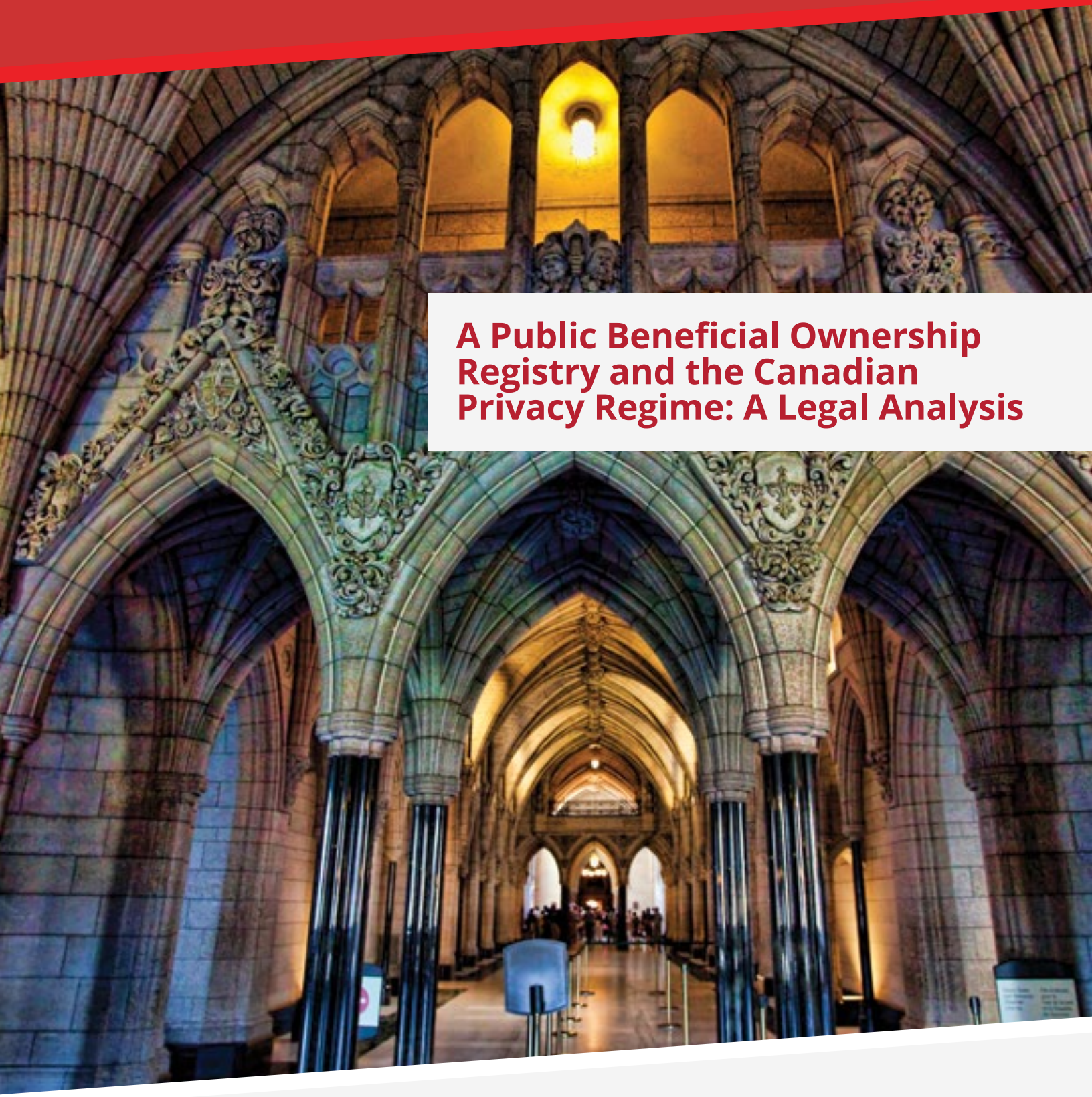
#endsnowwashing



A Public Beneficial Ownership Registry and the Canadian Privacy Regime: A Legal Analysis

PUBLISH WHAT YOU PAY CANADA

TRANSPARENCY INTERNATIONAL CANADA

Canadians for Tax Fairness
Canadiens pour une fiscalité équitable

FOREWORD

Since 2016, Publish What You Pay Canada, Canadians for Tax Fairness, and Transparency International Canada have been pushing for Canada to adopt a publicly accessible, pan-Canadian registry of beneficial owners. Canada's lack of beneficial ownership transparency makes our entire country an attractive destination for money laundering or 'snow washing'.

For the first time, this paper provides a comprehensive overview of the privacy considerations in developing a publicly accessible pan-Canadian registry of beneficial owners in Canada. It highlights key legislation and case law that explains how a beneficial ownership registry would fit into Canada's federal and provincial privacy regimes, as well as how Canada's constitutional privacy protections would apply to such a registry. It additionally provides a more granular analysis of specific fields that might attract a higher expectation of privacy if disclosed publicly.

We hope that this paper contributes critical analysis to Canada's active discussion on the importance of a public registry of beneficial owners, and provides valuable insights on the privacy considerations in setting up a pan-Canadian public registry of beneficial owners.

Emily Nickerson
Director
Publish What You Pay Canada

Toby Sanger
Executive Director
Canadians for Tax Fairness

James Cohen
Executive Director
Transparency International Canada

ACKNOWLEDGEMENTS

OCTOBER 2019

PWYP-Canada, Transparency International Canada, and Canadians for Tax Fairness are grateful to Open Society Foundations for supporting the research and writing of this report. The ideas, opinions, and comments within this publication are entirely the responsibility of its author and do not necessarily represent or reflect the Open Society Foundations.

Author: Mora Johnson, Barrister & Solicitor
The author gratefully acknowledges the invaluable research and writing assistance of Katharine Cornish and Magdalena Fish as well as those who read earlier versions and provided helpful comments: Professor Lisa Austin, Milos Barutciski, Brian Beamish (Ontario Information and Privacy Commissioner), Sasha Caldera, James Cohen, Kevin Comeau, Eric Hansen, Denis Meunier, Emily Nickerson and Toby Sanger. Any errors or omissions should be attributed to the author alone.

Design: Mouthmedia Inc.

This report provides general information on legal and related matters and should not be relied upon as legal advice.

ABOUT

ABOUT CANADIANS FOR TAX FAIRNESS

Canadians for Tax Fairness
Canadiens pour une fiscalité équitable

Canadians for Tax Fairness is a non profit organization whose aim is to raise public awareness of crucial issues of tax justice and to change the way Canadians talk about tax. We advocate for fair and progressive government policies aimed at building a strong and sustainable economy, reducing inequalities and funding quality public services. Canadians for Tax Fairness believes in the development and implementation of a tax system, based on ability to pay, to fund the comprehensive, high-quality network of public services and programs required to meet our social, economic and environmental needs in the 21st century.

ABOUT TRANSPARENCY INTERNATIONAL CANADA

TRANSPARENCY INTERNATIONAL CANADA

Transparency International Canada (TI Canada) is the Canadian chapter of Transparency International. Since its foundation in 1996, TI Canada has been at the forefront of the national anti-corruption agenda. In addition to advocating legal and policy reform on issues such as whistleblower protection, public procurement and corporate disclosure, we design practical tools for Canadian businesses and institutions looking to manage corruption risks, and serve as an anti-corruption resource for organizations across Canada.

ABOUT PUBLISH WHAT YOU PAY CANADA

PUBLISH WHAT YOU PAY CANADA

Publish What You Pay Canada is part of the global Publish What You Pay movement of civil society organisations working to make oil, gas and mineral governance open, accountable, sustainable, equitable and responsive to all people. As a movement, we envision a world where all people benefit from their natural resources, today and tomorrow. Launched in 2008, PWYP-Canada today numbers 15 members and realises its work through advocacy, research and public outreach to promote and achieve enhanced disclosure of information about extractive industry operations, with an emphasis on revenues and contracts.

TABLE OF CONTENTS

EXECUTIVE SUMMARY

In December 2017, Canada's Federal Finance Minister, together with provincial and territorial counterparts, announced an agreement to improve beneficial ownership transparency. The announcement also stated that "Ministers agreed to continue existing work assessing potential mechanisms to enhance timely access by competent authorities to beneficial ownership information." One way the government could achieve this objective is by creating a beneficial ownership registry, which could be made public as the UK and the EU have done. This would require publishing personal information about beneficial owners, which raises privacy concerns and considerations.

In Canada, individual privacy rights are protected under section 7 and section 8 of the *Charter of Rights and Freedoms*. Under Charter jurisprudence, most of the beneficial ownership information on corporations likely to be collected and disclosed publicly would carry a lower expectation of privacy and the societal benefits would likely be found to outweigh the privacy infringements. However, publishing information regarding an individual's citizenship or country of principal tax residency might be considered too sensitive for public disclosure as this information could lead to discrimination or arbitrary treatment based on race, colour, national or ethnic origin or even religion. This type of information carries a higher expectation of privacy and is more likely to be protected by the Charter.

Whether a public beneficial ownership registry would be at risk of a constitutional challenge will depend on the legislative purposes stated by the federal government in creating the registry. The limit on an individual's right to privacy could be justified if there is a rational connection between the infringement and the government's legislative objectives, and if the infringement is as minimal as possible to achieve these objectives. A registry could serve a range of objectives related to crime detection, tax enforcement, consumer protection, and transparency in political financing, as examples. In cases where individuals have legitimate privacy concerns, the registry could be designed to allow for publication exemptions where individuals have valid reasons for wanting to keep their personal information private, such as security concerns related to themselves and their family members.

Privacy legislation as it applies to government institutions and to private businesses would make it difficult to collect and disclose beneficial ownership information and legislative solutions authorizing such collection and disclosure are preferred. Should the government legislate a public beneficial ownership registry, federal, provincial, and territorial statutes should be passed specifically authorizing the collection and public disclosure of beneficial ownership information. There are already federal, provincial and territorial laws in place that would guide the management (including storage and destruction) of personal information used to validate a beneficial owner's identity such as home addresses, dates of birth, citizenship as well as scans of driver's licenses, passports or other forms of identification.

By limiting the types of personal information disclosed to those carrying a lower expectation of privacy and those essential to effectively addressing government objectives, and by enacting legislation authorizing the collection and disclosure of beneficial ownership information, the benefits of a public beneficial ownership registry should justify any risk of infringement on individual privacy rights.

A PUBLIC BENEFICIAL OWNERSHIP REGISTRY AND THE CANADIAN PRIVACY REGIME: A LEGAL ANALYSIS[1]

1. INTRODUCTION

In December 2017, Canada's Federal Finance Minister, together with provincial and territorial counterparts, announced an agreement to improve beneficial ownership transparency.[2] The announcement also stated that "Ministers agreed to continue existing work assessing potential mechanisms to enhance timely access by competent authorities to beneficial ownership information." A policy option[3] the Finance Ministers may consider is the creation of a beneficial ownership registry(ies), as have been implemented in European Union jurisdictions and elsewhere, which could make beneficial ownership information available to government departments and agencies and potentially, actors outside the government.[4]

This paper provides an analysis of privacy laws and protections in Canada as they would apply to a beneficial ownership registry (or registries) of Canadian businesses, should such a registry be made publicly available. The privacy analysis refers to corporations under federal, provincial, or territorial jurisdiction in Canada, but applies as well to partnerships (for example, where limited partners may not be publicly disclosed under current laws) and sole proprietorships operating under a business name.

Trusts are excluded from this analysis as their structures are significantly different and they operate much more in the private sphere and engage fundamentally different privacy interests.

This paper also examines the constitutionality of a public registry for beneficial ownership information when viewed through the lens of individual privacy rights protected by the Charter. In the sections that follow, the paper will:

- Outline the different rationales for creating a public registry;
- Examine how Charter rights may apply to a public registry and identify limitations under current privacy legislation;
- Propose a policy response to mitigate privacy risks or potential Charter infringements associated with a public registry; and
- Provide an overview of the federal and provincial legislation currently governing the management of personal information and data.

While there is no jurisprudence exactly on point, some cases are included which provide insight as to how Canadian courts might interpret constitutional privacy rights vis-à-vis beneficial ownership information. It should also be noted that the Ontario Privacy and Information Commissioner, Mr. Brian Beamish, expressed his view at a Transparency International Canada event in the spring of 2019 that he did not expect a public beneficial ownership registry to create privacy concerns.[5]

Below, the context in which beneficial ownership information for Canadian businesses could be disclosed is described. An overview of Canada's division of powers over business activities is provided as well as the corporate and business registries that currently exist at federal, provincial and territorial levels. Finally, the beneficial ownership information that should be collected and disclosed in line with existing registries is outlined.

1 Authored by Mora Johnson, Barrister & Solicitor. The author gratefully acknowledges the invaluable research and writing assistance of Katharine Cornish and Magdalena Fish as well as those who read earlier versions and provided helpful comments: Professor Lisa Austin, Milos Barutciski, Brian Beamish (Ontario Information and Privacy Commissioner), Sasha Caldera, James Cohen, Kevin Comeau, Eric Hansen, Denis Meunier, Emily Nickerson and Toby Sanger. Any errors or omissions should be attributed to the author alone. The opinions expressed in this paper belong to the author and do not necessarily reflect those of any clients or institutions to which the author is affiliated.

2 https://www.fin.gc.ca/n17/data/17-122_4-eng.asp

3 Other jurisdictions have made beneficial ownership more transparent by imposing obligations on corporate service providers such as lawyers and incorporation providers to retain beneficial ownership information and turn it over upon request. This policy solution is not likely to be adopted by Canada and does not raise the same privacy issues as would a public beneficial ownerships registry.

4 See also *Secret Entities: A legal analysis of the transparency of beneficial ownership in Canada*, available at http://www.pwyp.ca/images/documents/BOT%20Report.pdf and *Building a Transparent, Effective Beneficial Ownership Registry; Lessons Learned and Emerging Best Practices from Other Jurisdictions*, available at http://www.pwyp.ca/images/documents/PWYP-Canada-CRBO-Policy-English-INTERACTIVE.pdf

5 See agenda for TI Day of Dialogue 2019: http://www.transparencycanada.ca/wp-content/uploads/2019/04/Toronto-DOD19-Agenda-3-copy.pdf

A. BACKGROUND: CANADA'S DIVISION OF POWERS OVER CERTAIN BUSINESS ACTIVITIES

Canada possesses a federal system of government in which the federal, provincial, and territorial governments exercise certain powers over business activities. Under the constitutional division of powers, the federal government regulates banks[6], federally incorporated companies[7] and through its criminal law[8] powers, is responsible for certain rules for financial institutions and designated non-financial businesses and professions (DNFBPs) to comply with anti-money laundering and anti-terrorism financing requirements. Federally incorporated companies have a right to carry on business in each province and territory, however, they are generally required to register in each province or territory in which they do business.

Provinces exercise jurisdiction over provincially-incorporated companies, trusts, securities regulation, trust and loan companies[9], cooperative credit societies, savings and credit unions and *caisses populaires*[10]. Provinces also regulate businesses and professions, including casinos, real estate agents and lawyers. Provincially-incorporated companies may register their names and thereby obtain the right to do business in other provinces.

B. EXISTING BUSINESS AND CORPORATE REGISTRIES

Every jurisdiction in Canada (federal, provincial, and territorial) maintains at least one business registry which includes certain information about businesses registered under its jurisdiction. In other words, the federal government maintains a registry of federal corporations, and provinces and territories maintain their respective registries of businesses under their jurisdictions. Some provinces maintain registries of only corporations, but others are broader and include partnerships and sometimes sole proprietorships.

Business registries contain certain information about the businesses. Partnership registries will generally include the names of general and limited liability partners (who are the business owners), however, may not include information about limited partners (investors). Corporate registries typically contain date of incorporation, registered office address, as well as names and addresses of directors or officers but not that of other beneficial owners. Annex 1 illustrates one corporate registry – in this case the federal corporations database – and sets out the information currently available to the public. Currently, searches can be performed by Corporate Name keyword, Corporation Number, or Business Number. Some provincial registries are available to the public for free searches while others are behind privately-administered paywalls. With the exception of Québec, these registries do not provide public information on shareholders.

C. TYPES OF BENEFICIAL OWNERSHIP INFORMATION SUBJECT TO PRIVACY ANALYSIS

The types of information about beneficial owners of corporations that would be collected by federal, provincial, and territorial governments would likely include the following:

- Unique identifier (generated by the database itself)
- Full Legal Name
- All other names by which a person is commonly known
- Full Date of Birth
- Usual residential address
- Service or correspondence address
- Country of principal tax residency
- Country of usual residence
- Citizenship(s)
- Nature and extent of beneficial interest held
- Politically exposed person status and/or Head of International Organization Standard

6 *Constitution Act*, 1867, s. 91(15)

7 Through Trade and Commerce powers, *ibid.*, s. 91(2)

8 *Ibid.* s. 91(27).

9 *Ibid.* s. 92(11).

10 The remainder of subjects are covered by s. 92(13) of the *Constitution Act, ibid.*

The analysis in this report will assume that the following types of information may be made public in a beneficial ownership registry, on the basis of other beneficial ownership registries in existence around the world:

- Unique identifier (generated by the database itself)
- Full Legal Name and all other names by which the person is commonly known
- Year and Month of Birth
- Service or correspondence address
- Country of principal tax residency
- Country of usual residence
- Citizenship(s)
- Nature and extent of beneficial interest held
- Politically exposed person status and/or Head of International Organization Standard

Table 1: Summary of information that would be collected by the government to identify beneficial owners of corporations

Types of information that would be collected by federal, provincial, and territorial governments (not necessarily publicly disclosed)	Types of information that other jurisdictions have made public in a beneficial ownership registry (Public)	Rationale for collection and/or disclosure
Unique identifier (generated by the database itself)	Unique identifier (generated by the database itself)	Avoids confusion between registered persons of the same name
Full Legal Name	Full Legal Name	Needed for identification
All other names commonly known by	All other names commonly known by	Needed to identify persons who do not use their exact legal name
Full Date of Birth	Year and Month of Birth	Improves positive identification
Usual residential address	Not normally made public	Improves positive identification; provides useful information for law enforcement and other authorities
Service or correspondence address	Service or correspondence address	Allows for correspondence if business is not main address
Country of principal tax residency	Not normally made public	Important for financial institutions and allows CRA and other tax agencies to identify taxpayer information
Country of usual residence	Country of usual residence	Improves positive identification
Citizenship(s)	Citizenship(s)	Helps establish identity; Law enforcement requires this information for international cooperation
Nature and extent of beneficial interest held	Nature and extent of beneficial interest held	Clarifies whether the person owns or controls a company and to what extent
Day on which the individual became or ceased to be a beneficial owner	Day on which the individual became or ceased to be a beneficial owner	Establishes a timeframe for the purchase or sale of shares, etc.
Politically exposed person status and/or Head of International Organization Standard	Politically exposed person status and/or Head of International Organization Standard	This is especially useful for reporting entities as it helps meet their obligations under the Proceeds of Crime, Money Laundering and Terrorism Financing Act

2. POTENTIAL PURPOSES OF A BENEFICIAL OWNERSHIP REGISTRY

The way that the rationale(s) or purpose(s) of a beneficial ownership registry would be characterized by governments will be material to any legal privacy analysis, discussed in further detail in Section 3. A valid legislative purpose is an essential element of the constitutional analysis and whether any infringements to privacy rights can be justified by such a purpose. Additionally, under the privacy regime, in the absence of a statute authorizing the governmental release of private information, the purpose for which private information is collected by governments will determine limitations as to how governments can share it and use it (see Section 3.3).

A survey of the potential purposes for a beneficial ownership registry reveal that such purposes could be very wide-ranging. This section considers some of these rationales for collection and disclosure of beneficial ownership information, along with relevant government agencies and non-governmental actors with an interest in obtaining such information.

A. CRIMINAL LAW DETECTION AND ENFORCEMENT

A key policy rationale for greater transparency in beneficial ownership information relates to preventing, detecting, and investigating criminal activity due to the misuse of these legal vehicles. An in-depth study of serious transnational financial crimes by the World Bank showed that grand corruption, tax evasion, sanctions-busting, terrorist finance, and money laundering tend to involve companies and trusts that cannot be traced back to their real owners.[11]

Because financial crimes often involve the use of shell corporations and other legal structures, it is critical for law enforcement to have access to beneficial ownership information of corporations and any other entities for which it is collected. Currently, law enforcement finds that lack of access to beneficial ownership information is an obstacle that hinders the successful investigation of financial crimes[12].

The Financial Action Task Force (FATF), the global anti-money laundering body, recommends that "countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities."[13]

Beneficial ownership transparency would likely **deter** criminals from being attracted to a particular jurisdiction by making it more difficult to anonymously use corporate and other vehicles. Access to beneficial ownership information by financial institutions, law enforcement and others would make it easier to **detect** crimes than is currently the case, through suspicious ownership details or patterns. Lastly, the availability of such information to law enforcement would make it easier to **investigate** suspected

11 Van der Does de Willebois, E., Halter, E., Harrison, R., Park, J.W. and Sharman, J. (2011) *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It.* World Bank.

12 http://www.ourcommons.ca/DocumentViewer/en/42-1/FINA/meeting-134/evidence -- see evidence from Joanne Crampton

13 FATF Guidance (2014) *Transparency and beneficial ownership.* See also, FATF Recommendations 24 and 25, found at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf

crimes, including conducting investigations without tipping off the entities and their principals being investigated.

The *Proceeds of Crime (Money Laundering) and Terrorism Financing Act* (PCMLTFA) requires financial institutions and certain other entities to perform due diligence on clients and collect, inter alia, beneficial ownership information on them (see **Box 1**). The PCMLTFA also empowers the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) to supervise financial institutions and other entities' compliance with the Act and related regulations, as well as receive reports of suspicious transactions (and other reports) from them as mandated in the Act. FINTRAC makes disclosures to law enforcement when they suspect that financial transactions may relate to criminal activities. For both the supervisory functions as well as the law enforcement functions, it is important for FINTRAC to have access to a beneficial ownership registry.

BOX 1

Statutory Due Diligence Obligations under the PCMLTF Regulations requiring the collection of beneficial ownership information

Under section 11.1 of the PCMLTF Regulations to the Act, all financial entities, securities dealers, life insurance companies, brokers and agents and money services businesses are required to confirm the existence of an entity or trust, and must also collect beneficial ownership information and verify the identity of the beneficial ownership of that entity or trust. For all entities, including corporations, the names and addresses of all persons who own or control, directly or indirectly, 25 per cent or more of the entity must be collected. For trusts, the names and addresses of all trustees and all known beneficiaries and settlors of the trust must be collected. In all cases, information establishing the ownership, control, and structure of the entity must also be collected.[14]

Money laundering is a notoriously difficult crime to investigate. Professional money launderers can make this crime virtually undetectable. Additionally, money laundering tends to cross international boundaries, making it all the more difficult for jurisdictionally-bound law enforcement officers to access the information they seek to detect and disrupt criminal activitiesundetectable. Additionally, money laundering tends to cross international boundaries, making it all more difficult for jurisdictionally-bound law enforcement officers to access the information they seek to detect and disrupt criminal activities.

B. REGULATION OF CORPORATIONS

Federal, provincial and territorial Directors of Corporations or Registrars of Corporations would need access to beneficial ownership information for the purposes of implementing and enforcing corporate law statutes. These agencies are charged with overseeing the statutory compliance of corporations with the relevant laws of the federal government or provinces, typically a B*usiness Corporations Act*. In order to ensure compliance with corporate beneficial ownership requirements, they need access to any information collected by companies, and will of course be responsible for any government registry collecting and publishing that information.

C. TAX ENFORCEMENT

The *Canadian Income Tax Act* already requires individuals to declare their beneficial ownership of certain types of property and assets (however, this information is kept confidential from other government agencies). It would be useful for the Canada Revenue Agency and provincial equivalents to have access to a beneficial ownership registry to cross-check certain individuals' tax declarations against corporate disclosures of beneficial ownership. Such access would facilitate investigations into tax evasion as CRA's criminal investigators face the same difficulty as police in identifying beneficial owners of corporations who infringe tax laws.

D. TRANSPARENCY RELATED TO GOVERNMENT PROCUREMENT

Federal, provincial, and territorial procurement policies frequently prohibit certain individuals and entities from bidding on government contracts, for example, if they have been convicted of corruption or fraud offences. Officials implementing government procurement would want access to a beneficial ownership registry to ensure that an entity bidding on government contracts is not simply disguising a disbarred corporation and/or beneficial owners through the creation of a new legal entity.

14 *Ibid.*, Regulations s. 11.1, see http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-184/page-3.html#h-10

E. CONSUMER PROTECTION

Provincial Consumer Protection agencies help protect the public through a number of services, including a complaints-receiving mechanism and a watchlist[15]. Such agencies may be interested in tracking whether industries with a high number of complaints (such as home renovation services) include multiple companies with the same beneficial owner behind them.

F. TRANSPARENCY IN POLITICAL FINANCING

Elections Canada and provincial and municipal counterparts may wish to have access to beneficial ownership information. For example, where campaign financing laws restrict totals that individuals and corporations can donate to a political party, beneficial ownership information would help to determine whether individuals are breaking laws by donating through multiple legal entities.

G. ANTI-MONEY LAUNDERING AND ANTI-FRAUD DUE DILIGENCE BY NON-GOVERNMENTAL ACTORS

Financial Entities. As indicated above in *Box 1*, financial entities, securities dealers, money services businesses, and life insurance companies, brokers and agents have statutory due diligence obligations to collect beneficial ownership information under the *PCMLTF Regulations*. The federal government requires this category of reporting entities to collect beneficial ownership information from certain clients, under the threat of sanction on the reporting entity for non-compliance. Because it is difficult to independently obtain and verify the identity of beneficial owners, these reporting entities currently expend considerable resources trying to collect and confirm such information. They would have a strong interest in gaining access to a corporation's beneficial ownership information through a central portal to save costs and reduce reputational and financial risk.

Designated Non-Financial Businesses and Professions (DNFBPs). At present, reporting entities with obligations under the *PCMLTFA* and related regulations, such as accountants, real estate brokers and representatives, real estate promoters, BC notaries, casinos, and dealers in precious metals and stones, are exempted from the beneficial ownership identification and verification obligations, but this could change. The recent report of the House of Commons Finance Committee recommends expanding the list of reporting entities to include non-federally regulated mortgage lenders, high-value goods dealers, white label ATM operators, etc.[16] The Committee further recommends that the obligation to collect beneficial ownership information be extended to all reporting entities. Without access to public beneficial ownership information, such a requirement would be quite demanding, in costs, labour and time, for the individuals and small businesses captured in these categories.

Other professionals, such as lawyers, regularly conduct beneficial ownership due diligence on clients even without statutory requirements, pursuant to professional regulatory requirements or good practice. As DNFBPs, access to a beneficial ownership registry would ensure better financial and reputational risk management practice.

H. TRANSPARENCY IN BUSINESS ACTIVITIES[17]

Creditors. Existing creditors already have certain rights to access shareholder registry information under corporate law in Canada. However, accessing shareholder registries may not provide beneficial ownership information since registered shareholders may not be the same as beneficial owners (they may be nominees or banks holding investments in trust, for example). Additionally, the mechanism for creditors obtaining registered shareholder information is cumbersome and requires a formal request. Many creditors would appreciate having access to beneficial ownership information to assist their recovery of arrears, without incurring the costs, delay and inconvenience of having to seek such information in court.

Better Business Bureaus, other non-governmental watchdogs. Like consumer protection agencies, a number of private sector organizations provide a public service in monitoring, accepting complaints, and reporting on the performance of individual businesses. They may be interested in determining whether a new business in a category is actually incorporated by a beneficial owner of a previously poorly-rated business.

Businesses conducting due diligence on prospective customers or suppliers. Many of the thousands of business bankruptcies that occur annually across Canada can be attributed to creditors not being paid for goods or services they have

15 See, e.g., Ontario Consumer Beware List, http://www.consumerbeware.mgs.gov.on.ca/catsct/start.do?lang=en

16 https://www.ourcommons.ca/DocumentViewer/en/42-1/FINA/report-24

17 See also http://www.bteam.org/plan-b/ending-anonymous-companies-report-published/

already provided. Yet there is currently no way for a business to conduct beneficial ownership due diligence on a privately-held corporation with which it is considering doing business. Businesses would benefit from finding out if the beneficial owner of a potential business partner is a convicted fraudster, a person with a poor reputation, or perhaps, a longstanding competitor with dishonest intent.

Consumers. Many consumers prefer to buy from small, locally-owned businesses rather than those controlled by large domestic or foreign-owned corporations. Finding out, through beneficial ownership transparency, whether a local small business is indeed local and indeed small would allow for more informed choices for consumers.

I. PUBLIC INTEREST: JOURNALISTS AND INVESTIGATIVE NGOS

Journalists and Non-Governmental Organizations (NGOs), including those conducting research on alleged incidents of corruption, cronyism, and government patronage, have sought access to beneficial ownership registries in European jurisdictions pursuant to the "legitimate interest" provision in Anti-Money Laundering Directive 4[18]. For example, NGOs and journalists may investigate whether bid-rigging of government contracts resulted in their issuance to entities with beneficial owners who are party donors. In another example, the NGO Global Witness has reported in certain countries about oil and gas concessions being granted to companies whose beneficial owners are in fact government officials or their relatives.[19]

J. TRANSPARENCY ACROSS PROVINCIAL AND INTERNATIONAL BORDERS

It should be noted that, in our globalized world, many of the above-noted rationales apply across provincial and international borders. Criminals move proceeds of crime across the globe; police in other countries may be interested in the true owners of Canadian corporations, and vice versa. Canadians may fraternize businesses across borders; foreign and domestic companies bid on government contracts; tax officials may be interested in learning more about companies in other jurisdictions. Publicly available beneficial ownership information assists consumers, businesses, investigators, tax officials and law enforcement and others around the world access information expeditiously.

3. A BENEFICIAL OWNERSHIP REGISTRY AND THE CANADIAN PRIVACY REGIME

This part will describe the applicable statutory and constitutional laws that protect Canadians' privacy and analyze how these would interact with a beneficial ownership registry.

The Supreme Court of Canada has stated that the *Privacy Act* has "quasi-constitutional status", and that the values and rights set out in the *Act* are closely linked to those set out in the Constitution as being necessary to a free and democratic society.[20] The *Privacy Act* protects personal information held by a government institution from public disclosure, unless authorized by statute.

The analysis will include the following statutes and constitutional provisions: *The Canadian Charter of Rights and Freedoms,*[21] *sections 7, 8, and 1; The Personal Information Protection and Electronic Documents Act (PIPEDA);*[22] and the *Privacy Act*[23] and related provincial and territorial statutes.[24]

The relevant legal issues will be broken down into the following topics:

3.1. The Requirement for Authorizing Legislation for a Beneficial Ownership Registry
3.2. Constitutional protection of privacy in Canada
3.3. Would a public beneficial ownership registry be vulnerable to a constitutional challenge?

18 https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:JOL_2015_141_R_0003&from=EN

19 For example: https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/congo-secret-sales/

20 Privacy Commissioner of Canada, see https://www.priv.gc.ca/en/about-the-opc/publications/guide_ind/

21 *Canadian Charter of Rights and Freedoms*, s 8, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

22 S.C. 2000, c. 5

23 R.S.C. 1985, c. P-21.

24 All provinces have legislation protecting privacy of information collected by provincial government agencies. See, e.g. *Ontario Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, CHAPTER F.31

Federal, provincial and territorial legislatures would need to pass legislation to expressly authorize the collection and disclosure of beneficial ownership information to the public, and additionally beyond the department or Ministry collecting the information. Specific provisions would be required to override privacy protections in existing laws.

3.1. THE REQUIREMENT FOR AUTHORIZING LEGISLATION FOR A BENEFICIAL OWNERSHIP REGISTRY

As will be explained below, personal information collected by a government institution generally **cannot be disclosed without consent, except where authorized by Parliament**[25] or a provincial legislature, or pursuant to a list of exceptions. Therefore, any disclosure by the government of private beneficial ownership information to non-government actors, including the public or even just to financial institutions and those with statutory due diligence obligations, would require legislation passed by federal and/or provincial and territorial legislatures authorizing such collection and disclosure. Information sharing between government departments and agencies is also restricted under the *Privacy Act*. Going back to purposes discussed in section 2, numerous government departments and other levels of government would be interested in the beneficial ownership information, but specific provisions would be required for most of the sharing of information between them to override the *Privacy Act*.

If corporate service providers were to provide information directly to a beneficial ownership registry for purposes of expediency, an authorizing statute would clearly be required to override the provisions of the PIPEDA protecting personal information from release by private sector actors.

A. THE *PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT (PIPEDA)*[26]

PIPEDA governs the management and protection of personal information held by businesses. Under *PIPEDA*, "personal information" means "information about an identifiable individual."[27] The issue of whether such information must relate to a human being, rather than a legal entity, such as a corporation, has not been specifically decided under *PIPEDA*, but in *Tridel Corp. v. Canada Mortgage and Housing Corp.*[28], which dealt with the *Privacy Act*, the Court decided that "personal information" relates to people, not entities, and there is no reason to expect a different interpretation under *PIPEDA*.[29] The Office of the Privacy Commissioner of Canada states that, under *PIPEDA*, personal information includes any factual or subjective information, recorded or not, about an identifiable individual. This includes information in any form, such as:

- age, name, ID numbers, income, ethnic origin, or blood type;
- opinions, evaluations, comments, social status, or disciplinary actions; and
- employee files (federally-regulated), credit records, loan records, existence of a dispute between a consumer and a merchant, intentions (for example, to acquire goods or services, or change jobs).[30]

In brief, *PIPEDA* directs how personal information is to be treated in the course of commercial activity, defined in s. 2(1) of the Act as, "any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists."

PIPEDA has no application to government institutions that are subject to the federal *Privacy Act*[31] (s. 4(2)(a)). There is no similar exception for provincial or municipal government institutions that are subject to provincial freedom of information and protection of privacy legislation.

25 *Privacy Act, supra* note 23 at s. 8(2)(b)

26 S.C. 2000, c. 5

27 *PIPEDA*, s. 2.

28 [1996] F.C.J. No. 644 (FC TD).

29 Timothy M. Banks, *A Guide to the Personal Information Protection and Electronic Documents Act*, 2016: LexisNexis at p. 29.

30 https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda_brief/

31 R.S.C. 1985, c. P-21.

In the context of incorporation and the potential creation of a registry or beneficial ownership registries, the applicability of the *PIPEDA* would depend on which organizations, private sector or public sector, handle the personal information and forward it to a registry.

Federal corporations are created through Corporations Canada,[32] an organization to which *PIPEDA* does not apply (but *Privacy Act* does). In the provinces, however, various means to incorporate are available. Ultimately, the incorporation is granted by the provincial government. But the filing of the articles of incorporation may be managed through commercial organizations. For example, in Ontario, a corporation may be established by filing articles of incorporation online with Cyberbahn, a division of Thomson Reuters Canada Limited, OnCorp Direct Inc. or ESC Corporate Services Ltd.[33] The articles may also be filed by mail, albeit a little more expensively, directly with the Ontario Ministry of Government and Consumer Services.

If the proposed federal registry expects to collect information about corporations solely from government actors, provincial, territorial, or federal, *PIPEDA* would not apply to those actors. But if, for reasons of expediency, the registry chooses to obtain the relevant information from commercial incorporation actors, they would be barred from doing so by *PIPEDA* by default. *PIPEDA* applies "despite any provision, enacted after this subsection comes into force, of any other Act of Parliament, unless the other Act expressly declares that that provision operates despite the provision of this Part."[34] Therefore, commercial incorporation actors, if they will play a role in the operation of a beneficial ownership registry, would need to be legislatively exempted from the operation of *PIPEDA* to enable them to share information with the registry.

B. RELEVANT PROVINCIAL LEGISLATION

Three provinces, Quebec, Alberta and British Columbia, have adopted legislation regulating the collection, use and disclosure of personal information in the private sector generally.[35] An organization that carries on a commercial activity solely within one of those provinces is exempt from *PIPEDA* in connection with collection, use and disclosure of the personal information within those provinces.

However, any private business facilitating incorporation in Quebec, Alberta and British Columbia would be subject to the relevant provincial legislation and would become subject to *PIPEDA* in any information exchange with federal authorities (as such an exchange would be outside the confines of the province). Therefore, if the federal registry contemplates obtaining information from actors in Quebec, Alberta and British Columbia, those actors should also be exempted from the operation of *PIPEDA* and the applicable provincial legislation.

C. THE *PRIVACY ACT*

The *Privacy Act* protects personal information obtained by government agencies in sections 7 and 8:

> **7.** Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be used by the institution except
>
> **(a)** for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose; or
>
> **(b)** for a purpose for which the information may be disclosed to the institution under subsection 8(2).
>
> **8. (2)** Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed
>
> **(a)** for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose;
>
> **(b)** for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;
>
> **(c)** for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information;
>
> **(d)** to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;
>
> **(e)** to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed;
>
> [...]
>
> **(m)** for any purpose where, in the opinion of the head of the institution,
>
> **(i)** the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or
>
> **(ii)** disclosure would clearly benefit the individual to whom the information relates.

32 https://corporationscanada.ic.gc.ca/eic/site/cd-dgc.nsf/eng/home

33 https://www.ontario.ca/page/start-dissolve-and-change-corporation#section-1

34 *PIPEDA*, s. 4(3).

35 See *An Act respecting the protection of personal information in the private sector*, CQLR, c. P-39.1; the *Personal Information Protection Act*, S.A. 2003, c. P-6.5; and the *Personal Information Protection Act*, S.B.C. 2003, c. 63.

The above provisions of the *Privacy Act* make clear that absent authorizing legislation for a beneficial ownership registry, personal information under control of the Government cannot be shared or disclosed unless it is for a use related to the purpose or consistent with the purpose for which it was collected.

While the purpose for which information is used need not be identical to the purpose for which it had been collected, the two need to be at least consistent.[36] This is one of the reasons why the "legislative purpose" of a beneficial ownership registry determines how the information can be used and shared within government. A broader list of purposes would allow for greater sharing than a narrow list of purposes.

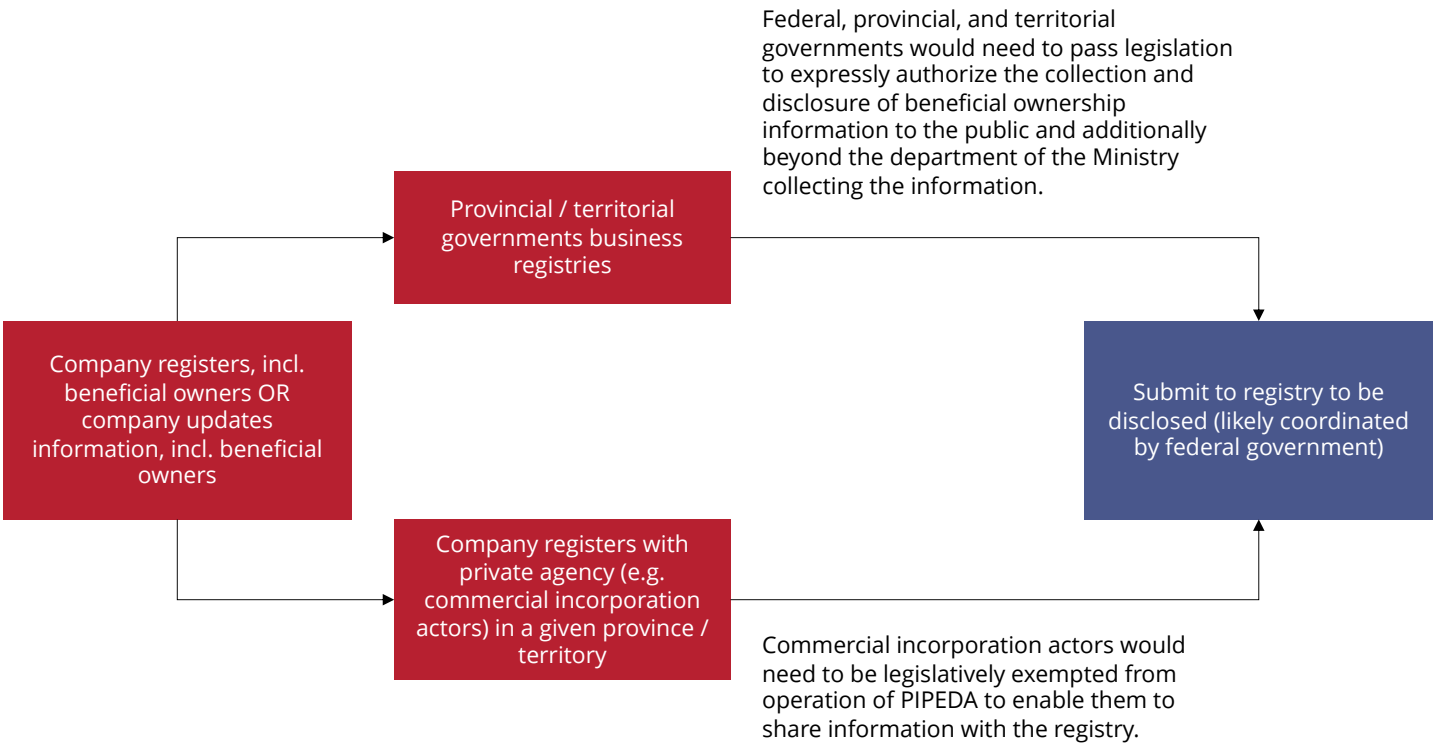
Accordingly, release of such records by a government institution would clearly be a violation of the *Privacy Act*, absent an Act of Parliament or regulation authorizing such disclosure (s. 8(2)(b)), or in the absence of public interest in disclosure that would, in the opinion of the head of the institution, outweigh any invasion of privacy that would result from disclosure (s. 8(2)(m)).

In her 2010-2011 Annual Report to Parliament, the Privacy Commissioner wrote,

> Paragraph 8(2)(m) of the Privacy Act allows government departments and agencies to disclose personal information if it is clearly in the greater public interest, or clearly in the interest of the individual concerned to make disclosure of personal information.

According to the Office of the Privacy Commissioner (OPC), institutions planning to make a public interest disclosure are required to notify the OPC in writing - prior to disclosure, where reasonably practicable or, in the alternative, immediately afterwards. The OPC reviews the disclosure and, if the individual whose personal information is being disclosed has not been notified, and if the OPC feels it is reasonable to do so, the OPC encourages the department to issue the notification. The department usually agrees to the OPC suggestion but, if it refuses, the Privacy Commissioner has the power to notify the individual herself.

In conclusion, creating an exception through an Act of Parliament is the best way to avoid a violation under the *Privacy Act*. The question of whether public release of private information under such an Act of Parliament, in whole or in part, is constitutionally valid, will be considered in the following sections.



36 *Bernard v. Canada (Attorney General)*, [2014] 1 S.C.R. 227.

3.2. CONSTITUTIONAL PROTECTION OF PRIVACY IN CANADA

This constitutional analysis will consider sections 8, 7 and 1 of the *Charter of Rights and Freedoms*.

A. SECTION 8 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

> 8. Everyone has the right to be secure against unreasonable search and seizure.

The purpose of this section is to guarantee protection against unreasonable search and seizure[37] by the state, and therefore it must be interpreted in a way that carries out its purpose. In the leading case of *Hunter v. Southam Inc.*[38] the Supreme Court of Canada held that the purpose of s. 8 was to protect the individual's reasonable expectations of privacy from unjustified state intrusion. The privacy rights of individuals in relation to the police and other agents of the state have been repeatedly affirmed in subsequent cases.[39] This is so, irrespective of whether the state is appropriating personal information from external actors or is taking it from the information holdings of the government itself.[40]

Charter jurisprudence recognizes that privacy has multiple aspects, one of which arises "in the information context."[41] Informational privacy derives:

> ...from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit. ...Competing social values may require that an individual disclose certain information to particular authorities under certain circumstances (e.g. census information). ...An individual has an interest, beyond the original access of another person to any particular fact about him, in whether and how it is further disseminated to third and fourth parties and to the public at large. This is particularly relevant where information about an individual is generated not by himself but by others, for example, his passport or carlicence number. In these cases, the issuing authority is obviously in control of the information, but the individual also has a continuing interest in controlling its further dissemination.[42]

Therefore, it is clear from the case law that section 8 rights extend beyond protections from "search and seizure."

A core consideration in determining whether a section 8 Charter infringement has occurred is whether the individual has a *reasonable expectation of privacy* in the material to be divulged.[43] Certain Charter cases have also focussed on a balancing between the individual's privacy needs against state and society's interests in accessing the information.[44]

Supreme Court jurisprudence has helped clarify the types of information that merit differing reasonable expectations of privacy under s. 8. However, it should be noted that cases under s. 8 typically involve personal information (or property) obtained by the state but not for public release – an issue that is governed by the *Privacy Act*, and will be considered in section 3.3.

How can a reasonable expectation of privacy be defined? On the one hand, private and intimate information such as a person's religious or political beliefs, sexual orientation, and lifestyle choices would attract a high expectation of privacy under s. 8. Supreme Court Justice Sopinka articulated this principle as follows:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a **biographical core of personal information** which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.[45]

On the other hand, the courts have consistently held that privacy expectations are much lower with respect to documents and records **produced by business and in the course of regulated activities**. Supreme Court Justice LaForest:

37 2019 Martin's Annual Criminal Code (Canada Law Book, 2018).

38 [1984] 2 S.C.R. 145

39 Stanley A. Cohen, *Privacy, Crime and Terror - Legal Rights and Security in a Time of Peril* (LexisNexis, 2005) p. 413.

40 *R. v. Mills*, [1999] S.C.J. No. 68 and *R. v. Law*, [2002] S.C.J. No. 10.

41 *R. v. Dyment*, [1988] S.C.J. No. 82, citing Department of Communications and Department of Justice, Canada *Report of the Task Force on Privacy and Computers* (Ottawa: Information Canada, 1972) at pp. 12-14 (hereinafter Privacy Task Force Report).

42 Privacy Task Force Report, at pp. 13-15.

43 Cohen, *supra* note 39 at 413.

44 This type of internal balancing has been promoted by legal experts as a more rational and purposive way of analysing s.8 in certain types of cases. See, e.g. Lisa M. Austin, Information *Sharing and the "Reasonable" Ambiguities of s.8 of the Charter*, (2007) 57 University of Toronto Law Journal 499.

45 *Freedom of Information and Protection of Privacy Act (FIPPA)*, R.S.O. 1990, c. F.31., s.45.

> As Dickson J. made clear in *Hunter v. Southam Inc.*, [1984] 2 S.C.R 145, the purpose of s. 8 is the protection of the citizen's reasonable expectation of privacy (p. 159). But the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state.
>
> In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection; and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records.
>
> It follows that there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course.[46]

In *R. v McKinlay Transport Ltd.*, Supreme Court Justice Wilson quoted with approval A.D. Reid and A.H. Young in *Administrative Search and Seizure Under the Charter* (1985), 10 Queen's L.J. 392, at pp 398-400:

> ...Other activities are regulated so routinely that there is virtually no expectation of privacy from state intrusion. Annual filing requirements for banks, **corporations**, trust companies, loan companies, and the like are inextricably associated with carrying on business under state licence.[47]

In *R. v. Jarvis*,[48] a tax audit gave rise to a tax evasion prosecution. The accused, Jarvis, was not made aware that at some point an audit had turned into collection of evidence. The Supreme Court found that using the information that had been entered into a tax record for prosecution purposes did not violate s. 8 (though accessing bank statements to use in a prosecution was a different matter).

> The context-specific approach to s. 8 inevitably means ... that "[a]t some point the individual's interest in privacy must give way to the broader state interest in having the information or document disclosed". Naturally, if a person has but a minimal expectation with respect to informational privacy, this may tip the balance in the favour of the state interest: *Plant, supra; Smith v. Canada (Attorney General)*, [2001] 3 S.C.R. 902, 2001 SCC 88.
>
> Generally, an individual has a diminished expectation of privacy in respect of records and documents that he or she produces during the ordinary course of regulated activities: see, e.g., *Thomson Newspapers, supra*, at p. 507, *per* La Forest J.; *143471 Canada, supra*, at p. 378, per Cory J.; *Comité paritaire, supra*, at pp. 420-21; *Fitzpatrick, supra*, at para. 49. In the particular context of the self-assessment and self-reporting income tax regime, a taxpayer's privacy interest in records that may be relevant to the filing of his or her tax return is relatively low: *McKinlay Transport, supra*, at pp. 649-50.[49]

Turning to an analysis of the application of these principles to beneficial ownership information of corporations and other legal entities, it should be recalled that corporations are creatures of statute and regulated as such. Incorporation confers benefits on business owners and investors by limiting liability, shifting risk onto other actors in the economy and providing tax advantages. As a regulated activity which endows corporations and their owners with significant advantages in the economy, the jurisprudence suggests that statutory corporate filings to the government requiring information about beneficial owners of corporations would attract a relatively low expectation of privacy under s. 8 of the Charter.

That said, information to be collected by the state under a new beneficial ownership regime would contain private information about individuals which may attract privacy protection under s.8, including legal names of corporate beneficial owners, their dates of birth, home addresses, and the percentage of ownership of the company, to name a few. Certain cases have held financial information of individuals to be highly sensitive and/or close to their biographical core.[50] It is therefore necessary to weigh any privacy infringements against the state and societal benefits in having the information disclosed – a balancing analysis within s. 8.

Balancing state interests against the privacy rights of beneficial owners

The balancing analysis goes beyond asking whether there is a reasonable expectation of privacy contained in the information to be provided to the state, and evaluates whether the public benefit justifies the individual infringement. In some cases, the state

46 *Thomson Newspapers v. Dir. Of Inv. & Res.* [1990] 1 S.C.R. at p. 507.

47 [1990] 1 S.C.R. at p. 645 (emphasis added).

48 [2002] 3 S.C.R. 757.

49 *Ibid.*, at paras 71-72 (emphasis added)

50 See e.g., *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34 and *Royal Bank of Canada v. Trang*, 2016 SCC 50, [2016] 2 S.C.R. 412

seizure (and disclosure) may be justified even in cases when the information is highly personal and private. For example,

> The Canadian judicial system considers most court documents to be "public." The reason for this is not that these documents lack privacy concerns: often these documents include highly private information pertaining to individuals' finances, mental and physical health and family circumstances. The "public" nature of these documents refers to the fact that the public's interest in getting access to these documents generally outweighs the privacy interests at stake. The public interest is the open courts principle: public access fosters accountability in the judicial system.[51]

Case law examples include *British Columbia Securities Commission v. Branch*,[52] in which the Supreme Court of Canada upheld s. 128(1) of the *Securities Act* which allows for highly intrusive powers of securities regulators as "reasonable", noting that "[w]e have already mentioned that in a highly regulated industry, such as the securities market, the individual is aware, and accepts, justifiable state intrusions."[53]

In *R. v. Trang*, though not a Charter case, the Supreme Court referred to the privacy infringements in the *Land Registration Reform Act* as follows:

> *The legislature decided to make this information available to the public, in part to allow creditors with a current or future interest in the land to make informed decisions*. As the Office of the Information and Privacy Commissioner of Ontario observed [...] "The land registration system requires that all pertinent information be made available as a matter of public record, and *the extent to which this represents an invasion of any individual's privacy, that result is justified and defensible. Transparency is integral to the public administration of the system, and has been incorporated into the statutory framework that regulates land registration* in Ontario. Said another way, in implementing Ontario's land registration system, the Legislature has considered and debated the appropriate balance between the right to privacy and the need for transparency, and has made a decision that transparency outweighs privacy, in the public interest."[54]

The state's possible legislative purposes for collecting beneficial ownership information and creating a beneficial ownership registry[55] were enumerated earlier in Section 2 and include a number of important state and societal goals in making the ownership of private corporations more transparent. These include deterring, detecting and enforcing crime; assisting regulated entities to collect beneficial ownership information for anti-money laundering purposes as required by federal statute; tax enforcement; transparency related to government procurement, consumer protection; and transparency in political financing. All these state and societal objectives involve reducing the abuse of corporate entities in the commission of crimes, the evasion of taxes, and reducing other nefarious uses of corporations to circumvent rules around political donations, procurement, and so on.

In considering the information that would be collected by the state in a beneficial ownership registry, it is clear that it is of two natures: information as part of government-regulated business activity, as well as private information about the beneficial owners of private corporations. However, looking more closely, it is difficult to conclude that the information is close to a beneficial owner's "biographical core." Most of the information is for the purpose of positively identifying the beneficial owners: full legal name, residential address, date of birth, etc. Even slightly more sensitive information such as citizenship, country of usual residence and tax jurisdiction, when requested by the government in this context, would serve an important purpose of positively identifying the individual. While the percentage of beneficial ownership held would be collected (or categories therein, such as 25% - 50%, over 50%), no financial information about private corporations would be collected, so it would not be possible to calculate the value of the shares held from the registry information alone – just the fact of and percentage in corporate ownership *as* owner.

It would be useful to compare the proposed beneficial ownership registry of privately-held companies to the existing disclosures related to publicly-traded companies. Securities regulation includes as its legislative objective a certain overlap with the proposed beneficial ownership registry – the protection of the public from the fraudulent or other misuse of legal entities for private gain. Indeed, as *British Columbia Securities Commission v. Branch*[56] articulated, securities law provides regulators with highly intrusive powers to compel and coerce private information, but it is justifiable given the important goal of protecting investors and the public from fraud.

51 Austin, *supra* note 44 at p.11.

52 [1995] 2 S.C.R. 3,

53 *Ibid.*, at para 61.

54 *R.v. Trang, supra* note 52 at paras 36-37.

55 The analysis of whether such information should be kept within government or made public is contained in section 3.3.

56 *Supra* note 52.

Compared to the proposed beneficial ownership registry, securities regulators collect significantly more information about listed entities and their beneficial owners, including financial information, which allows for calculating the value held by each beneficial shareholders holding 10% or greater of voting shares (see below). A registry of beneficial owners of publicly traded corporations already exists under provincial law (see **Box 2**) and is publicly disclosed on the internet. The legislative objectives of the public database, the System for Electronic Disclosure by Insiders (SEDI)[57] , while somewhat narrower (deterring and detecting insider trading and disclosing large stock acquisitions of publicly traded companies), are also substantially similar when considered more broadly (avoiding the misuse of legal entities, protecting the markets and the public from fraud). As a registry collecting very similar private information in the public interest, the SEDI sets a certain precedent for a new beneficial ownership registry of privately held corporations.

The SEDI publicly available database includes information on insiders including name, insider ID, nature of holdings, municipality, province and country of usual residence.

Conclusions

Concluding the s. 8 analysis, the type of information sought by governments in the creation of a beneficial ownership registry would not likely be found to possess a high expectation of privacy.[64] The information would be generally restricted to information identifying the beneficial owners of corporations, with the overall goals of reducing the misuse of such regulated entities and improving transparency. While financial information about individual business owners might be revealed as owners of certain private corporations as such, no financial statements of privately-held corporations or other information which would reveal the value of shareholdings would be collected. Given the regulatory context and the nature of the information to be gathered, state collection of beneficial ownership would unlikely be found to be an illegal search and seizure under s.8 of the Charter.

If the collection of beneficial ownership information were to be found to engage s.8, it would likely be accepted by courts as a **justifiable** intrusion on individual privacy rights when balanced against the important state and social objectives of making corporations more transparent and less susceptible to abuse.

BOX 2: PROVINCIAL SECURITIES LAWS AND BENEFICIAL OWNERSHIP TRANSPARENCY

Insider trading rules require that beneficial ownership information of securities of publicly traded companies ("reporting issuers") purchased, held and sold by insiders must be disclosed. In Ontario, an "insider" is defined in part as a director or officer of a reporting issuer; a company that is itself an insider or subsidiary of a reporting issuer; or any beneficial owner holding more than 10 per cent of the voting rights of a security holder.[58] Insiders must report all holdings within 10 days of becoming an insider, and all changes in holdings.[59] Beneficial ownership transparency is critical for the effective regulation of insider trading, to ensure that insiders are not just avoiding rules by arranging for legal ownership by another party.[60] Insider information promotes a high degree of beneficial ownership transparency as it is publicly viewable at the System for Electronic Disclosure by Insiders (SEDI) website.[61]

Other provisions requiring beneficial ownership transparency in securities laws relate to early warnings to shareholders of a securities issuer when a person acquires beneficial interest or control or direction in holdings above 10 per cent.[62] The rationale is to ensure that companies and their shareholders targeted for hostile take-over bids receive early warning of large share acquisitions. New rules as of 2016 also require disclosure when a security holder's ownership decreases by 2 per cent or falls below the 10 per cent reporting threshold, highlighting a decrease in that person's voting power.[63]

57 See System for Electronic Disclosure by Insiders, https://www.sedi.ca/sedi/

58 *Ontario Securities Act*, R.S.O. 1990, c. S.5, s. 1

59 *Ibid*., s. 107.

60 David Johnston, Kathleen Rockwell, Christie Ford, *Canadian Securities Regulation*, 5th Ed, Toronto: LexisNexis, 2014 at 345.

61 https://www.sedi.ca/sedi/

62 National Instrument 62-102

63 NI 62-103.

64 A more detailed field-by-field analysis will be conducted in section 3.3.

B. SECTION 7 OF THE CHARTER

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

While privacy is mainly protected under section 8 of the Charter, s. 7 can offer a residual protection. Specifically, privacy can be part of the "liberty" and "security of the person" interests. Any deprivation of the right to life, liberty and security of the person must be in accordance with the principles of fundamental justice, which are the basic principles that underlie our notions of justice and fair process.[65]

> [Privacy] is not a right tied to property, but rather a crucial element of individual freedom which requires the state to respect the dignity, autonomy and integrity of the individual.[66]

Therefore, even if collection of beneficial ownership records is not found to infringe a reasonable expectation of privacy under s. 8, the residual protection under s. 7 could be considered. While s. 8 limits state powers to invade privacy, s. 7 supports a more positive protection of privacy rights, specifically the right to make fundamental decisions about one's life without interference.[67]

In the context of beneficial ownership transparency, the public disclosure of personal information could give rise to certain violations of constitutionally-protected privacy. These could include:

- The public disclosure of personal information which possesses a high expectation of privacy that does not outweigh societal benefits;
- The public disclosure of information which would allow individuals to be singled out or publicly targeted because of their nationality or country of origin; or
- Other unintended consequences of privacy breaches rising to the level of s.7 engagement.

Each one will be discussed further in section 3.3. Any violations of s.7 would have to be justified under s.1 of the Charter.

C. SECTION 1 OF THE *CHARTER*

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[68]

Section 1 operates as a limitation clause allowing the state to violate rights under the Charter so long as such limits are reasonable and can be justified under the Oakes test, which is set out as follows:

1. There must a pressing and substantial objective for the law or government action.
2. The means chosen to achieve the objective must be proportional to the burden on the rights of the claimant.
  i. The objective must be rationally connected to the limit on the Charter right.
  ii. The limit must minimally impair the Charter right.
  iii. There should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.[69]

To be clear, if a public beneficial ownership registry were found to violate Charter privacy rights, the infringements would have to be justified under s. 1. The following describes the three stages of the proportionality test (part two of the Oakes test) in greater detail:

Rational Connection Test

To pass the rational connection test, the legislation must not be arbitrary, unfair or based on irrational considerations.[70] If the limit on the Charter right is not logically linked to the legislative objective, it will not pass the rational connection test.

65 *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9

66 *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841 at 854.

67 Eric H. Reiter, *Privacy and the Charter: Protection of People or Places?*, 2009 Canadian Bar Review, 88:121.

68 Canadian Charter of Rights and Freedoms, section1.

69 *R. v. Oakes* (1986), 24 C.C.C. (3d) 321.

70 https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art1.html

Minimal Impairment Test

This test asks whether the impairment is as minimal as possible to achieve the stated government objectives. For example, can these objectives be achieved without making a beneficial ownership registry publicly available? Could they be achieved with a tiered, password-protected database making the information only available to those who need it?

Final Balancing Test

This test considers the proportionality between the negative effects of the legislation on the Charter rights holder and the beneficial effects of the legislation for society broadly. Does the benefit for society derived from the legislation outweigh the seriousness and harm caused by the infringement? In other words, the greater the Charter infringement, the more compelling and important the benefit for society as a whole must be to justify the infringement. A disproportionate infringement will serve to render the legislative objective unconstitutional.

As it is impossible to predict with certainty how the Government would frame its objectives in a public beneficial ownership registry, hard and fast conclusions under a hypothetical section 1 analysis are not possible. However, some kinds of information, including specific categories or fields, would be more vulnerable to a finding of unconstitutionality under the Section 7/Section 1 analysis. These will be reviewed in the next section.

3.3 WOULD A PUBLIC BENEFICIAL OWNERSHIP REGISTRY BE VULNERABLE TO CONSTITUTIONAL CHALLENGE?

If a government were to collect beneficial ownership information and create a registry, it would then have to decide who will have access to such a registry: i) government officials only; ii) the general public; or iii) government plus a limited group of non-governmental stakeholders, such as banks, insurance companies and others with statutory duties to collect beneficial ownership information from clients. As indicated earlier in section 2, the government would be advised to pass legislation authorizing access to the registry by other branches/levels of government and all others who they wish to provide access. **But would such legislation itself be susceptible to constitutional challenge as an infringement on privacy?**

In accordance with s. 8 analysis above, the collection by the state of beneficial ownership information would likely not be found to be unconstitutional. While s.8 jurisprudence generally relates to information that must be divulged to government in the first place, a statute requiring such divulgations to be made public must also conform to the Charter sections 7 and 8 and additionally, they must be justifiable under section 1. Recall that to justify any infringement under s. 1 of the Charter, after establishing that the law has a pressing and substantial objective, the second part of the Oakes test must be satisfied, and that involves establishing that 1) the measure was carefully designed to achieve the objective in question; it must not be arbitrary, unfair or based on irrational considerations, but rather must be rationally connected to the objective; 2) the means, even if rationally connected to the objective, should be proportional and minimally impair the freedom in question.

Thus, a constitutional analysis of a statute authorizing **public disclosure** of beneficial ownership information would require a consideration of the objectives enunciated by the government enacting legislation. For example, police do not **require** a beneficial ownership registry to be made **public** to use it to detect and investigate crimes. In this case, if the purpose of the public registry is to support criminal law objectives alone, then the resulting infringement of privacy rights is not as minimally impaired as possible: the objective could reasonably be achieved without making the registry public (even if public access might bring some law enforcement benefits, such as investigating NGOs having access). On the other hand, if the government's key rationale is business transparency, then the infringement resulting from making the registry public would be more rationally connected to the law's purpose. As section 2 illustrated, the **large number of potential societal benefits of creating a public beneficial ownership registry considerably strengthens the constitutional arguments justifying the public disclosure of private information**.

When considering the constitutionality of a public beneficial ownership registry, **public disclosure of each individual data field** must be considered **separately as well as a whole** to determine whether any privacy infringements can be justified. In order to conduct this analysis, it will be necessary to look at likely registry fields themselves:

- Unique identifier (generated by the database itself)
- Full legal name
- Year and month of birth
- Service or correspondence address
- Country of principal tax residency
- Country of usual residence
- Citizenship(s)
- Nature and extent of beneficial interest held
- Politically exposed person status and/or Head of International Organization Standard

Fields that essentially support the basic purpose of a registry, particularly information used to positively **identify** beneficial owners would likely to be held to be rationally connected to any purpose of a registry. These include providing public disclosure of beneficial owners' **unique identifier, full name, country of usual residence** and are already found publicly available on the SEDI insider website of beneficial owners of publicly traded companies. The **year and month of birth**, if these can be shown to be necessary to establish and affirm a beneficial owner's identity, would also likely be found to be rationally connected to the purpose of having a beneficial ownership database. However, as indicated above, it would be important to demonstrate that the state and societal benefits of a public database would be proportional to any privacy infringements.

The **business/service/correspondence address** is not sensitive information, and most often would already be available as the registered corporate office in existing public business databases supported by the Government, such as the Canada Corporations website. There would be no privacy impediment to including this information in a public beneficial ownership registry.

The **nature and extent of beneficial interest held** (a category e.g. 25 – 50%, over 50%) appears to attract a slightly higher expectation of privacy, although as discussed in the s. 8 analysis, in the absence of any financial information divulged about the privately-held company, this information does not provide significant personal financial information about the individual. It should be noted that it is also the type of information publicly disclosed on the SEDI.

Public disclosure of the **Politically Exposed Person (PEP) status or Head of International Organization Status** is a much newer and untested area of Canadian law. However, it is certain that there is no reasonable expectation of privacy in information that a person has a prominent position, such as a Cabinet Minister, a judge, or the head of an international organization as the occupancy of such offices is already in the public domain and appearing in public is often part of their regular functions. (There may be, however, a stronger argument in favour of privacy for the spouses, children and associates of PEPs, especially if they reside or travel often to countries where kidnappings for ransom is more commonplace). It should be noted that many jurisdictions such as Ukraine and Uruguay maintain lists of PEPs for use domestically in anti-corruption and anti-money laundering efforts.

However, there is a serious likelihood that public disclosure of two proposed fields – **country of principal tax residency, and citizenship(s)** – while also playing an important identifying role, would **attract a much higher degree of privacy protection** under the Charter, because such information falls much closer to individuals' identities and personal core, rather than in the category of regulated business information. For example, whether a person who lives in Canada chooses to apply for Canadian citizenship once eligible, rather than remaining long term in permanent resident status, would likely be considered a personal decision which may include all kinds of individual and potentially sensitive factors. This is discussed in more detail below.

Overall, each of the fields enumerated in the registry further the immediate objective of having a strong and effective beneficial ownership registry which allows for clear identification of beneficial owners. Indeed, each piece of information strengthens the overall value in identifying beneficial owners and providing useful information to users. The registry, in turn, would serve other objectives as would be defined by Parliament such as effective law enforcement, tax enforcement, business transparency, public procurement, etc.

Table 2: Privacy considerations for proposed public disclosure of particular beneficial owner information

Beneficial owner information of corporations that could be made public	Privacy consideration and vulnerabilities of specific fields of information
Unique identifier (generated by the database itself)	Low expectation of privacy, not inherently sensitive.
Full Legal Name	Lower expectation of privacy, and the type of information already found publicly available on the SEDI.
Year and Month of Birth	If these can be shown to be necessary to establish and affirm a beneficial owner's identity, would likely be found to be rationally connected to the purpose of having a beneficial ownership database.
Service or correspondence address	Not sensitive information, and probably available in existing public business databases as registered corporate address.
Country of principal tax residency	Higher expectation of privacy protection under the Charter (personal tax-related information as well as possible grounds for discrimination).
Country of usual residence	Lower expectation of privacy, and type of information already found publicly available on the SEDI.
Citizenship(s)	Higher expectation of privacy protection under the Charter (personal information, as well as possible grounds for discrimination).
Nature and extent of beneficial interest held	Possibly a slightly higher expectation of privacy, but the type of information already found publicly available on the SEDI.
Politically exposed person status and/or Head of International Organization Standard	No reasonable expectation of privacy in information that a person has a prominent position, such as a Cabinet Minister, a judge or the head of an international organization.

The public disclosure of information which would allow individuals to be singled out or publicly targeted because of their citizenship or country of origin

If the publication of personal information results in that person being singled out for audits or publicly targeted because of their nationality or country of residence, a s. 7 interest could be engaged, especially given Canada's stance on discrimination and dissemination of hatred.

Relevant to this analysis is the CCRA Airline Passenger Database, initiated in April 2000 by the then Minister of National Revenue, Martin Cauchon. It was intended to improve customs and immigration risk management capabilities by providing officials with information on travellers in advance of their arrival in Canada. Integral to the project was the establishment of the CCRA database to capture, record and analyse information concerning Canadian travel activities for links to terrorist enterprises. The CCRA and Citizenship and Immigration Canada jointly set up the program under revisions to the *Customs Act* (Bill S-23), which received Royal Assent on October 25, 2001 and the *Immigration and Refugee Protection Act (IRPA)*.[71] The former Supreme Court judge, G.V. La Forest authored an opinion on the database, because it attracted significant controversy and the scrutiny of the then Privacy Commissioner, George Radwanski.[72]

71 in force as of June 28, 2002.

72 Cohen, *supra* note 39 at 458-471.

Concluding the s. 1 analysis, the precedent of SEDI, in existence for many years, suggests that a public beneficial ownership registry with important legislative purposes would be constitutional so long as the information contained therein was necessary to achieve those objectives and the infringement on individual privacy rights was proportional to the public benefits.

> The threat to privacy generated by the CCRA's proposed database is exacerbated by its constitution in digital form. Officials may be able to use [the] data, on its own or in conjunction with information from other government databanks, to infer the race, ethnicity, religion or national affiliation of travellers. The ability to conduct automated algorithmic searches may by design or effect disproportionately identify individuals with disfavoured racial, ethnic, religious, national or political affiliations. These people may subsequently be targeted for heightened customs scrutiny or other forms of surveillance. ... [A]s demonstrated by the recent controversy over the handling of Canadians born in certain Arab or Islamic countries by United States customs officials, **profiling based on such criteria and the absence of individualized suspicion is antithetical to Canadian values of tolerance and non-discrimination**.[73]

It is here that one key aspect of a challenge to the constitutionality of a beneficial ownership registry would likely be found. This information, placed in a database setting, and especially *if* made available to the public, would open the individuals whose information appears in the registry to the kind of targeting and profiling that La Forest warns against in the CCRA opinion. Moreover, in the current climate, where there are calls to boycott products of companies with specific national affiliations,[74] there is conceivable risk to the business operations of a company whose owners' nationality and tax jurisdiction might attract politically-motivated scrutiny should this information be published in the public domain.

In short, a beneficial ownership registry that includes tax jurisdiction and citizenship could form grounds for discrimination against particular beneficial owners on the basis of race, colour, national or ethnic origin, or even religion. This discrimination is the product of bias and prejudice related to assumptions about the personal characteristics of individuals who reside in other countries or are citizens of other countries. The inclusion in a public database of citizenship and tax jurisdiction would likely not be saved under section 1. These fields may well be found to be a disproportionate infringement of privacy rights, without a sufficiently strong rationale for disclosing those publicly or a rational connection to an important legislative objective.

While Canada does not have any court cases where the matter of a beneficial ownership database has been discussed, it would be prudent to include for public disclosure only personal information which attracts a very high degree of justification and a low expectation of privacy. Therefore, the **citizenship and tax jurisdiction information should not be made publicly available** in order to safeguard Charter rights and values.

Other unintended consequences of privacy breaches

A final question is whether there may be any further privacy infringements created by a public beneficial ownership registry that may engage s.7. The answer is unclear. The possibility exists of unanticipated consequences of the public release of beneficial ownership information in an open data format which could be mined in conjunction with other data sources by large corporations or hostile powers, potentially through increasingly sophisticated algorithms or artificial intelligence. Such potential privacy breaches may never materialize, or they may become clear over time and may well represent another vulnerability under section 7.

It would be useful for governments and other stakeholders to work with technical experts to carefully consider possible consequences in making large amounts of beneficial ownership information publicly available, particularly in an open data format.

73 https://www.priv.gc.ca/en/opc-news/news-and-announcements/2002/opinion_021122_lf/ (emphasis added)

74 See, for example, https://www.ipsc.ie/campaigns/consumer-boycott

4. POLICY RESPONSE TO MITIGATE PRIVACY CONCERNS AND BUSINESS CONFIDENTIALITY

This section reviews some legitimate concerns that may be held by businesses and/or individuals about public release of beneficial ownership information and suggests some general responses. Provisions for a reasonable policy response, namely case-by-case exemptions upon application, would soften the pressure on beneficial owners' legal and constitutional rights. As a practical matter, an exemption process would also potentially reduce the likelihood of a Charter challenge to a public registry by an aggrieved beneficial owner.

A. BUSINESSES CONFIDENTIALITY

There are many reasons why businesses would like to keep certain activities, investments, acquisitions and holdings confidential. Business confidentiality allows for firms to invest in new ventures and knowledge creation without any gains immediately being eroded or appropriated by competitors.[75]

Business activities kept confidential through anonymous holding companies may include the following:

- Acquiring a concession for mineral or petroleum exploitation
- Preparing to enter new markets, either extra-provincially or internationally
- Acquiring property to expand operations or develop a new facility
- Developing new products through the acquisition of existing firms
- Purchasing intellectual property rights
- Entering into a new joint venture with other entities

Canadian law recognizes the concept of commercial confidentiality and the imperative for Government to protect third party commercially confidential information in its possession.[76]

Another group of businesses that try to keep under the radar are institutional investors and large asset managers such as pension funds and mutual funds. They often prefer discretion in making acquisitions or sell-offs so as not to unduly affect markets. Most securities regulators require regular mandatory disclosure of holdings of such large investors (typically quarterly). While this allows fund investors to better evaluate the performance of its fund manager, it has drawbacks including traders "copycatting" and "front-running" institutional investors.[77] Certain non-institutional investors or high net worth individuals may similarly wish to keep a low profile, for example, if they are investing in a corporation that has recently gone public.

In Ontario, high-profile investors may try to maintain a low profile by keeping holdings under 10% which avoids the triggering of reporting obligations under insider trading and early warnings rules (see **Box 2**).

B. PRIVACY INTERESTS OF INDIVIDUALS

Most individuals appreciate privacy in their financial and personal affairs. Some individuals, due to fame or notoriety, wealth or the type of business in which they engage are more vulnerable to harassment, protests, attention and intrusion into their privacy, and potentially even fears of being targeted by criminals for extortion or kidnapping of their family members.

It should be noted that unlike many European jurisdictions such as Germany and France, most large companies in Canada are publicly-traded. As discussed earlier, public disclosure of ownership of more than 10% of voting shares of a corporation or trades on the SEDI website[78] means that a great deal of Canadian wealth in the form of publicly traded shares is already

75 Maya Forstater, *Beneficial openness? Weighing the costs and benefits of financial transparency.* CMI Working Paper number 3 2017, March 2017, found at https://www.cmi.no/publications/file/6201-beneficial-openness.pdf

76 For example, the *Access to Information Ac*t, (R.S.C., 1985, c. A-1), ss 20 (1)(b) and (c) and the Supreme Court's leading case *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23

77 Copycatting means that traders buy, hold and sell whatever the portfolio discloses, thereby free-riding on its expertise and trying to deliver something close to its return at a much lower cost. Additionally, the trades of these copycats can make it more expensive for the investment managers if they decide to acquire more shares in subsequent quarters. Traders "front-running" means that they anticipate future trades of institutional investors through close monitoring of both markets and disclosures. For example, if at quarter-end an institution is midway through executing a big trade, a trader may intuit the ongoing transaction from the change from the previous quarter-end, and thus makes a trade in the same direction, buying after an increase and selling after a decrease, hoping that this precedes the institution's remaining trades.

78 https://www.sedi.ca/sedi/SVTWelcome?locale=en_CA

publicly disclosed. Therefore, opening-up ownership information of private corporations for greater public knowledge would not necessarily have the same magnitude of privacy impacts in Canada as it is having in Europe.

Currently, Canadian law recognizes shareholder rights to privacy as balanced against public rights to information, through certain provisions in the *Canada Business Corporations Act* (CBCA) and some provincial equivalents. Traditionally, access to shareholder registries was an important common law right intended to ensure that minority and dissident shareholders had the opportunity to communicate freely with other shareholders. However, pursuant to the CBCA since 2001, **any person** is allowed access the shareholder registry of a publicly traded corporation (but not a privately-held corporation), on payment of a reasonable fee and provision of an affidavit.[79] This affidavit required the inclusion of a statement that the information obtained will not be misused i.e. used for any purpose other than:

- an effort to influence the voting of shareholders of the corporation;
- an offer to acquire securities of the corporation; or
- any other matter relating to the affairs of the corporation.[80]

Case law has clarified that **improper purposes for accessing shareholder lists** would include **using the information to target wealthy persons for selling products or investment opportunities unrelated to the corporation**.

In the *CBCA*, the requirement of an affidavit and clear uses which are permitted is an effort by Parliament to **balance the interests of the public on the one hand in having access to information about publicly-traded corporations, against the privacy rights of shareholders on the other hand, while preventing the misuse of the information**.

Because **real property** may be held through corporate structures or trusts, privacy related to home ownership is potentially an issue as well. High net-worth individuals, or those who are famous or notorious, or even sometimes middle-class homeowners at times acquire property through shell companies or trusts. These allow them and any family members who live at those addresses to enjoy a greater level of privacy and freedom from harassment by photographers, gawkers, journalists, protesters, sales-people and others.

In conclusion, individuals and businesses have legitimate interests in maintaining a certain level of confidentiality in their business activities and personal lives, and at times do so through the use of anonymous vehicles.

C. PROPOSED POLICY RESPONSE: PUBLIC DISCLOSURE EXEMPTION

A reasonable policy response would include some form of exemption that could be made by application only, to be decided by an objective process on a case-by-case basis. Government registrars should clearly inform the public, corporations and their representatives about any such exemption. Privately-held corporations with legitimate business confidentiality rationales could be permitted to have their beneficial ownership information exempted from public disclosure for a specific time period, for example, one or two years, after which it would be made public. Applicants would be required to provide evidence to support a business confidentiality application.

For beneficial owners concerned about harassment or protesters, a longer lasting, different type of exemption could be contemplated, perhaps modelled on the U.K. example.

By way of background, European Union governments have grappled with balancing privacy against the benefits of greater transparency of beneficial ownership. Originally, the 4th Anti-Money Laundering Directive (AMD4) required governments to provide access to beneficial ownership information to those with a "legitimate interest," but the 5th Anti-Money Laundering Directive adopted in 2018 now requires **public access** to national beneficial ownership registries for all EU members.

Creating a publicly available beneficial ownership registry, such as the one in place in the UK, requires that legislators consider all fields and whether their public disclosure infringes privacy in a manner that outweighs the public benefit. Annex 2 shows which fields and information are made publicly available in the UK Companies House Registry of Persons with Significant Control, and which pieces of information are kept from the public eye.

79 *CBCA*, s. 21 (3).

80 *CBCA*, s. 21 (7, 9).

In the UK, individuals **may apply to restrict the disclosure of their private information on the public registry** – see below an excerpt from the Companies House website explaining the process:

Applying to restrict disclosure of private information from the UK Register of Persons of Significant Control (Beneficial Ownership Registry)[81]

> "Certain characteristics or personal attributes of a Person of Significant Control (PSC) when associated with a company could put them, or someone who lives with them at serious risk of violence or intimidation. In these cases, an application can be made so that no information about them in relation to that company is available on the public register. If the application's successful, the PSC's registered information is protected. This would still be available to specified public authorities on application. In these cases, the public register will show there's a PSC subject to protection.
>
> ...The activities of certain companies can place their directors and PSCs, or someone who lives with them, at serious risk of violence or intimidation. This could be due to their involvement in a particular sector of commerce or industry.
> An application may be appropriate if:
>
> you're a director or PSC of a company whose business is licensed under the Animal (Scientific Procedures) Act 1986
> you're a director or PSC of a company active in the defence industry
>
> you're a director or PSC of a company that's a readily traceable supplier to, or partner of an organisation in the above categories
>
> a company you're a director or PSC of has been targeted by activists."

To date, approximately 30 individuals have been successful in their application for restricted disclosure. The UK example, if not perfectly appropriate for Canada, provides an idea of a policy measure designed to address privacy concerns of a public registry.

5. DATA MANAGEMENT, STORAGE, RETENTION AND DESTRUCTION POLICIES

Sensitive information such as home addresses, dates of birth, citizenship as well as scans of driver's licenses, passports or other forms of identification may be used to confirm the identity of beneficial owners of corporations. If the government were to create a beneficial ownership registry, these documents would need to be retained by the government and may be requested by tax authorities or law enforcement so long as the individuals in question remain beneficial owners. Understanding existing federal, provincial and territorial policies surrounding the management, retention, and destruction of personal information can help to identify and mitigate potential privacy risks associated with a public registry.

5.1. FEDERAL POLICIES ON DATA MANAGEMENT

The *Privacy Act* contains retention and disposal requirements for personal information retained by federal institutions. Usually, personal information that has been used for an administrative purpose is retained for two years after it has served its purpose to provide reasonable time for an individual to access their personal information. Under the Act, government institutions are also responsible for taking reasonable steps to ensure that personal information used for administrative purposes is kept accurate, up-to-date and as complete as possible. Disposal of personal information is conducted in accordance with the regulations and any directives or guidelines issued by the designated minister.

Personal information banks (PIBs) are used to describe personal information under the control of a government institution that is *organized and retrievable by an individual's name or by a number, symbol or other element that identifies that individual*.[82] The personal information described in a PIB is or was used for an administrative purpose. Each year, the federal government publishes an index of all PIBs that identifies and describes each bank, the legal authority for each bank, the types of personal information maintained in the bank, how the personal information is used on a regular basis, to whom the personal information is disclosed on a regular basis, the categories of individuals about whom the personal information is maintained, and the policies and practices applicable to the retention and disposal of the personal information.[83] Records of exceptional uses and disclosure of personal information must be attached or linked to the personal information in the bank.[84]

81 https://www.gov.uk/government/publications/restricting-the-disclosure-of-your-psc-information/restricting-the-disclosure-of-your-information

82 https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/information-about-programs-information-holdings/standard-personal-information-banks.html

83 *FIPPA*, s. 45.

84 *FIPPA*, s. 46

It's also important to note that Privacy Impact Assessments, or PIAs, must be undertaken during the design or redesign of federal programs or services. PIAs are a type of risk-assessment exercise that helps reassure Canadians that privacy issues are thoroughly taken into account. They also help to avoid or mitigate the risk that the privacy of Canadians could be compromised when a program is developed or substantially changed. Institutions must submit their PIAs to the Privacy Commissioner of Canada, who may advise institutions on ways to address potential privacy risks. Institutions must publish summaries of their PIA results so that Canadians can see how privacy issues have been addressed in the design of a program or service. Conducting a PIA prior to the creation of a public registry could help to capture and mitigate some of the associated privacy risks.

5.2. PROVINCIAL POLICIES ON DATA MANAGEMENT

The provinces also have legislation that addresses how personal information collected and shared by government is protected and managed. For example, in Ontario, information (other than health information) collected and shared by the provincial government is protected under the *Freedom of Information and Protection of Privacy Act* (FIPPA). This Act requires institutions, including provincial ministries, to implement reasonable measures to preserve records of information in accordance with any legislation that applies to the institution. The FIPPA sets out retention and disposal requirements for the protection of privacy generally, but different or additional requirements may also be set out in other governing legislation related to the governmental agency or matter in issue.

Generally, personal information that has been used by an institution shall be retained for one year minimum after its use (although this is clarified for each institution in the regulations). Information is retained to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to their personal information. Maximum retention times are also set in record retention schedules set out in applicable statutes and regulations and municipal by-laws. Every head shall take all reasonable steps to ensure that when personal information is to be destroyed, it is destroyed in such a way that it cannot be reconstructed or retrieved. Protecting the security and confidentiality of personal information that is to be destroyed is a priority during its storage, transportation, handling and destruction.

In Ontario, personal information maintained for the purpose of creating a public record is specifically exempted from the retention and disposal requirements outlined above. To satisfy this exemption, the government agency must establish that:

a) that the information in question is "personal information";
b) that the personal information is being maintained by the institution; and
c) that the purpose of maintaining the personal information is to create a record that is available to the general public.[85]

This exception could apply to a beneficial ownership registry developed for public access.

5.3. PRIVACY COMMISSIONER GUIDANCE

Both federal, provincial and territorial governments have established privacy commissioners who arbitrate privacy complaints and give guidance on best practices for both the private and public sectors. The guidance is a form of soft law that sets standards for compliance with the requirements of the legislation and regulations.

The federal Privacy Commissioner, the Office of the Privacy Commissioner of Canada ("OPCC") published guidelines for the retention and disposal of personal information in June 2014 ("OPCC Guidance").

RETENTION

While the regulations to the *Privacy Act* require personal information to be retained for at least two years, there is no maximum retention period. When it comes to deciding how long to retain information, the OPCC Guidance says:

There is no "one size fits all" retention period. For some organizations, there is a legislative requirement to keep information for a certain amount of time. In other instances, there may be no legislative requirement, and an organization needs to determine the appropriate retention period.

85 IPCO Investigation Report PC-980049-1: Ministry of Consumer and Commercial Relations, June 22, 1999, 1999 CanLII 14328 ("PC-980049-1"), p. 4.

In assessing what is the appropriate retention period and whether it is time to dispose of personal information, an organization should consider the following points:

- Reviewing the purpose for having collected the personal information in the first place is generally helpful in assessing how long certain personal information should be retained.
- If personal information was used to make a decision about an individual, it should be retained for the legally required period of time thereafter – or other reasonable amount of time in the absence of legislative requirements – to allow the individual to access that information in order to understand, and possibly challenge, the basis for the decision.
- If retaining personal information any longer would result in a prejudice for the concerned individual, or increase the risk and exposure of potential data breaches, the organization should consider safely disposing of it.

Where possible, data should be de-identified so that the data is no longer considered to contain personal information.

DISPOSAL

The goal of disposal is to irreversibly destroy the media (whether electronic or hard copy), which stores personal information so that the personal information cannot be reconstructed or recovered in any way. When going through the process of disposal, all associated copies and backup files should also be destroyed.

The OPCC Guidance lists several methods for destroying personal information:

- By completely destroying the media on which the information is stored, whether it is a hard or electronic copy, to ensure that the information can never be recovered. This can be accomplished using a variety of methods including disintegration, incineration, pulverizing, shredding and melting;
- By deleting electronic information using methods that resist simple recovery methods, such as data recovery utilities and keystroke recovery attempts. One method for clearing media is overwriting, which can be done using software and hardware products that overwrite the media with non-sensitive data; and
- By degaussing, in which magnetic media are exposed to a strong magnetic field to make data unrecoverable. This can be used to protect against more robust data recovery attempts, such as a laboratory attack using specialized tools (for example, signal processing equipment). Degaussing cannot be used to purge nonmagnetic media, such as CDs or DVDs.

Federal, provincial and territorial Privacy Commissioners require organizations to implement and follow clear policies and procedures for data retention and disposal. The above-noted principles should be incorporated into any such policies related to the management of a public beneficial ownership registry.

6. CONCLUSION

A public beneficial ownership registry similar to those created in other jurisdictions is likely constitutional under Canadian privacy laws, as long as measures are taken to limit the disclosure of sensitive information, and the registry is granted the necessary authorization. With statutory authority, the registries at provincial and territorial levels could share information on beneficial ownership with a federal portal/search engine available to the public. Existing policies around storage, retention and destruction of data are sufficiently robust to manage the transfer and maintenance of personal information, and tailored regulations could be developed for a registry.

In the absence of proposed legislation with a clear purpose or purposes to creating a beneficial ownership registry, it is difficult to fully assess the likelihood of a constitutional challenge based on infringement of privacy rights as recognized under s. 7 and s. 8 of the Charter. While disclosure of personal information relating to citizenship or principal tax residency could form a basis for discriminatory or arbitrary treatment and may be too sensitive to disclose as a result, a number of the remaining proposed fields carry a lower expectation of privacy and are therefore unlikely to draw a constitutional challenge. In many cases, the type of personal information contained in these fields is already publicly available through platforms such as SEDI. In combination, these remaining fields should be adequate to achieve the objective of correctly identifying the beneficial owners of Canadian businesses.

...continued

Privacy is an important right and those considered the beneficial owners of Canadian companies have legitimate concerns about the publication of their personal information. Creating options for disclosure exemptions as the UK has done could help to mitigate the unique risks faced by some individuals, without compromising the creation of a registry. Given the potential benefits of a public registry, these risks should not deter the government from pursuing this option.

ANNEX 1: INFORMATION REGARDING FEDERALLY-INCORPORATED COMPANIES MADE AVAILABLE FROM A PUBLIC SEARCH ON CORPORATIONS CANADA WEBSITE

- Corporation Number
- Business Number (BN)
- Corporate Name
- Status (Active, dissolved, etc)
- Governing Legislation, e.g. Canada Business Corporations Act - 1984-09-12
- Registered Office Address. This must be an address where legal documents can be served, not a box number.
- Number of Directors – can be a range
- Names and Addresses of Directors. The address directors must provide can either be a residential address or an address for service that is not their residential address. An address for service is an address where legal documents must be accepted by the director or someone on the director's behalf. A director's address cannot be a post office box.
- Annual Filings
- Anniversary Date (MM-DD)
- Date of Last Annual Meeting
- Annual Filing Period (MM-DD)
- Type of Corporation (Distributing Corporation, Non-distributing Corporation with 50 or fewer shareholders; Non-Distributing Corporation with 50 or greater shareholders)
- Status of Annual Filings (whether they have been filed in the past 3 years)
- Corporate History, including corporate name history, and years each name was used. There will also be a history of certificates and filings, beginning with the certificate of incorporation and then list all amendments to the Certificate of Incorporation and the date on which the Articles of Amendment were filed. If the company has been dissolved and then revived, those dates will also be listed. The corporate history will also indicate whether the company is an amalgamated company and what the pre-amalgamated companies are, including their corporate numbers. The search will also disclose whether the company was previously incorporated in another jurisdiction and then continued (i.e. moved) from that province or territory to the federal jurisdiction.

ANNEX 2: BENEFICIAL OWNERSHIP INFORMATION COLLECTED AND DISCLOSED (AND ANY RESTRICTIONS ON PUBLIC DISCLOSURE IN BRACKETS) BY THE UK GOVERNMENT

- name
- date of birth (full date of birth collected but only month and year of birth disclosed publicly)
- nationality
- country of residence
- service address
- usual residential address (not displayed to the public)
- the date they became a PSC of the company
- the date entered into PSC register
- which conditions of control are met

The level of their shares and voting rights, within the following categories:

- over 25% up to and including 50%
- more than 50% and less than 75%
- 75% or more

#endsnowwashing

endsnowwashing.ca

@endsnowwashing

PUBLISH WHAT YOU PAY CANADA

TRANSPARENCY INTERNATIONAL CANADA

Canadians *for* Tax Fairness
Canadiens pour une fiscalité équitable