BILL C-27: *ARTIFICIAL INTELLIGENCE AND DATA ACT* - AN IMPORTANT FIRST STEP TOWARDS AN CANADIAN ARTIFICIAL INTELLIGENCE CHARTER OF DIGITAL RIGHTS AND FREEDOMS

Brief submitted to the House of Commons
Standing Committee on Industry and Technology (CIT)

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Five Key Recommendations

1. **Need for a Universal *Canadian Charter of Digital Rights & Freedoms*.**

2. **Legislative right to equal treatment, data security and transparency in the use of AI.**

3. **Legislative protections of notice, explicability, and AI under user control.**

4. **AI Legal training requirement should be enacted.**

5. **Legislated external audits, external consultation, and civil and criminal liability.**

Introduction

For many grappling with the enormity of the implications surrounding the explosive use of artificial intelligence (AI) solutions in the world, can find themselves equally in awe and in dread. Simply put, there exist incredibly positive explosive possibilities for all facets of life, let alone law. Dread, though, derives from a fear of how much of life can be automated: what remains distinctly human, private? There are examples both domestically and internationally discussed briefly below, where AI has worsened the racial, socio-economic, and political divides and discrimination so entrenched in our society. Damaging though these outcomes may be, "they are not inevitable."[1] Equally known, automated systems are also responsible for incredible advancements in several different sectors, from agriculture to zoology. "These tools hold the potential to redefine every part of our society and make life better for everyone."[2]

It is important, though, that these developments do not negatively change democratic values and civil liberties. Thus, it is critical that any legislation related to AI encompass both the public and private sphere. One can hardly fathom what our societal and jurisprudential evolution, and its critically devalued bearing on every sector of society could have been had the *Canadian Bill of Rights*[3] and the *Canadian Charter of Rights and Freedoms*[4] applied only to private entities. It is laudable, therefore, the effort taken by the Ministry of Innovation, Science and Economic Development Canada (ISED) to legislate the digitization of delivery, information collection, data storage, document management, and the expanding use of AI but it is nowhere near enough: we need a *Canadian Charter of Digital Rights and Freedoms*.

We made ten legislative recommendations and testified before the House of Commons Standing Committee on Citizenship and Immigration on Differential Outcomes in Immigration, Refugees, Citizenship, Canada (IRCC) Decisions on the Scope and Impact of the Use of Advanced Analytics Technology in Application Processes. The recommendations, albeit the product of AI's potential on immigration law, can be applied universally. The *Digital Charter Implementation Act, 2022* and the *Artificial Intelligence and Data Act* (*AIDA*)[5] are limited and, at most, can serve as general first steps in defining, applying, and regulating digital rights and freedoms that may stand the test of time and progress, and adapt, as prior foundational legal doctrines have, in guiding and shaping our democratic society.

Moving forward as is, risks sending the message that AI must be legislated only in the private, not public sphere. The counter argument may be that we must begin somewhere. However, *AIDA* seemingly intersects between the public and private in a few of its provisions. It stands to reason that the next steps will be taken to fully explore the use of AI wherever possible, but with the benefit of safeguards implemented throughout society. To this end, we make the following five recommendations.

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[1] *"Blueprint for an AI Bill of Rights." The White House, 22 Oct. 2022, www.whitehouse.gov/ostp/ai-bill-of-rights/. Accessed 4 Jan. 2023.*
[2] *Ibid.*
[3] S.C. 1960, c. 44.
[4] Enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), which came into force on April 17, 1982.
[5] https://www.parl.ca/DocumentViewer/en/44-1/bill/C-27/first-reading.

1. **Need for a Universal *Canadian Charter of Digital Rights and Freedoms*.**

Expanding AI Possibilities

The use of AI globally explodes each year. This has not abated during the pandemic, in fact, AI has been crucial in addressing the COVID-19 pandemic[6] in many ways including the development of vaccines,[7] biomedical research and AI driven diagnostic X-Rays.[8] Montreal as one example, is now a major global hub for AI research and its AI ecosystem is thriving.[9] In an article entitled *Towards Standardization of Data Licenses: The Montreal Data License* data was referenced as the new oil.[10] Furthermore, in Estonia there are "robot judges" for small claims court for disputes valued at less than 7000 euros.[11] Digital courts with non-human judges have also been implemented in China.[12] The emergence of ChatGPT and Dall-E have dramatically raised the profile for AI uses seemingly overnight. A powerful example of the transformative properties of AI. Universities, are also beginning to revamp how they teach.[13]

The implications are boundless. The increasing use of AI will inevitably require that interpretative, jurisdictional, and other legal issues be resolved by the Courts. Thus, no bright line, in our view, can reasonably be drawn to restrict public oversight, nor can it be left exclusively, as *AIDA* has been criticized for, to the government to regulate. Third parties including the judiciary must play a key role.[14]

Legislating AI Internationally

States have begun implementing transparency and ethical guidelines of their own to end any lack of trust by citizens of the state. A prime example of this is the New Zealand Algorithm Charter that was implemented to provide guidelines on the use of AI by institutions.[15] One of its principal objectives is to provide transparency on the implementation of AI and to ensure that citizens' rights and freedoms are upheld, despite the use of automation technologies in important decision-making processes.[16] Other governing organizations and bodies, like the European Union Commission, are similarly guided by the emergence and development of digital rights and freedoms, such as respect for human dignity, freedom of the individual, respect for democracy, justice and the rule of law, equality, non-discrimination, and solidarity, and finally citizens' rights (i.e., human autonomy,

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[6] Arora, Neelima, Banerjee, Amit K, and Narasu, Mangamoori L. (October 2020). "The role of artificial intelligence in tackling COVID-19". *Future Virology.* doi: 10.2217/fvl-2020-0130.

[7] Keshavarzi Arshadi A, Webb J, Salem M, Cruz E, Calad-Thomson S, Ghadirian N, Collins J, Diez-Cecilia E, Kelly B, Goodarzi H and Yuan JS (2020) Artificial Intelligence for COVID-19 Drug Discovery and Vaccine Development. Front. Artif. Intell. 3:65. doi: 10.3389/frai.2020.00065.

[8] CIFAR and the Ontario Government support major breakthroughs in COVID-19 research. *CIFAR.* Available: https://cifar.ca/cifarnews/2020/12/16/ontario-researchers-use-ai-to-diagnose-and-treat-covid-19/.

[9] Investissement Quebec, International. *Montreal's Artificial Intelligence Hub.* Available: https://www.investquebec.com/international/en/secteurs-activite-economique/technologies-information-communications/Montreal-s-Artificial-Intelligence-Hub.html.

[10] Misha et al, "Towards Standardization," pg. 1.

[11] Niiler, Eric (25 March 2019). "Can AI Be a Fair Judge in Court? Estonia Thinks So." *Wired.* Available: https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/ .

[12] Vasdani, Tara (5 February 2020). "Robot Justice: China's use of Internet court." *The Lawyer's Daily.*

[13] https://www.nytimes.com/2023/01/16/technology/chatgpt-artificial-intelligence-universities.html.

[14] https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-136/hansard#11955659, 10067 (1315).

[15] New Zealand Government (July 2020). Algorithm Charter for Aotearoa New Zealand. https://data.govt.nz/assets/data-ethics/algorithm/Algorithm-Charter-2020_Final-English-1.pdf.

[16] *Ibid.*

prevention of harm, fairness, and explicability).[17] New Zealand, Australia as another example[18], and the European Union[19], have become pioneers in the newly arising field of AI use in government institutions.

The United States has recently released the *Blueprint for an AI Bill of Rights (AIBoR)* which aims to serve as a response to the unrestrained potential of automated systems. As with previous efforts toward legislation, the *AIBoR* is based on the preservation of five fundamental rights.[20] These five principles cover (1) *Safe and Effective Systems* to safeguard the public from the dangers of automated systems, independent evaluation and reporting on the system's safety and efficacy should be performed regularly.[21] (2) *Algorithmic Discrimination Protections* as the Office of Science and Technology Policy (OSTP) maintains that individuals should be free from digital discrimination, and that data should be deployed in an equitable manner.[22] (3) *Data Privacy,*[23] the OSTP highlights that the public "should be protected from abusive data practices through built-in protections,"[24] just as it should be informed as to how personal data is being used.[25] (4) *Notice and Explanation*, the widespread deployment of automated systems is too often coupled with the individual being denied the knowledge necessary "to address the impact of automated systems on their lives."[26] (5) *Human Alternatives, Considerations and Fallback,* "the public deserves the assurance that, when rights, opportunities, or access are meaningfully at stake and there is a reasonable expectation of an alternative to an automated system . . . and will not be disadvantaged for that choice."[27]

In juxtaposition to *AIDA*, *AIBoR* is an aspirational document and, glaringly, the *AIBoR* opens with a disclaimer that plainly explains that it is nonbinding, especially to law enforcement. It only speaks to the Federal government and not private companies.[28] Both, *AIDA* and *AIBoR* suffer from dealing piecemeal with AI and digital regulation. A standalone strong and all-encompassing legislative enactment like we have seen outside of North America is the path forward.

Perpetuating Historical Disadvantage

This is critical because AI can turbocharge discrimination.[29] In our AI brief before CIMM we set out several striking examples of Canadian and international examples of bias AI driven data and its application.[30] A few examples include the AI powered iBorderCTRL – a lie detector used by the European Union at borders – was demonstrated to discriminate against "people of colour,

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[17] European Commission (8 April 2019). "Ethics Guidelines for Trustworthy AI"

[18] Cox, J., Lewih, A., & Halforty, I. (2021). "AI, Machine Learning, & Big Data Laws and Regulations 2021 Australia." Global Legal Insights. Available: https://www.globallegalinsights.com/practice-areas/ai-machine-learning-and-big-data-laws-and-regulations/australia#:~:text=Australia%20does%20not%20have%20specific,implementation%20of%20these%20emerging%20technologies.&text=Case%20law%20can%20also%20be%20relevant.

[19] European Commission (8 April 2019). "Ethics Guidelines for Trustworthy AI."

[20] "What Is the Blueprint for an AI Bill of Rights?" *The White House*, 22 Oct. 2022, www.whitehouse.gov/ostp/ai-bill-of-rights/what-is-the-blueprint-for-an-ai-bill-of-rights/. Accessed 4 Jan. 2023.

[21] *Ibid.*

[22] Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People. The White House, 2022. Pg 23.

[23] Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People. The White House, 2022. Pg 31.

[24] Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People. The White House, 2022. Pg 30.

[25] *Ibid.*

[26] Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People. The White House, 2022. Pg 41.

[27] *Ibid.*

[28] "The AI Bill of Rights Makes Uneven Progress on Algorithmic Protections." LawFare Blog, 7 Oct. 2022, www.lawfareblog.com/ai-bill-rights-makes-uneven-progress-algorithmic-protections. Accessed 4 Jan. 2023.

[29] AIBOR, p. 5, https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-136/hansard#11955659, 10070.

[30] https://www.ourcommons.ca/Content/Committee/441/CIMM/Brief/BR11713740/br-external/BellissimoLawGroup-e.pdf.

women, children, and people with disabilities".[31] In New Zealand, technology used to identify potential immigrant overstayers was modelled using information such as age, country of origin, gender, usage of public health services, law enforcement encounters, and immigration status.[32] Immigration New Zealand was criticized for the use of ethnicity data in its risk modelling, as it had the potential to further marginalize racialized groups.[33] This resulted in the passing of the Algorithm Charter. Again, these issues arose when AI was utilized by government authorities.

New Zealand became the first state to develop an Algorithm Charter that affirms what governments can and cannot do in their use of AI measures.[34] This Charter emphasizes and commits to directing government agencies on how to carefully utilize algorithms, while striking a balance between privacy and transparency.[35] Moreover, this Charter aims to minimize and eliminate unintended bias in the use of algorithms, which can result from training by humans whose actions may ultimately have implicit biases or errors, including through the development of a risk matrix.[36] Key features of an innovative AI Charter in the Canadian context will similarly include a commitment towards transparency, intelligibility, and equality.

AIDA does not apply to most, if any, government institutions governed by the Privacy Act.[37] *Section 4 of AIDA – **Purposes*** states that the Act is to regulate domestic and international trade and commerce in AI systems, and to prevent serious harm to individuals or their interests that may result in the use of AI. However, there must be a recognition that harm can flow from all segments of society. Sections 5 to 37 refer to the regulation of AI systems in the private sector. Again, this must be expanded and not limited to the private sector.

AIDA itself blurs the line. As one example, section 26 of *AIDA* relates to the reporting of AI use by private sector corporations and allows the Canadian government to audit, collect, and review the data produced by those private corporations. Section 26 allows the government to release any of the information collected under Part I to several entities, including "any person appointed by the government of a province, or any provincial entity, with powers, duties and functions that are similar to those of the Privacy Commissioner or the Canadian Human Rights Commission" or "any other person or entity prescribed by regulation."

They can do so if they have reasonable grounds to believe that a person who conducts any regulated activity has contravened (or is likely to contravene) another Act of Parliament or provincial legislation. That is enforced by the recipient government department. This, without specificity, intersects the private and the public sectors, but ultimately reads as though the regulation of government use of AI is neither essential, nor urgent. Any universal legislation would include the following four recommendations.

[31] Liew, Jamie and Molnar, Petra (5 May 2021). "Clear safeguards needed around technology planned for border checkpoints *CBC News.* Available: https://www.cbc.ca/news/opinion/opinion-technology-border-canada-1.6005907.

[32] The Conversation (28 April 2021), Canada should be transparent in how it uses AI to screen immigrants. Accessed 25 November 2022. https://theconversation.com/canada-should-be-transparent-in-how-it-uses-ai-to-screen-immigrants-157841 (hereinafter The Conversation, "Transparent AI Screening").

[33] RNZ, "Immigration NZ pilot described as racial profiling," YouTube, 5 April 2018. https://www.youtube.com/watch?v=nfqPCrQmVKs&t=149s&ab_channel=RNZ. Project Quantum being administered by the Canada Border Services Agency appears to also be a risk predictor model of those entering Canada.

[34] The Conversation, "Transparent AI screening".

[35] New Zealand Government (July 2020). Algorithm Charter for Aotearoa New Zealand. https://data.govt.nz/assets/data ethics/algorithm/Algorithm-Charter-2020_Final-English-1.pdf.

[36] *Ibid.*

[37] S.C. 1985, c. P-21, Schedule.

2. Legislative right to equal treatment, data security and transparency in the use of AI.

To avoid discrimination between individuals and groups, efforts should be made to clearly legislate what information is being collected, stored, shared, and used.[38] The collection of data should be limited to the purposes of the collection. Valid consent must be obtained prior to collection.[39] The definition of a minor must be plainly identified.[40] Measures should be established that would mitigate risks of harm or biased outputs, that would reduce bias and risks resulting from AI use.[41] Section 2 of the *AIDA* provides a robust definition of AI systems. Therefore, the rights to equal treatment, freedom from algorithmic discrimination, fairness and prevention from harm must be clearly delineated and become a recognized right of all persons and supported by other foundational legal instruments like the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*.

Further, legislation should set out minimum operating requirements for safe use, storage, and dissemination to ensure that the data used, and its sources cannot be altered with models that are multidisciplinary in design and secure technologically.[42] Transparent uses and restrictions on the selling of private information must also be legislated.[43] The host organization should be responsible for the data collected and should ensure sufficient protection for data collection.[44]

Any legislation and/or policy adopted must provide a clear and explicit definition of AI use to ensure future accountability and oversight. The legislation recognizes the need to prevent harm to individuals or their interests that may result in the use of AI.[45] Data should be consolidated and compiled through a safe and secure process, to protect privacy and ensure reliability.[46] The use of AI should enable individual freedoms, rather than place them at a disadvantage.[47]

3. Legislative protections of notice, explicability, and AI under user control.

Until we are all on a relatable informational plane, users are at a severe disadvantage in understanding how parts of their lives may be reordered. AI must remain under user control to ensure that these tools cannot decide by themselves and do not prescribe anything, including having the ability to easily deviate from the outcome of the algorithm when needed.[48] As per

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[38] https://www.canada.ca/en/immigration-refugees-citizenship/corporate/transparency/access-information-privacy/info-source/personal information-banks.html.

[39] Bill C-27, Part 1 cl 12-14.

[40] https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-136/hansard#11955659, 10069.

[41] *Ibid*, Part 3 cl 8.

[42] McEvenue, Patrick and Mann, Michelle (2019). "Case Study: Developing guidance for the responsible use of artificial intelligence in decision making at Immigration, Refugees and Citizenship Canada." *Law Society of Ontario, Special Lectures 2019.* (hereinafter "McEvenue and Mann, "Case Study"").

[43] https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-136/hansard#11955659, 10066.

[44] Bill C-27, Part 1, cl 11.

[45] Bill C-27, Part 3 cl 4.

[46] In the immigration law context, a key finding from the reports as it pertains to the workings of the two systems is that both systems, while not making any ineligibility determinations, do 'sort' applications by eligibility. A stark contrast between the two reports, however, lies in the fact that the former accounts for the system's explainability by relying on the fact that the impact of TRV refusals on applicants is "temporary," whereas the latter is slightly more sensitive to the unforeseen negative impacts the system can have, such as bias and discrimination, and acknowledges that IRCC will need to be proactive in identifying those negative impacts and mitigate them. It is noted that the latter report was released about seven months after the former report, and thus this contrast is a positive trend in IRCC's acknowledgement of the need for its system's transparency and explainability. For further information, please see: IRCC. "Algorithmic Impact Assessment – Spouse or Common-Law Partner in Canada Advanced Analytics Pilot," *Government of Canada*, Available: https://open.canada.ca/data/en/dataset/d41f9ec2-bf01-4b2a-bd8d-1b3a8424f534.

[47] European Commission (8 April 2019). 'Ethics Guidelines for Trustworthy AI."

[48] McEvenue and Mann, "Case Study" p. 6-7.

recommendation four, those who train AI processes need to be given clear roles and responsibilities to allow for a system of governance at the highest levels.

Section 8 – Measures Related to Risk of *AIDA* introduces an important protection that directs individuals responsible for high-impact systems to set up measures to help mitigate risks of harm or biased output following regulations. Section 9 also requires the individual to monitor compliance of the mitigation measures. Section 10 mandates that the person must keep records. However, there must be a strong third party fully resourced that watches and enforces the law with meaningful recourse.

Section 11 – Publication of Description – Making System Available for Use requires that someone who makes a high-impact system available for use must publicly publish a plain-language description online. The description must include the following (a) how the system is intended to be used (b) types of content, recommendations, decisions, predictions it is intended to generate (c) mitigation measures and (d) any other information that may be prescribed by regulation. An important protection. Section 11(2), like the above, requires the online publication of a description of the managing the operation of a high impact system with the same requirements as above. That a high impact system is scrutinized and subject to comprehensive consultation, why should any AI system receive any less legal scrutiny?

4. AI Legal training requirement should be enacted

Training must be undertaken that is reflective and responsive to vulnerable persons and groups, such as racialized workers, LBGTQA+, women, persons with disabilities, ethnic minorities, and children.[49] Legislated personnel allocations should be instilled to ensure diversity and inclusion balances are maintained for those that train and drive the technology because the technology will apply to all and must be neutral.

In addition, it is essential that the host organization implement and maintain a privacy management program that details the policies and procedures that the organization must do to fulfill its obligation under a universal Act. The policies must consider the protection of personal information, training of organization staff, and materials that explain the organization's policies and procedures. All of this is subject to the volume and sensitivity of the data.[50]

5.Legislated external audits, external consultation, and civil and criminal liability.

AIDA – Section 29 – Administrative Monetary Penalties - Section 29(4) allows the government to designate one violation into separate violations for each day the violation continued, but digital harm and discrimination cannot be restricted to civil sanctions. Penal consequences must be developed and applied where needed. The misuse of digital power can inflict as much harm on a person as a physical assault. It can strip one of their privacy, their dignity, and their choices. ***AIDA – Section 30 – Offences -*** Section 30(1) classifies a contravention of sections 6 to 12 as an offence. Section 30(2) states that a misrepresentation of a regulated activity is also an offence. Section 30(3) is reproduced below, detailing the punishment. A start, but more is needed.

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[49] *Ibid.*
[50] Bill C-27, Part 1, cl 9.

AIDA – Section 35 – Advisory Committee - This section empowers the Minister to establish a committee in relation to the administration of the Act. *The Personal Information Protection and Electronic Documents Act (PIPDTA)* foresees the institution of a tribunal to serve as the last line of defense against improper AI use. This body would be tasked with overseeing AI function and decisions rendered.[51] As an expression of its appreciation for greater transparency, the tribunal would publicize any decisions made on the use of AI and the collection of personal information.[52] A tribunal, co-existing with the jurisdiction where necessary to pursue criminal liability much like the *Immigration and Refugee Protection Act* allows, would go a long way to creating the necessary deterrence and proper messaging as to the potentially catastrophic consequences of AI and digital mismanagement, privacy breaches and other harms. Ultimately digital rights should be akin to physical rights.[53]

Conclusion

Intelligence automation or AI[54] is rapidly altering our concept of reality.[55] Game changing, transformative, conducive to an uneasy co-existence. These are all terms that can be used to describe AI. Although AI is not new, its recent ascension to the mainstream, the proliferation of government and private use and its impact on our daily lives, are relatively new developments. Hence, the earnest call for effective, universal legislation to govern this new and growing facet of our existence. The ask of legislators is enormous as AI uses change and expand each day, so any legislation must aim to be adaptive, much like some of our foundational legal documents. But like the development of those legal documents, we require extensive consultation,[56] domestically and internationally, with as many stakeholders as possible to frame the law in a way that does not erode, but rather identifies a new age abounding with fundamental legal rights and protections, while also promoting the fullest reasonable expression of the benefits of AI and other digital technology without stifling innovation.

Bill C-27 and *AIDA* are a first step in what must be a careful, thoughtful, and deliberate process that culminates with a *Canadian Digital Charter of Rights and Freedoms* that applies equally to all. Anything else will fall short of the legal necessities of our new and still relatively unknown digital future. AI indeed offers an enticing redefinition of large swaths of our current reality. The law then must play a pivotal role to bridge the growing divide between the ethical and the legal and breathe new life into what our fundamental legal rights, freedoms and protections stand for in a new and seemingly daily reorientation of our existence in a digital world.

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[51] Bill C-27, Part 2, cl 18.
[52] *Ibid*.
[53] https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-136/hansard#11955659, 10056.
[54] Lennox, John C., (2020) *2084 Artificial Intelligence and the Future of Humanity*, Zondervan Reflective, p. 50.
[55] Kissinger, Henry A., Schmidt, Eric and Huttenlocher, Daniel, (2021) *The Age of AI And Our Human Future*, Little, Brown and Company, p. 19.
[56] https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-136/hansard#11955659, 10067.

Bellissimo Law Group PC

Bellissimo Law Group PC has a well-respected and lengthy history with immigration stakeholders. Our multi-cultural and talented team represents individuals from all over the world in Canadian citizenship, immigration, and refugee matters with experience dating back over forty-five years. We have engaged in extensive community, policy, pro bono, and academic outreach by virtue of our legal publications, policy positions, media, testimony before the House of Commons and Senate and speaking engagements throughout Canada over the past decades.

Bellissimo Law Group PC is responsible for key citizenship and immigration court decisions, policies, and publications that have shaped immigration law. We work with Immigration, Refugees and Citizenship Canada, Service Canada, the Canada Border Services Agency, Federal Court of Appeal, Federal Court of Canada, Department of Justice, and the Immigration and Refugee Board, not only on individual cases but also at the highest levels through our extensive outreach efforts.

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Mr. Bellissimo has testified before Parliamentary and Senate Committees on several proposed amendments to immigration law over the years. He has been a lead on policy papers, legal analyses, and proposed recommendations to the government on behalf of immigration advocacy associations and in his personal capacity.

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