

Apps for Justice Challenge: Main Scenario and Background Guide

Student Handout

Scenario 2

At What Cost? AI, Privacy and Workers' Rights

After returning to work at SmartRx after the bike accident, Tal was still regaining strength and mobility in their wrist and was limited in what tasks they could do. Around this time, Samantha Smart, the owner of SmartRx, decided to change the store's business model to primarily online retailing. This meant that the store hours would be reduced, and there would be less need for staff in the brick-and-mortar store.

Samantha opened a SmartRx warehouse next to the drugstore to stock all the products sold in the online store. The warehouse uses an automated collection and distribution system to prepare orders to be shipped out. Since the system needs to be monitored and operated by staff in-person, Samantha offered her employees the option of moving to the warehouse. However, if they decided to stay at the store, they faced the possibility of being scheduled for fewer hours, especially with the introduction of self-checkout for customers.

Tal was one of the first to be offered the option to switch to the warehouse position because their wrist injury made working at the cash and stocking shelves difficult. The warehouse job didn't require much use of their hands, just some typing here and there, but they were still working a bit slower than the other employees because of it.

The automated system at the new warehouse used facial recognition software to log in each staff member and had a voice-command option too. Tal liked the new position and even suggested to a friend who was looking for a job that they should apply for it. Tal's friend applied but never got called back. Tal heard rumours that the hiring for the warehouse was also being done with the help of an automated system. In fact, according to Tal's manager Gio, Samantha had purchased an automated system from the nearby Amazon warehouse. The system used data collected from the employees in the Amazon warehouse and others like it in the province.

The SmartRx system tracked things like punctuality, how fast certain tasks were completed, how many breaks employees took and for how long, and if they missed days of work. The data collected was matched with each employee's personal biodata as well. Data associated with their work profile included address, age, gender identity, education, number of children, and even hair and eye colour. Based on these metrics, the system ranked current employees and potential candidates that applied for jobs.

The result was that people who fit certain profiles were more likely to be hired than others. The wages offered were also based on these metrics. People who fit certain profiles were paid better, regardless of their experience or merit. Promotions were offered to incentivize employees to work faster and take fewer breaks, and employees who ranked lowest were disciplined. The result of the automated system, although not intentionally biased, was the discrimination of people based on their backgrounds and social status, and how much or how little they worked.

Samantha eventually asked every employee to sign a new employment contract. There was no opt-out option for the data collection if you wanted to work at the SmartRx warehouse. The contract didn't say what the data would be used for, and Tal was concerned it might be used against them in some way in the future. Why do they need to know hair and eye colour to determine how well an employee is doing their job?

Since the bike accident, Tal has had to take the bus to get to work. On Thursdays and Fridays, they went straight from school to work, and because of the unreliable bus schedules, often arrived a few minutes late. Something seemed off about the type of data the company was tracking, and Tal was worried that their reduced capacity because of their wrist injury would put their job at risk. Tal explained the problem to Gio, but he said there was nothing he could do because the tracking system didn't have an option to document extenuating circumstances, such as his wrist injury.

Tal decided to talk to the store's union rep, to find out if the union could do anything to protect their privacy at work without risking their job. The rep told Tal that the collective agreement between the union and the owner of the store was signed before the data tracking system was implemented. However, because of the risk of bias and discrimination, as well as the unqualified layoffs that had started happening, the union may be able to leverage the human rights code to renegotiate a new agreement.

Because the technology is so new, there aren't any specifically relevant rules on how employers should use the automated system. There are laws to protect privacy and data collection though, but how do those fit in with the employment contracts and the new collective agreement? The union rep says the union will take care of all the negotiations and legal matters, but Tal doesn't feel secure at work, and they aren't going to sit back and wait for someone to tell them they no longer have a job in a month. And even if they don't lose their job, there might still be some sketchy activity going on behind the scenes with all the bio data the company is tracking.

Should Tal have the right to opt-out of all or some of the data being collected about them at work? Should SmartRx be required to get informed consent from their employees about the type of data being collected and what they intend to do with it?

If Tal's broken wrist is slowing them down, but the tracking system didn't take the injury into account when generating data results, what other discriminatory practices could the system be inducing? For example, what if someone uses a wheelchair, or has intellectual disabilities? Would those be taken into consideration, and if so, how can we ensure that information is used to reduce, not increase bias?

Because of the numerous issues at work that affect Tal, they decided to get more involved with the union to bring some of their concerns to the negotiation table. Can Tal insist on renegotiating the collective agreement given all the changes that have been happening, like the data tracking system, and unfair lay-offs and disciplinary measures?

What can Tal rely on to improve their situation at work and to support the union to protect these rights for all the employees?

Questions to think about and discuss:

1. What areas of law, legal issues are engaged by Tal's situation at work?
2. What are the A2J barriers present in this situation?
3. What is the negative impact on Tal and their network?

Areas of Law

Tal sure has a lot on their plate, huh? Let's think about the areas of law that their current set of issues raise. They fall into four major categories:

- **Workers' rights**
- **Collective bargaining**
- **Human rights and discrimination**
- **Artificial intelligence, privacy and data collection**

Below, you will find some information about each of these areas of law. As you're reading through, think about which of these areas interest you. Is there one you're particularly passionate about? Does it spark any ideas for a technology-related solution?

Workers' Rights

What is the governing legislation in Ontario?

- See the Ontario [Ministry of Labour](#) and the Ontario [Employment Standards Act](#) (ESA) for governing legislation protecting a range of workers' rights. The [ESA Guide](#) describes the rules about [minimum wage](#), [hours of work limits](#), [termination of employment](#), [public holidays](#), [pregnancy and parental leave](#), [severance pay](#), [vacation](#), breaks, employment insurance and more.

What can Tal do about time off after the cycling accident?

- CLEO's [Steps To Justice](#) is a great resource that Tal can consult to find information and practical help in various employment situations. Steps To Justice offers useful links and guides in areas of employment such as insurance, work related injuries, unions, time off, hiring, and getting laid off. The ESA guarantees a certain amount of time off for illnesses and some personal emergencies, referred to as a "[leave of absence](#)". Workers have the right to take off a certain number of days per calendar year, and depending on the union or employment contract, may also be entitled to paid time off.

Collective Bargaining

What is the governing legislation in Ontario?

- The Ontario [Labour Relations Act](#) (LRA) outlines several key objectives that protect workers' right to join a trade union or an employers' organization and participate in its activities. The LRA aims to facilitate negotiation, adaptability, communication, cooperation, and efficient dispute resolution for the overall improvement of labour relations and workplace conditions.
- The LRA facilitates collective bargaining between employers and employee union representatives. It recognizes the significance of workplace parties being adaptable to change. It seeks to foster flexibility, productivity, and active employee involvement within the workplace. The LRA encourages communication between employers and employees as a means to enhance workplace dynamics. It underscores the importance of economic growth as the basis for fostering mutually beneficial relations among employers, employees, and trade unions. Additionally, the legislation

promotes cooperative participation between employers and trade unions to address and resolve workplace issues. Finally, it emphasizes the need for a prompt resolution of workplace disputes to maintain a conducive and efficient working environment.

What is a collective agreement?

- The LRA defines a collective agreement¹ as a written contract between an employer or employers' organization and a trade union representing employees. It outlines employment terms, conditions, and the rights and duties of the employer, union, and employees. The agreement must address aspects like union dues, grievance resolution through arbitration, a no-strike or lock-out commitment during its term, and the exclusive bargaining rights of the listed union for the represented employees.

What happens if the parties in a collective agreement cannot agree?

- In Ontario, if the parties cannot reach an agreement, they can ask the [Ministry of Labour](#) to appoint a [conciliator](#). The conciliator's role is to help the parties come to an agreement. If the conciliation is not successful, the conciliator will advise the Minister of Labour who will then issue a "no board" report.
- The parties can choose to ask an [interest arbitrator](#) to decide on the issues in dispute. They will present their respective arguments for each issue on which they cannot agree and the arbitrator will give a binding decision. The parties will have to follow the arbitrator's decision. If the parties choose to use an arbitrator, they are giving up their right to strike or to lockout.
- Parties who cannot reach an agreement and who do not proceed by way of arbitration can be in a strike or a lockout position once conciliation has failed.

What can Tal do to ensure job security and get paid a fair wage?

- Since SmartRx started using the new artificial intelligence (AI) system, employees are very worried about getting laid off, told not to come in, or not getting enough hours. A spokesperson for SmartRx's union has told Tal that the union's bargaining team will refuse to agree to a Collective Agreement that allows for any lay-offs, pay decreases, or other disciplinary measures based on biodata collected with the AI system that are protected grounds under the [Human Rights Code](#).

Human Rights and Discrimination

What is the governing legislation in Ontario?

- The Ontario [Human Rights Code](#) prohibits discriminatory actions against persons based on protected grounds. [Protected grounds](#) are race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.
- The situation at SmartRx likely engages the grounds of race, ancestry, place of origin, ethnic origin, age, marital status, family status, and disability. The scenario engages the social areas of membership in unions, trade or professional associations and employment.
- The main idea behind human rights is that everyone should have an opportunity to fully participate in society. People with disabilities often face significant barriers to this participation. The Human Rights Code says that if a person has a disability, employers, service providers and

¹ See the **Collective Agreements e-Library Portal**, a self-serve, online portal that houses public and private sector collective agreements in Ontario, online: < <https://www.lr.labour.gov.on.ca/en-CA/Collective-Agreements/> >.

landlords must make reasonable changes in order to accommodate their disability, even if it is inconvenient or costs money to do so.

- The word “reasonable” is important because there can be situations in which making full accommodations would be an undue hardship, or unfairly difficult. Undue hardship can occur when making a change could lead to significant health and safety risks or would cost more than the business could afford.

What can Tal do about their employer’s discriminatory hiring, firing, and disciplinary actions?

- In addition to [Steps to Justice’s section on this area of law](#), Tal can access free legal advice from the [Ontario Human Rights Legal Support Centre](#). They can help Tal determine whether they have a claim and the legal processes and options available, including whether and how to file a complaint with the [Human Rights Tribunal of Ontario](#) (HRTO). The HRTO can make a decision about whether the employer has discriminated against Tal and can order them to compensate Tal. They can also force the employer to change hiring and firing practices to stop breaking the law. Lawyers can also help with this, but generally for a fee. A lawyer can also help in the event that the dispute cannot be resolved and you need to take legal action to be accommodated.

Artificial Intelligence, Privacy and Data Collection

What is the governing legislation in Ontario?

- Employees are protected from privacy infringement and the misuse of personal data in Artificial Intelligence (AI) systems in the workplace. Privacy rights are protected by [Personal Information Protection and Electronic Documents Act](#) (PIPEDA) and data collection and use are protected under the proposed [Bill C-27](#), also known as the *Digital Charter Implementation Act, 2022*. Part 2 of the Act is the [Artificial Intelligence and Data Act](#) (AIDA) which aims to regulate international and interprovincial trade and commerce in AI systems.
- The legislation introduces standardized requirements for the design, development, and use of AI systems. These requirements include measures to address potential risks of harm and biased outcomes. Additionally, the legislation prohibits certain practices related to data and AI systems that could cause serious harm to individuals or their interests. The goal is to establish a framework that ensures responsible and safe use of AI technology while preventing practices that could negatively impact individuals or lead to biased outcomes.

What personal information is protected?

- The PIPEDA protects Tal at work from unreasonable or inappropriate information being collected about them. [Section 5\(3\) Appropriate purposes](#) provides that: “An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.” It also prevents an employer from collecting information without the employee’s knowledge or consent: see sections [7\(1\) Collection without knowledge or consent](#) and [7\(2\) Use without knowledge or consent](#).

Artificial Intelligence systems collecting and using biodata

- Tal has several concerns about the potential misuse of biodata collected by SmartRx. The collection of certain types of data may infringe on an employee’s rights. Until the AIDA is enacted into law, individuals can seek remedies for discriminatory use of data through the [Canadian Human Rights](#)

[Commission](#) (CHRC) or [Ontario Human Rights Commission](#). The use of AI systems carries the potential to disproportionately harm historically marginalized communities if not rigorously evaluated for bias. The proposed AIDA seeks to mitigate this risk by mandating businesses engaged in regulated activities to proactively assess and address the potential bias risks, specifically focusing on grounds prohibited by the [Canadian Human Rights Act](#) (CHRA).² This proactive approach aims to ensure that AI technologies are developed and employed in a manner that avoids discriminatory outcomes.

How does the AIDA protect Canadians from collective harms?

- The AIDA introduces a new general offense related to personal information obtained through conduct recognized as an offense in Canada. The offence provision prohibits the possession or use of such personal information for designing, developing, using, or making an artificial intelligence system available. It also makes it an offense to knowingly or recklessly make an AI system available if it is likely to cause and indeed causes serious specified harms, or if there is intent to defraud the public causing substantial economic loss, with the AI system being the cause of such loss.

² The prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

Relevant Facts and Barriers

In the table below, you'll find some sentences pulled out from the scenario. These excerpts exhibit some of the main issues that Tal is confronted with, along with the areas of law that they each raise. As you begin thinking about how technology could help Tal, try focusing on a specific problem.

FACTS	AREA OF LAW AND CONNECTED QUESTIONS
<p>" ... if they decided to stay at the store, they faced the possibility of being scheduled for fewer hours, especially with the introduction of self-checkout for customers."</p> <p>"If Tal's broken wrist is slowing them down, but the tracking system didn't take the injury into account when generating data results, what other discriminatory practices could the system be inducing? For example, what if someone uses a wheelchair, or has intellectual disabilities? Would those be taken into consideration, and if so, how can we ensure that information is used to reduce, not increase bias?"</p>	<p>Workers' Rights:</p> <ul style="list-style-type: none"> • <i>Leave of absence</i> • <i>Termination of Employment</i> • <i>Breaks and Time off</i> <p>• What can Tal rely on to improve their situation at work, and to support the union to protect these rights for all the employees?</p>
<p>"Tal decided to talk to the store's union rep, to find out if the union could do anything to protect their privacy at work without risking their job. The rep told Tal that the collective agreement between the union and the owner of the store was signed before the data tracking system was implemented. However, because of the risk of bias and discrimination, as well as the unqualified layoffs that had started happening, the union may be able to leverage the human rights code to renegotiate a new agreement."</p>	<p>Collective Bargaining:</p> <ul style="list-style-type: none"> • <i>The right to a collective agreement</i> • <i>Employment Contracts</i> • <i>Unions / Collective Bargaining</i> <p>• Because of the numerous issues at work that affect Tal, they decided to get more involved with the union to bring some of their concerns to the negotiation table. Can Tal insist on renegotiating the collective agreement given all the changes that have been happening, like the data tracking system, and unfair lay-offs and disciplinary measures?</p>
<p>"Because the [AI] technology is so new, there aren't any specifically relevant rules on how employers can use the automated system. There are laws to protect privacy and data collection though, but how do those fit in with the employment contracts and the new collective agreement?"</p>	
<p>"Something seemed off about the type of data the company was tracking, and Tal was worried that their reduced capacity because of their wrist injury</p>	<p>Human Rights and Discrimination:</p> <ul style="list-style-type: none"> • <i>Discrimination / disability</i> • <i>Bias</i>

would put their job at risk. Tal explained the problem to Gio, but he said there was nothing he could do because the tracking system didn't have an option to document extenuating circumstances, such as his wrist injury."

"The SmartRx system tracked things like punctuality, how fast certain tasks were completed, how many breaks employees took and for how long, and if they missed days of work. The data collected was matched with each employee's personal biodata as well. Data associated with their work profile included address, age, gender identity, education, number of children, and even hair and eye colour. Based on these metrics, the system ranked current employees and potential candidates that applied for jobs."

"The result was that people who fit certain profiles were more likely to be hired than others. The wages offered were also based on these metrics. People who fit certain profiles were paid better, regardless of their experience or merit. Promotions were offered to incentivize employees to work faster and take fewer breaks, and employees who ranked lowest were disciplined. The result of the automated system, although not intentionally biased, was the discrimination of people based on their backgrounds and social status."

"Samantha eventually asked every employee to sign a new employment contract. There was no opt-out option for the data collection if you wanted to work at the SmartRx warehouse. The contract didn't say what the data would be used for, and Tal was concerned it might be used against them in some way in the future. Why do they need to know hair and eye colour to determine how well an employee is doing their job? "

- *Protected Grounds*
- If Tal's broken wrist is slowing them down, but the tracking system didn't take the injury into account when generating data results, what other discriminatory practices could the system be inducing? For example, what if someone uses a wheelchair, or has intellectual disabilities? Would those be taken into consideration, and if so, how can we ensure that information is used to reduce, not increase bias?

AI, Privacy and Data Collection:

- *AI System Bias*
- *Discrimination / Human Rights violations*
- *Privacy*
- *Protection of Personal Information*
- Should Tal have the right to opt-out of all or some of the data being collected about them at work? Should SmartRx be required to get informed consent from their employees about the type of data being collected and what they intend to do with it?

Additional Reading

As you begin to think about what your app may look like, you're likely going to want to do some research on the particular problem that it's targeting. To help you get started on your search, here are some places that you may find useful to turn to.

Workers' Rights

- **CLEO's Steps to Justice** has an excellent [section on workplace legal topics issues](#).

Collective Bargaining

- In addition to **CLEO's** [publications on the matter](#), **OJEN** has a [dedicated resource on collective bargaining](#) too.

Human Rights

- The **Ontario Human Rights Commission** ("OHRC") promotes, protects, and advances human rights through research, education, targeted legal action, and policy development. The OHRC has [eLearning modules](#) that may be helpful for Tal, including the [Human Rights 101](#) module as well as other webinars.
- If Tal decides to seek legal advice or assistance relating to their human rights, the **Human Rights Legal Support Centre** ("HRLSC") is their next stop. Tal could complete their [Decision Tree](#) survey to see if they are eligible for their services. If they are, they can receive legal support services to file an application to the Human Rights Tribunal and beyond. If Tal is not eligible to receive legal advice or assistance from the HRLSC, they may have to try to file their human rights application to the Human Rights Tribunal on their own.
- The **Human Rights Tribunal of Ontario** ("HRTO"), where human rights applications are filed and decided, has resources on how to navigate the application and hearing process if Tal wishes to proceed to submit an application under the Ontario *Human Rights Code*. These are good starting points whether Tal files the application with or without the help of counsel: [application and hearing process, forms and filing, FAQs, videos, and guides](#). However, even with the help of these resources, the process could still be very time-consuming and difficult for Tal.

AI, Privacy and Data Collection:

Much has been written lately on AI and its current and potential impacts on law and workplace legal issues. The following is a selection of pieces that may help you think along your app idea.

- "Legal Risks Associated with Automated Hiring Tools in Canada": <https://mcmillan.ca/insights/publications/legal-risks-associated-with-automated-hiring-tools-in-canada/>
- "Canada's voluntary AI code of conduct is coming — not everyone is enthused": <https://www.cbc.ca/news/business/ai-code-of-conduct-stopgap-1.6983064>
- "The Landscape of AI Regulation in Canada": <https://cassels.com/insights/the-landscape-of-ai-regulation-in-canada/>

- “Canada mustn’t rush into legislating AI “: <https://nationalmagazine.ca/en-ca/articles/law/hot-topics-in-law/2023/canada-mustn-t-rush-into-legislating-ai>
- “Guide to artificial intelligence regulation in Canada”: <https://www.torlys.com/en/our-latest-thinking/publications/2023/04/guide-to-artificial-intelligence-regulation-in-canada>
- AI and Access to Justice: <https://justiceinnovation.law.stanford.edu/projects/ai-access-to-justice/>
- AI and Biometric Policy Issues: <https://ainowinstitute.org/publication/regulating-biometrics-global-approaches-and-open-questions>
- AI and A2J Conference: <https://justiceinnovation.law.stanford.edu/jurix-workshop/>
- AI biometric risks: <https://www.gov.uk/ai-assurance-techniques/aneanta-ai-ai-risk-intelligence-system-for-biometric-and-high-risk-ai>
- AI assurance: <https://www.gov.uk/guidance/cdei-portfolio-of-ai-assurance-techniques>
- OECD AI bias: <https://oecd.ai/en/wonk/ai-biases-usa>
- Submission of the Office of the Privacy Commissioner of Canada on Bill C-27, the *Digital Charter Implementation Act, 2022*: https://www.priv.gc.ca/en/opc-actions-and-decisions/submissions-to-consultations/sub_indu_c27_2304/
- AIDA <https://ised-isde.canada.ca/site/innovation-better-canada/en/artificial-intelligence-and-data-act> (<https://www.ourcommons.ca/documentviewer/en/44-1/INDU/meeting-96/notice>)
- *Data Act* extended reading list: <https://www.parl.ca/legisinfo/en/bill/44-1/c-27?view=about>