal information. In Quebec, starting September 22, 2023, violations can lead to fines of the greater of \$25 million or 4% of global turnover, with potential fines doubled for repeat offenders.</p>	<p>McCarthy's can help your organization develop procedural and contractual parameters to reduce confidentiality and privacy risk, including:</p> <ul style="list-style-type: none"> <li>• Current state assessment</li> <li>• Privacy gap assessment and compliance roadmap</li> <li>• Privacy-related governance tools that can be used for AI systems, including: privacy framework; internal/external notices; breach management; data processing agreements; and anonymization policy</li> <li>• Technology law expertise in support of AI litigation</li> </ul>
<p><b>Lack of transparency/explainability</b> – People often want to know when they are interacting with a machine rather than a human. Moreover, AI can produce output and render decisions which organizations might not be able to explain. Non-explainability is problematic when AI systems are used to help make decisions that affect individuals' legal rights and opportunities, such as in hiring decisions or the processing of credit applications.</p>	<p>McCarthy's can help your organization comply with law by being transparent toward employees and customers about its use of AI systems and their explainability limits. In furtherance of this goal, we can advise on:</p> <ul style="list-style-type: none"> <li>• Transparency elements of your AI governance policy</li> <li>• External and internal AI notices</li> <li>• Automated decision notices and feedback policy</li> <li>• Collaboration with AI service providers to understand how an AI system arrives at its decisions</li> </ul>

<p><b>Legal and regulatory compliance</b> – Development and use of AI systems come with an increasingly complex and fast evolving web of legal and regulatory obligations. In addition to significant privacy law reforms, AI regulation is making its way through the legislative process. It will be much more challenging and costly to think about responsible AI governance only after organizations routinely start integrating AI systems into their business.</p>	<p>McCarthy's can help your organization comply with laws and industry standards that apply to the development, use and deployment of AI systems. This could include advising on:</p> <ul style="list-style-type: none"> <li>• AI governance policy legal compliance</li> <li>• Privacy gap assessment</li> <li>• Responsible AI Impact Assessment</li> <li>• Training in responsible AI principles</li> <li>• Technology law expertise in support of AI litigation</li> </ul>
<p><b>Biased output</b> – Even if done unintentionally, AI systems can generate biased and potentially harmful results leading to reputational harms and liability under proposed privacy laws.</p>	<p>McCarthy's can help your organization implement controls and best practices to mitigate against unintentional biases, including advising in respect of:</p> <ul style="list-style-type: none"> <li>• Bias management in your AI governance policy</li> <li>• A responsible AI impact assessment</li> <li>• Collaboration with AI service providers to test for bias</li> <li>• Technology law expertise in support of AI litigation</li> </ul>
<p><b>Intellectual property</b> – AI input or output might infringe upon intellectual property rights of others. Moreover, the ownership of content generated by AI systems is an unsettled legal area that must be navigated cautiously. This is particularly problematic for generative AI use cases. Intellectual property risks may also be introduced by terms of use associated with third-party AI systems.</p>	<p>McCarthy's can help your organization avoid infringement of intellectual property rights via AI use and maximize the power of your organization's intellectual property rights through:</p> <ul style="list-style-type: none"> <li>• Your AI governance policy</li> <li>• A responsible AI impact assessment</li> <li>• A procurement toolkit including vendor questionnaire and standard contractual clauses</li> <li>• Intellectual property expertise in support of AI litigation</li> </ul>
<p><b>Vendor management</b> – Organizations remain accountable when procuring AI-powered solutions from vendors and thus must find ways to mitigate risk when dealing with a vendor. Vendors tend to demand excessively large and liberal uses of the organization's data that they process. This issue is only accentuated when organizations and their employees use "free" solutions available over the Internet.</p>	<p>McCarthy's can help create a vendor management program to help your organization protect its interests while still benefiting from AI procurement, and provide advice in respect of:</p> <ul style="list-style-type: none"> <li>• AI governance and acceptable use policies</li> <li>• A template AI impact assessment</li> <li>• AI-specific due diligence to ensure compliance throughout the AI value chain</li> <li>• Procurement toolkit including standard contractual clauses to address privacy, confidentiality and IT security issues</li> </ul>



<p><b>Mergers &amp; Acquisitions</b> – Acquiring or selling an AI company, whether as a developer, user, deployer, or designer of AI systems, comes with specific opportunities, challenges and risks, regulatory or otherwise, that our team can help navigate from a technology law and corporate law perspective.</p>	<p>McCarthy's can help your organization in their M&amp;A activities and strategies in multiple ways, including:</p> <ul style="list-style-type: none"> <li>• Due diligence adapted for AI companies</li> <li>• Responsible AI impact assessments</li> <li>• Drafting and review of AI reps and warranties</li> </ul>
<p><b>Product liability class actions</b> – Organizations that sell products that harness AI systems face the risk of product liability class actions, which can cause serious reputational harm and financial exposure. These risks are playing out in courts across Canada, as novel theories of liability for AI systems are tested in a fast-moving technological landscape.</p>	<p>McCarthy's can help your organization proactively mitigate product liability class action risk and respond to existing product liability class actions through our top-tier National Class Actions Group, who can offer a proven track record, unparalleled AI expertise, a nationally integrated approach and seamless service.</p>

## Recent Client Success Stories

<p><b>Innovation Canada</b> on AI in preparation for G7 summit.</p>	<p>A leading financial Institution and CGI: near-shore <b>IT outsourcing negotiation</b></p>	<p><b>A leading AV developer</b> on the Canadian regulatory landscape and the feasibility of testing and/or deploying AVs in Canada</p>
<p><b>Tandem Expansion Fund I, L.P.</b> in the sale of its portfolio company, Acquisio, to Web.com</p>	<p><b>Uber Technologies, Inc.</b> in its acquisition of certain intellectual property rights and related assets relating to artificial intelligence</p>	<p><b>NVIDIA Corporation</b>, one of the investors, in <b>Element AI's</b> US\$102 million Series A Funding Round</p>
<p>A transportation company in the context of a <b>major procurement process</b> to select a contractor who will design, manufacture, test and supply new trainsets</p>	<p>A manufacturer company in connection with the <b>negotiation of a global outsourcing agreement</b> for IT services</p>	<p>A financial institution in the renewal of enterprise <b>software licensing and SaaS agreement</b></p>

## Reputation for Excellence

- **CHAMBERS GLOBAL, CHAMBERS CANADA** - Band 1 for Information Technology expertise, Technology Law Firm of the Year (2018), Privacy & Data Protection - Leading Firm
- **LEGAL 500** – Ranked in Tier 1 for Technology and Telecoms expertise
- **CANADIAN LEGAL LEXPERT DIRECTORY**- Recognized for leading expertise in Computer & IT Law in each Vancouver, Toronto and Montréal, only firm Most Frequently Recommended in both Technology Transactions and Computer/ IT
- **CANADIAN LEGAL LEXPERT DIRECTORY** - Recognized for leading expertise in Technology Transactions in each Vancouver, Toronto, Montréal, and Québec City

McCarthy Tétrault is one of the few Canadian firms with capacity and specialized expertise across the country, offering the benefits of on-the-ground support and jurisdictional knowledge. We bring a multi-disciplinary team of top-ranked legal innovators, but also the expertise of MT>3, a division of McCarthy Tétrault that specializes in e-Discovery and information governance.

**If you have any questions or would like to discuss how our Cyber/Data team can help you implement your responsible AI governance program, please contact Charles Morgan ([cmorgan@mccarthy.ca](mailto:cmorgan@mccarthy.ca)).**

## **VANCOUVER**

Suite 2400, 745 Thurlow Street  
Vancouver BC V6E 0C5  
Tel: 604-643-7100  
Fax: 604-643-7900

## **CALGARY**

Suite 4000, 421 7th Avenue SW  
Calgary AB T2P 4K9  
Tel: 403-260-3500  
Fax: 403-260-3501

## **TORONTO**

Suite 5300, TD Bank Tower  
Box 48, 66 Wellington Street West  
Toronto ON M5K 1E6  
Tel: 416-362-1812  
Fax: 416-868-0673

## **MONTREAL**

Suite MZ400  
1000 De La Gauchetière Street West  
Montréal QC H3B 0A2  
Tel: 514-397-4100  
Fax: 514-875-6246

## **QUÉBEC CITY**

500, Grande Allée Est, 9e étage  
Québec QC G1R 2J7  
Tel: 418-521-3000  
Fax: 418-521-3099

## **NEW YORK**

55 West 46th Street, Suite 2804  
New York NY 10036  
UNITED STATES  
Tel: 646-940-8970  
Fax: 646-940-8972

## **LONDON**

1 Angel Court, 18<sup>th</sup> Floor  
London EC2R 7HJ  
UNITED KINGDOM  
Tel: +44 (0)20 7788 5700  
Fax: +44 (0)20 7786 5702