

#end snowwashing

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

SUMMARY REPORT

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 an analysis of 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.



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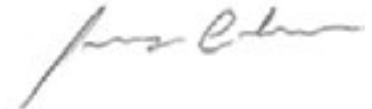
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SUMMARY

In December 2017, Canada's Federal Finance Minister, together with provincial and territorial counterparts, announced an agreement to improve beneficial ownership transparency.¹ 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 *Canadian Charter of Rights and Freedoms*.² 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.

CONDENSED ANALYSIS

LEGISLATIVE PURPOSES

The legislative purposes stated by the federal government in creating a beneficial ownership registry will help guide the analysis surrounding the constitutionality of a publicly accessible registry, particularly as the public nature of a registry may have to be justified as a rational and proportionate response to its policy objectives. Possible legislative objectives may include:

- Criminal Law Detection and Enforcement
- Regulation of Corporations
- Tax Enforcement

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

2 *Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982*

- Transparency Related to Government Procurement
- Consumer Protection
- Transparency in Political Financing
- Anti-Money Laundering and Anti-Fraud Due Diligence by Non-Governmental Actors
- Transparency in Business Activities
- Public Interest: Journalists and Investigative NGOs
- Transparency Across Provincial and International Borders

In relation to criminal law legislative objectives, 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 crimes, including conducting investigations without tipping off the entities and their principals being investigated. Other non-criminal law objectives also offer important rationales in reducing the potential misuse of corporate vehicles and improving transparency.

THE REQUIREMENT OF AUTHORIZING LEGISLATION FOR A PUBLIC BENEFICIAL OWNERSHIP REGISTRY

If the government chooses to make a beneficial ownership registry public, it is advisable that federal and provincial legislation be passed to expressly authorize the collection and disclosure of beneficial ownership information to the public and beyond the department or Ministry collecting the information. Specific provisions would be required to override privacy protections in existing laws such as the *Privacy Act*.³ Additionally, if the proposed registry seeks to obtain the relevant information from commercial incorporation actors, they would be barred from doing so by *Personal Information Protection and Electronic Documents Act*⁴ (PIPEDA) and provincial equivalent laws in Alberta, British Columbia, and Quebec. Specific provisions would also be required exempt private incorporation actors from private sector privacy laws such as PIPEDA.

CONSTITUTIONAL ANALYSIS

Section 8 of the *Charter of Rights and Freedoms* guarantee protection against unreasonable search and seizure by the state. In the leading case of *Hunter v. Southam Inc.*,⁵ 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. 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. Some cases also include a balancing analysis – weighing any privacy infringements against the state and societal benefits in having the information disclosed. The balancing question 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 seizure (and disclosure) may be justified even in cases when the information is highly personal and private.

Supreme Court jurisprudence has helped clarify the types of information that attract a high expectation of privacy under s. 8. 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. 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. Corporate filings to the government requiring information about beneficial owners of corporations *as owners*, would therefore likely attract a lower expectation of privacy under s. 8 of the Charter.

It should be noted that a public registry of beneficial owners of publicly traded corporations already exists under provincial law. The legislative objectives of the public database, the System for Electronic Disclosure by Insiders⁶ (SEDI) relate to protection of investors with regard to insider trading and large stock acquisitions of publicly traded companies, aspects of the

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

4 S.C. 2000, c. 5

5 [1984] 2 SCR 145

6 <https://www.sedi.ca/sedi/>

broader objectives of securities law to protect the markets and the public from fraud and misuse of listed entities. **In having a substantially similar purpose, the SEDI sets a helpful precedent for a future beneficial ownership registry of private corporations, affirming that the societal benefits of collecting and publicly disclosing beneficial ownership information likely outweigh any privacy infringements of beneficial owners.**

Concluding the s. 8 analysis, the type of information largely sought by governments in the creation of a beneficial ownership registry would not likely be found to possess a high expectation of privacy. 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. Given the regulatory context and the nature of the information to be gathered, state collection of beneficial ownership would unlikely to 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 private corporations more transparent and less susceptible to abuse.

It is also important to specifically consider the constitutionality of **public disclosure** of beneficial ownership information, for example in a public registry available on the internet. Under the *Privacy Act* and provincial equivalents, governments 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?**

To answer this, it is essential to go beyond s.8 and consider s.7 of the Charter, which 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. 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.

If a public beneficial ownership registry were found to violate Charter privacy rights, the infringements would have to be justified under s. 1. It is under section 1 of the Charter where the proposed public nature of a beneficial ownership registry would be most vulnerable to legal challenge, particularly under the rational connection and minimal impairment tests.

To pass the rational connection test, the legislation must not be arbitrary, unfair or based on irrational considerations. If the limit on the Charter right is not logically linked to the legislative objective, it will not pass the rational connection test. The government’s enunciated legislative objectives for creating a public registry would play an important role in this analysis. 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, then the resulting infringement on privacy rights is not rationally connected to the legislative objective: the objective can be achieved without making the registry public.

The minimal impairment test asks whether the impairment is as minimal as possible to achieve the stated government objectives. 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?

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 is not possible. However, some kinds of information, in particular categories or fields would be more vulnerable to a finding of unconstitutionality under the Section 7 / Section 1 analysis.

The following fields, should they be made publicly available would attract differing levels of privacy:

- 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

Of these, two fields, **country of principal tax residency** and **citizenship(s)** would likely attract a much higher degree of privacy protection under the Charter, because such information, if made publicly available, could form grounds for discrimination against particular beneficial owners on the basis of race, colour, national or ethnic origin or even religion. If the publication of personal information results in that person being 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.

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.

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.

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.

One final question to consider 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 constitutional vulnerability.

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.

POLICY RESPONSE TO MITIGATE PRIVACY CONCERNS

Some businesses and individuals may have legitimate privacy concerns. 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 by competitors. 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 may be useful to address privacy concerns about a public beneficial ownership registry through a policy mitigation measure such as an exemption from publication to be made by application on a case-by-case basis.

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 registry.

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 issues by the designated minister.

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*⁷ (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.

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.

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.

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.

7 R.S.O. 1990, c. F.31

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