

Federal Court Updates its Guidance on the Use of AI-Generated Content

R. Scott MacKendrick, Bereskin & Parr LLP

As 2023 was coming to a close, the Federal Court issued a [Notice](#) to the Parties and the Profession on the use of artificial intelligence in court proceedings. Consistent with several other provincial courts, the Notice required parties to inform the Court, and the other parties, if they have used artificial intelligence to create or generate new content in preparing a document that is filed with the Court. If any such content has been included in a filed document, the Notice provided that the first paragraph of the text in that document must disclose that AI had been used to create or generate that content.

The Notice also advised that counsel and the parties are to verify any AI-related content - that there was a “human in the loop” - and set out principles to guide the use of AI in court documents, including the exercise of caution and the use of only well-recognized and reliable sources when referring to legal authority or analysis.

On May 7, 2024, the Federal Court issued an [updated Notice](#), addressing issues raised in the Court’s Artificial Intelligence Working Group. The Court recognized that significant concerns continue to be raised regarding the use of AI in Court proceedings, including the possibility of “hallucinations” and “deepfakes”, and the potential fabrication of legal authorities through AI. The issues raised included:

“Where does the Court draw the line between uses of AI that must be declared and those that do not need to be declared?”

On this issue, the Court noted that the “Notice does not apply to AI that lacks the creative ability to generate new content. For example, [it] does not apply to AI that only follows pre-set instructions, including programs such as system automation, voice recognition, or document editing.”

The Court indicated that “a Declaration is required if content ... was directly provided by AI, whether or not it was inserted from an external source like a web-based generative AI.” A Declaration is not, however, required “if AI was used to merely suggest changes, provide recommendations, or critique content already created by a human”. A useful formulation of when a Declaration is required is that one is required “when the role AI plays in the preparation of materials for the purpose of litigation resembles that of a co-author.”

“Will the Court treat documents containing a Declaration on the use of AI differently than those that do not? More particularly, would a member of the Court use the inclusion of a Declaration to make a negative inference on the contents of the document?”

On this issue, the Court confirmed that the inclusion of a Declaration will not in and of itself attract an adverse inference, rather, it simply notifies the Court and the other parties that AI has been used in the generation of its content.

“What is the onus on counsel, when taking over a matter from either a self-represented litigant or previous counsel, to verify whether documents that were previously filed with the Court contain content that should have been declared?”

On this issue, the Court advised that when counsel takes over from a previous lawyer or self-represented party - while it may be difficult to ascertain whether materials previously filed contain content created or generated by AI - it is reasonable to expect counsel to use best efforts to provide a Declaration in respect of any materials they have reason to believe may include AI generated content.

As new concerns on the use of generative AI are encountered, we are likely to see further updates from not only the Federal Court, but from other provincial courts.