Privacy, Trusts and Cross-Border Transfers of Personal Information: The Quebec Perspective in the Canadian Context

Eloise Gratton
McMillan

Pierre-Christian Collins Hoffman
McMillan

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This paper argues that data protection laws apply to prevent the disclosure of certain information relating to trusts, which are increasingly being used as business and investment vehicles. Given the broad scope of the concept of "personal information" found under both provincial and federal personal information protection statutes, arguments can be made that information relating to trust beneficiaries or trustees, where such beneficiaries or trustees are natural persons, enjoy some level of protection. Even where a trust contains an express choice of law clause providing that the laws of another province or country apply, Quebec conflict of laws rules may point to the application of Quebec's own personal information protection legislation. Hence, in order to avoid liability, trustees should use caution before disclosing trust-related information where part of the trust's business operations is outsourced to foreign jurisdictions, or where a foreign authority may request the disclosure of such information.

Cet article soutient que les lois en matière de protection des renseignements personnels ont pour effet d'interdire la communication de certains renseignements relatifs aux fiducies, qui sont de plus en plus employées comme instruments d'affaires et d'investissement. Compte tenu de la portée étendue de la notion de « renseignement personnel » figurant aux lois provinciales et fédérales en matière de protection des renseignements personnels, il peut être avancé que les renseignements relatifs aux bénéficiaires de fiducies ou aux fiduciaires, lorsque ces derniers sont des personnes physiques, peuvent profiter d'un certain degré de protection. Même lorsqu'une fiducie contient une clause prévoyant un choix exprès d'une loi d'une autre province ou d'un autre pays, les règles en matière de droit international privé du Québec peuvent conduire à l'application des lois du Québec en matière de protection des renseignements personnels. Par conséquent, afin d'éviter d'engager leur responsabilité, les fiduciaires doivent faire preuve de prudence avant de divulguer de l'information relative à une fiducie lorsqu'une partie des activités commerciales de la fiducie est donnée en sous-traitance à des entreprises situées dans d'autres états, ou lorsqu'une autorité étrangère peut requérir la divulgation de tels renseignements.

* Partner and National Co-chair, Privacy, McMillan LLP.
** Lawyer, McMillan LLP.
Introduction

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Introduction
Throughout the centuries, trusts have evolved from legal claims in equity presented to the Lord Chancellor by landowners returning from the Crusades in the 12th century to international business instruments used as investment vehicles in which trustees may manage assets, securities, real estate, natural resources, or public utilities. Whether they are listed on a stock exchange or private, trusts are employed in a context where the flow of data and information among states, investors, and market participants is an ever increasing phenomenon. For instance, businesses trying to reduce their costs often consider outsourcing part of their activities, which may involve transferring the personal information of their members, employees, or customers outside of their jurisdiction. Cloud computing services also generate large amounts of personal information that may be stored in a different jurisdiction from where the information originated. As reported in the media, there are increasing concerns regarding local and foreign government surveillance of online or mobile user activities, as well as cross-border data exchange cooperation between states or international treaties entered into for law enforcement purposes. All of this contributes to a growth in legitimate concerns about the security of

Section 18(5) disclosure exception: public body in the exercise of its function
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1. Cloud computing is the delivery of computing services over the Internet. See Fact Sheets: Cloud Computing, online: Office of the Privacy Commissioner of Canada <http://www.priv.gc.ca>.
personal information transferred to foreign jurisdictions that either do not have adequate data protection laws or in which there is the potential that data will be misused or used for a different purpose than it would be under local laws.3

In Canada, the federal *Personal Information Protection and Electronic Documents Act*4 sets out ground rules for how private sector organizations may collect, use, and disclose personal information in the course of their commercial activities.5 The federal government may exempt organizations or activities in provinces that have their own data protection laws if those laws are substantially similar to the federal law. The provinces of British Columbia,6 Alberta7 and Quebec have enacted provincial data protection legislation that has been recognized as substantially similar to *PIPEDA*; this legislation operates in place of *PIPEDA* in those provinces for intra-provincial matters.8

The Quebec Act respecting the Protection of Personal Information in the Private Sector,9 which came into effect in January 1994, was enacted to provide a legal framework for enterprises' collection, use and

3. For example, many have raised their concerns that the US *Patriot Act* may allow US intelligence to obtain access to their personal information with minimal procedural hurdles. See Sean Gallagher, “Patriot Act and privacy laws take a bite out of US cloud business: European IT companies are using uncertainty about the US's surveillance laws ...,” *Ars Technica* (8 December 2011), online: *Ars Technica* <http://arstechnica.com>.
4. SC 2000, c 5 [*PIPEDA*]. Bill S-4, the *Digital Privacy Act*, currently being debated in the House of Commons, proposes several amendments to *PIPEDA*. Among other things, Bill S-4 introduces provisions to permit organizations to disclose personal information where the disclosure is made for the purposes of preventing, detecting or suppressing fraud, or where “reasonable for the purposes of investigation of a breach of an agreement or a contravention of the laws of Canada.” These additional permissions to disclose, as well as new penalties and powers given to the Privacy Commissioner, have been criticized for opening the door to warrantless data sharing and excessive disclosures. For instance, see Michael Geist, “Why the Digital Privacy Act Undermines Our Privacy: Bill S-4 Risks Widespread Warrantless Disclosure” (10 April 2014), online: Michael Geist <http://www.michaelgeist.ca/2014/04/s-4-post>.
5. *PIPEDA*, ibid, s 3. *PIPEDA* is applicable to organizations carrying on “federal work, undertaking or business” (ss 2, 4(1)(b)) and organizations in provinces and territories where no personal information protection act has been enacted, such as Ontario (ie, all provinces except Quebec, Alberta and British Columbia).
7. *Personal Information Protection Act*, SA 2003, c P-6.5 [*ABPIPA*]. On 15 November 2013, the Supreme Court of Canada declared unconstitutional and struck down *ABPIPA* on grounds of freedom of expression and granted a 12-month stay of the declaration of invalidity: *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 SCR 733 [*United Food*].
8. The Manitoba Legislature has passed *The Personal Information Protection and Identity Theft Prevention Act*, CCSM c P33.7, which was given royal assent on 13 September 2013. However, it has yet to come into force.
communication of personal information to third parties,\textsuperscript{10} and to further protect and enshrine the fundamental right to privacy of natural persons\textsuperscript{11} as provided by the \textit{Civil Code of Quebec}\textsuperscript{12} and the \textit{Quebec Charter of Human Rights and Freedoms}.\textsuperscript{13}

The \textit{Act} is similar, in essence, to \textit{PIPEDA} and the personal information protection acts of Alberta and British Columbia. Quebec has enacted one of the most rigorous privacy legislation regimes in Canada and was the first province in which a privacy statute regulating the protection and communication of personal information held by enterprises came into effect.

In the context of international trusts constituted for profit, such as investment trusts, resource trusts, business trusts, and real estate investment trusts (REITs), beneficiaries, trustees and asset management consultants should be aware of the laws applicable to the protection or disclosure of personal information, particularly where a trust may be administered in multiple countries, manage assets in different states and have beneficiaries of different nationalities.

In Part I of this article, we assess whether data protection laws, such as the \textit{Quebec Private Sector Act}, apply to information pertaining to a trust and its beneficiaries, even if such trust is governed by foreign legislation, either by choice or through proximity factors pointing to the law of another state, where there is still some connection with Quebec and where the trust can be considered to carry on an enterprise in Quebec. In Part II, working under the assumption that the \textit{Quebec Private Sector Act} applies to various types of trusts created for generating profit (and more specifically, to the information pertaining to the trust and its beneficiaries), we examine the legality of the disclosure or transfer of this information, first to a foreign jurisdiction as part of the outsourcing of operations (for instance, following the hiring of a foreign service provider or the use of cloud services), and second, to a foreign (non-Canadian) government following a request made for the disclosure of (or access to) information relating to trusts and their beneficiaries (including financial information). In Part III, we review the potential civil and penal liability to which trustees may be subject to

\textsuperscript{10} \textit{Ibid}, s 1.

\textsuperscript{11} \textit{Quebec, Assemblée nationale, Journal des débats de la Commission de la culture, 36th Leg, 2nd Sess, No 23 (6 December 2001); Syndicat de Autobus Terremont Itée (CSN) c Autobus Terremont Itée, 2010 QCCA 1050 at para 98.}

\textsuperscript{12} \textit{Arts 35-40 CCQ 1 [CCQ].}

\textsuperscript{13} \textit{CQLR, c C-12, s 5 [Quebec Charter].}
under Quebec law, following an illegal cross-border or an unauthorized disclosure of the personal information pertaining to beneficiaries.\(^\text{14}\)

I. Applicability of the Quebec Private Sector Act

The *Quebec Private Sector Act* only applies where a person "carries out an enterprise" within the meaning of article 1525 of the *CCQ*,\(^\text{15}\) and to information held by such a person if such information can qualify as "personal information" as defined in the *Act*. Therefore, a twofold test must be met for the *Quebec Private Sector Act* to apply to the collection, holding, use, and communication of private information by a trustee. Even where these two tests are satisfied, the question arises whether a choice of law clause inserted in a trust deed or geographical factors of proximity that would point to the law of another state for purposes of the administration or validity of the trust, may render the *Quebec Private Sector Act* inapplicable by virtue of conflict of laws rules.

In this part, we will assess whether the *Quebec Private Sector Act* may apply to trusts, if these trusts are said to be carrying on business in Quebec, and if their information, such as financial information pertaining to the trusts, can qualify as personal information of the trust beneficiaries. Second, we will analyze whether the *Quebec Private Sector Act* may apply to trusts for matters that pertain to the protection of personal information, even in cases where the conflict of laws rules point to the law of another state.

1. Applicability of the Act to information relating to trusts and their beneficiaries

a. Civil and common law trusts

Under the *Civil Code of Lower Canada*, trusts could not be created nor used in Quebec for commercial purposes.\(^\text{16}\) Since the coming into force of the new civil code in 1994, a private trust can indisputably be created for

\(^{14}\) This paper is restricted to the perspective *Quebec Private Sector Act* and related Quebec privacy legislation, although case law rendered by other Canadian courts under similar privacy statutes was contemplated. Quebec conflict of laws rules were also examined to determine whether the law applicable to the validity or administration of a trust (for instance, when parties have included a provision in the act or deed of trust under which a foreign law may apply), could trigger the application of foreign law where privacy protection issues arise or, instead, whether the *Quebec Private Sector Act* would nonetheless apply to a trust which has some type of proximity factors with Quebec, for example if these trusts are said to be carrying on business in Quebec.

\(^{15}\) *Quebec Private Sector Act*, supra note 9, s 1.

the sole purpose of carrying on an enterprise.17 Article 1269 of the CCQ
now provides that "[a] trust constituted by onerous title...particularly
[one created for the purpose] of allowing the making of profit by means of
investment...is also a private trust."

A trust may be "carrying on an enterprise" within the meaning of
article 1525 of the CCQ even if it has not been constituted under Quebec
law, as long as the statute under which the trust was constituted allows for
the creation of trusts for that purpose.

b. Can a trust be considered to be "carrying on an enterprise" under the
Quebec Private Sector Act?
The Quebec Private Sector Act applies where an individual or a legal
person collects, holds, uses or communicates personal information to third
parties "in the course of carrying on an enterprise within the meaning of
article 1525 of the Civil Code." This section defines the "carrying on of an
enterprise" as:

The carrying on by one or more persons of an organized economic
activity, whether or not it is commercial in nature, consisting of producing,
administering or alienating property, or providing a service.[18]

This definition of "enterprise" is broader than the definition of "commercial
activity" previously found under the Civil Code of Lower Canada. An
enterprise does not have to carry on activities that are "commercial in
nature" for this Code to apply.19 Therefore, the definition of "enterprise" is
interpreted very broadly, for instance, to include non-profit organizations,
professionals, artisans or agricultural activities.

While the enterprise has to be carried on in the province of Quebec,20
courts have applied broad criteria in order to determine this geographical
factor. For example, in Guay, the Court of Quebec ruled that the
Commission d'accès à l'information du Québec,21 the administrative
court specialized in the application of the Quebec Private Sector Act, had
rightfully considered that the Insurance Institute of Canada, a nonprofit
and educational organization, carried on an enterprise in Quebec, since it

925; Nabil NAntaki & Charlaine Bouchard, Droit Et Patrice De L'entreprise, v7, 2d Ed (Cowansville,
Quebec: Editions Yvon Blais, 2007). See the Chapter Entitled "L'entreprise Selon Le Code Civil Du
Québec—L'Exploitation D'Une Entreprise" at para 221.
18. Art 1525 CCQ.
19. Karl Delwaide & Antoine Aylwin, Learning From A Decade Of Experience: Quebec's Private
Sector Privacy Act (Ottawa: Privacy Commissioner of Canada, 2005) at 5.
21. [CAI].
sold course materials and offered examination and correction services in Quebec. While the Institute had its head office in Ontario, had no place of business in Quebec and did not hold documents containing personal information in Quebec, the court held that it still had to comply with the *Quebec Private Sector Act*, and that the Institute could not avoid the application of the *Act*, for instance, by sending its documents to its Ontario head office.

A trust company or an asset management consultant, which administers or offers consultancy services to trusts in Quebec in exchange for a commission or remuneration, would most likely be considered to carry on an enterprise subject to the *Quebec Private Sector Act*. There can be no doubt that such entities are carrying on an organized economic activity. A consultant or trust company who holds personal information regarding beneficiaries would therefore be subject to the *Act*. Consequently, if a request for access to information is made directly to such entities, the *Quebec Private Sector Act* is applicable, provided that the information requested qualifies as “personal information.”

However, does the simple act of administering a trust in itself constitute “carrying on an enterprise” in Quebec? Further analysis of whether a trust (and if so, which kind of trusts) can be considered as “carrying on an enterprise” is required.

A trust will only be subject to the *Quebec Private Sector Act* if its purpose is economic, and if its main activities consist in the “carrying on of an enterprise.” For one to “carry on an enterprise” within the meaning of article 1525 of the *CCQ*, it must produce, administer or alienate property, or provide services, for the purpose of carrying on an “organized economic activity.” According to professors Nabil N. Antaki and Charlaine Bouchard, to carry on an “organized economic activity,” a person must seek to satisfy needs by optimizing limited resources in a market.

In 1994, Pierre Dalphond (before his appointment to the Quebec Court of Appeal), proposed five criteria, repeatedly cited in case law, to

22. Constituted pursuant to the *Act respecting trust companies and savings companies*, CQLR, c S-29.01.
23. See *ibid* for an analysis of which kind of information can qualify as “personal information.”
24. *Conseil de presse du Québec c Québec* (Cour du Québec), 2006 QCCA 1282, 165 ACWS (3d) 202 [Conseil de presse].
25. If the enterprise is merely an ancillary activity of the trust, it may not be considered to be an enterprise for the purpose of application *Quebec Private Sector Act*. See *Congrégation des Témoins de Jehovah D’Issoudun-Sud c Mailly*, (2000) CAI 427, (CQ).
characterize the "carrying on of an enterprise" under article 1525 of the 
(CCQ):
1. necessity of a plan detailing the economic objectives of the 
company and on which basis the activity is organized;
2. necessity of assets related to the objectives...;
3. necessity of a series of usual and customary legal transactions 
involving the contractor and made in the pursuit of the 
predetermined goals;
4. necessity of other economic stakeholders receptive to the goods or 
services offered by the enterprise, generally defined as customers, 
goodwill or the market; and
5. presence of economic value or a benefit directly attributable to the 
efforts of the contractor.27

According to the decision of the Court of Quebec in Conseil de presse du 
Québec c. Lamoureux-Gaboury,28 there are four elements, similar to those 
described above, that can be considered in the definition of an "enterprise" 
and which can be useful to determine whether the activities of a trust are 
subject to the Quebec Private Sector Act:
1. that the operations of an enterprise constitute jurisdictional acts, 
which are repetitive;
2. that there exists a coordination between human and material 
resources;
3. that the organization must aim at responding and satisfying certain 
needs; and
4. that its success is dependent on similar standards as to market 
forces and the efforts deployed by the business person.29

These criteria seem sufficiently broad to support the contention that the 
main types of income trusts, namely, business/utility trusts, royalty trusts, 
investment trusts, and real estate investment trusts, which all involve an 
organized economic activity on the market, are covered by this broad 
definition of "enterprise." This interpretation is in line with the views 
of certain authors who propose that a liberal interpretation of the term 
"enterprise" should be used:

35 [translated by authors].
28. [2003] CAI 686, (CQ). This decision was overruled by the Superior Court in judicial review 
mainly on questions of fact; see Conseil de presse, supra note 24. For a review of this decision, see S 
Reynolds, "Commentaires sur la décision Conseil de presse du Québec c Lamoureux-Gaboury—La 
notion d’entreprise dans le cadre de la Loi sur la protection des renseignements personnels dans le 
29. Translation by K Delwaide & A Aylwin in Delwaide & Aylwin, supra note 19, of Justice 
Bourduas’ criteria in Conseil de presse du Québec c Lamoureux-Gaboury.
In the context of privacy legislation, the definition of “enterprise” should benefit from a wide and liberal interpretation in order to allow the legislation to achieve its objects of protecting personal information.\(^{30}\)

As previously mentioned, according to a Court of Quebec decision, the \textit{Quebec Private Sector Act} applies to every enterprise that conducts business in Quebec, independently of the location of its place of business and the place where the personal information is stored\(^{31}\); the Court’s intention is to ensure that the \textit{Quebec Private Sector Act} applies if there are at least some kind of business activities in Quebec or other proximity factors with Quebec.

Finally in \textit{CG Jr c. M-C B},\(^{32}\) the Superior Court of Quebec went as far as concluding, without any hesitation, that the \textit{Quebec Private Sector Act} protected personal financial information relating to a trust: trusts may carry on business in Quebec and therefore be subject to the \textit{Quebec Private Sector Act}.

The jurisprudence suggests therefore that the \textit{Quebec Private Sector Act} should apply to income trusts, asset management consultants and trust companies where these are carrying on an enterprise in Quebec. What remains to be determined is whether the information pertaining to a trust, such as the beneficiaries’ contact information and the financial information of the trust, can qualify as “personal information” under the \textit{Quebec Private Sector Act}. This issue is analyzed next.

c. Can information pertaining to trusts (such as financial information) qualify as “personal information” protected under the Quebec Private Sector Act?

Personal information protected by the \textit{Quebec Private Sector Act} is broadly defined in section 2 as “any information which relates to a natural person and allows that person to be identified.”\(^{33}\)

\textit{Broad Interpretation of “personal information” under PIPEDA}

The definition of “personal information” found in the \textit{Quebec Private Sector Act} is consubstantial to the term “personal information” defined under \textit{PIPEDA} as “information about an identifiable individual,” as both definitions come from the same source.\(^{34}\) At the federal level, case law

\(^{30}\) Delwaide & Aylwin, \textit{supra} note 19 at 6 [emphasis added].
\(^{31}\) Guay, \textit{supra} note 20.
\(^{32}\) 2004 CanLII 53038 (QC CS) [CG].
\(^{33}\) \textit{Quebec Private Sector Act, supra} note 9.
\(^{34}\) See Eloïse Gratton, \textit{Understanding Personal Information: Managing Privacy Risks}, (Toronto: LexisNexis, 2013) at 17 fl (see section 1.1.3: “Definition of Personal Information: Origin and Background”).
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issued under PIPEDA and the Privacy Act are clear that the definition of
personal information must be given a broad and expansive interpretation. In Wyndowe v. Rousseau, the Federal Court of Appeal mentioned that in light of the fact that "personal information is defined...as meaning 'information about an identifiable individual.' The Act is therefore very far reaching."

The definition of "personal information" is so broad that almost any information can qualify as "personal." As Barbara McIsaac summarizes in her treatise on Canadian privacy law, "in essence, almost any information in any form that can be attributed to an identified individual is caught by this expansive definition." The federal Privacy Commissioner has played a key role in deciding whether information is "personal." The general tendency has been expansionist.

In 2011, the Office of the Privacy Commissioner of Canada published a handbook entitled "A Privacy Handbook for Lawyers, PIPEDA and Your Practice" which states that: "as per relevant jurisprudence on the concept of 'personal information,' a broad and expansive interpretation is in order." According to Canadian case law, information will be "about" an individual when it is not just the subject of that individual, but also relates to or concerns the individual. That being said, it should be noted that in United Food, the Supreme Court of Canada criticized the fact that ABPIPA "deems virtually all personal information to be protected regardless of context." This ultimately resulted in the finding that ABPIPA infringed the union's

36. 2008 FCA 39, 373 NR 301 [Wyndowe].
37. Ibid at para 40 [emphasis added].
38. Barbara McIsaac et al, The law of privacy in Canada, loose-leaf (consulted in 2011), (Toronto: Carswell, 2011) at 4-7. See also Jeffrey A Kaufman, ed, Privacy Law in the Private Sector: An Annotation of the Legislation in Canada (Aurora: Canada Law Book, 2007), at 15: "It is, therefore, important to note at the outset that the definition of 'personal information' [in PIPEDA] is extremely broad"; and Stephanie Perrin et al, The Personal Information Protection and Electronic Documents Act: An Annotated Guide (Toronto: Irwin Law, 2001), at 54: "The definition in the Act is limitless in terms of what can be information about an identifiable individual."
39. Office of the Privacy Commissioner of Canada, A Privacy Handbook for Lawyers, PIPEDA and Your Practice (Ottawa: Office of the Privacy Commissioner of Canada, 2011), at 2 [OPCC]: "Information will be 'about' an individual when it is not just the subject of that individual, but also relates to or concerns the individual."
40. TAISB, supra note 35; Dagg, supra note 35.
41. United Food, supra note 7 at 25.
freedom of expression in a disproportionate manner and the statute being struck down with a 12-month stay of the declaration of invalidity.\textsuperscript{42}

Interestingly, the Federal Government has provided a list of information that may be considered information about an identifiable person under the \textit{Privacy Act}, demonstrating that a very broad definition has been attached to “personal information”:

Personal information also includes any information that can remotely be linked to a person, such as an account number; a certificate or license number, an Internet Protocol (IP) address, a biometric identifier, a photographic image; and any other number, characteristic, or code that could lead to the identification of an individual. The person’s name is not always the determining factor since personal information includes any recorded information that permits or leads to the possible identification of an individual whether alone or when combined with information from sources “otherwise available”, including public sources.\textsuperscript{43}

Furthermore, in the often cited\textsuperscript{44} \textit{Gordon v. Canada (Health)} decision,\textsuperscript{45} the Federal Court held that information relates to an identifiable individual where there exists a serious risk that the person could be identified with the information or in conjunction with other information, even where such secondary source of information is public.\textsuperscript{46}

\textit{Quebec definition of “personal information” is even more extensive than under PIPEDA}

The notion of “personal information” as provided by section 2 of the \textit{Quebec Private Sector Act} has also been interpreted broadly by the CAI and Quebec courts.\textsuperscript{47} The definition of personal information under the \textit{Quebec Private Sector Act} is even broader than under PIPEDA.

Unlike PIPEDA, the \textit{Quebec Private Sector Act} does not expressly exclude “business contact information” from the scope of its definition, which is information relating to “professional/employment status” (such

\begin{itemize}
  \item \textsuperscript{42} \textit{Ibid} at 37 and 40.
  \item \textsuperscript{43} \textit{Guidance on Preparing Information Sharing Agreements Involving Personal Information}, online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca> [footnote omitted].
  \item \textsuperscript{44} See, e.g.: \textit{Leon's Furniture Limited v Alberta (Information and Privacy Commissioner)}, 2011 ABCa 94, 502 AR 110; \textit{Re Schindler Elevator Corporation}, 2012 BCIPC 25; Order F2008-025, 2009 CanLII 90959 (AB OIPC); Order F2010-018, 2011 CanLII 96615 (AB OIPC); \textit{Un gestionnaire révèle le salaire d'un employé dans le cadre d'une remarque—le consentement était nécessaire malgré l'obligation d'informer le public}, 2010 CanLII 72777 (CVPC).
  \item \textsuperscript{45} 2008 FC 258, 324 FTR 94 [\textit{Gordon}].
  \item \textsuperscript{46} \textit{Ibid}.
  \item \textsuperscript{47} It includes handwritten notes if they relate to a particular individual. See \textit{Assurance-vie Desjardins Laurentienne inc c Stebenne}, [1997] RSQ 2871, (CQ). It also includes notes of an attorney about his client if the information contained therein relates to a natural person and allows him to be identified. See \textit{Hudon v Desrosiers}, [1996] CAI 189.
\end{itemize}
as an individual’s name, title, business address, or telephone number at work), although in a few CAI decisions, information about an employee, when acting as a representative of a corporation, was excluded from the definition of “personal information.”

In contrast with the IMS Health Canada ruling under PIPEDA, the CAI has considered that the “work product” of a professional (such as a pharmacist or a physician) should be considered “personal information” relating to that professional. In decisions rendered under PIPEDA on whether “work product” information should be considered as “personal information,” the OPCC has been using a “total context approach,” which has allowed more flexibility. The OPCC has therefore not been employing the same approach as the CAI, under which most information (even work product information) qualifies as “personal information” encompassed under the scope of the Quebec Private Sector Act.

Also, the Quebec Private Sector Act, unlike other Canadian private sector data protection statutes, does not include a specific exemption for personal information that may be otherwise publicly available.

48. See PIPEDA, supra note 4, s 2.
49. Part 3 of this paper elaborates on this case law.
51. See the Superior Court’s judgment in IMS du Canada Ltée c CAI, 2002 CarswellQue 519, and the reasons of the decision rendered by the CAI, as referred to at paragraphs 2 to 6 and 11 to 13. It took an amendment (in 2001) to the Quebec Private Sector Act to allow the communication to third parties of “work product” information. For example, in March 2005 (File No 04 17 07), the CAI granted to an enterprise, under section 21.1 of the Act, the authorization to receive communication from pharmacists of certain personal information on prescription drugs. The CAI specifically underlined that information on the “Pharmacy (Identification) Number,” its Postal Code, the dates of the transactions, the costs of a drug and the mode of payment are “personal information” on the activities of the pharmacy owners. The CAI therefore considered that the “work product” of a professional (such as a pharmacist or a physician) should be considered “personal information” related to that professional.
52. The OPCC is no longer limited by the rigid distinction between personal information “produced in a work or business context” and other types of personal information, and it has been using a “total context approach” to determine whether certain types of data created by an employee should be excluded from the application of PIPEDA. See PIPEDA Case Summary #2001-15, Privacy Commissioner releases his finding on the prescribing patterns of doctors (2 October 2001); PIPEDA Case Summary #2003-220, Telemarketer objects to employer sharing her sales results with other employees (15 September 2003), online: Office of the Privacy Commissioner of Canada <http://www.priv.gc.ca>; PIPEDA Case Summary #2003-303 Real estate broker publishes names of top five sales representatives in a city (31 May 2005), online: Office of the Privacy Commissioner of Canada <http://www.priv.gc.ca>.
53. PIPEDA Regulations Specifying Publicly Available Information, SOR/2001-7 have been in force since 2001 and exclude certain types of publicly available information. See also the ABPIPA, at Part 2, Division 3, s 14 (e) and Part 2, Division 4, s 17, and the BCPIPA, at Part 4, s 12 (1) (e), Part 5, s 15 (1) and (3) and Part 6, s 18 (1) (a). See also Eloise Gratton, supra note 34 at 300 ff, which elaborates on the exemptions found in various Canadian data protection laws for information publicly available.
Therefore, the *Quebec Private Sector Act* applies even to publicly available information.

**Financial information of a trust considered as the personal information of beneficiaries**

Given the very broad interpretation of "personal information," it is reasonable to assume that financial information in connection with a trust would be interpreted as being the personal information of the beneficiaries.

There is a privacy interest at stake in preventing the disclosure of financial and commercial information. For instance, in *Société québécoise d’initiatives agro-alimentaires c. Libman*, the Court of Quebec noted that the financial statements of a corporate body are protected from disclosure under section 5 of the *Quebec Charter*, which sets out that "[e]very person has a right to respect for his private life."\(^{54}\) Quebec courts have also recognized that corporations may invoke the right to privacy set out in the *Quebec Charter* and the *CCQ* to prevent the disclosure of documentation or information such as annual reports and books of account,\(^{55}\) commercial secrets and number of employees,\(^{56}\) investment and development strategies, and documents relating to a commercial transaction.\(^{57}\) That being said, in the case of a trust, the privacy interest in protecting financial and commercial information rests with the trustees and beneficiaries given that trusts do not possess legal personality. Where beneficiaries are natural persons, financial details of the trust protected under the beneficiaries’ right to privacy may translate into personal information.

In one Quebec case, financial information relating to beneficiaries of a trust was construed as personal information. In *CG*, the Superior Court had to determine whether a spouse could, in divorce proceedings, subpoena the other spouse to obtain the names of beneficiaries contained in a trust deed and the financial statements of a trust. The Court ultimately quashed the writ of subpoena *duces tecum*, as it sought the producing of personal documents protected under article 36(6) of the *CCQ*. Richard J. noted that the information requested was protected by the *Quebec Private Sector Act*, therefore implying that financial information relating to beneficiaries of a trust is protected under the *Act*.\(^{58}\)

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54. REJB 1998-08141, JE 98-1648 (CQ) at para 28 [translation by authors].
55. *Commissaire de la concurrence c 9044-0413 Québec inc*, REJB 2001-30799 (QC CS).
58. *CG*, *supra* note 32.
While this may be the only decision on point, an analogy may be drawn with shareholders’ information within a corporation. In *EnCana Corporation v. Douglas*, the Alberta Court of Appeal held that the information comprised in a corporation’s securities register, which includes the shareholders’ names and addresses, was personal information of these shareholders and was therefore protected under the *ABPIPA* and *PIPEDA*:

Both statutes define personal information as “information about an identifiable individual”...As none of the exclusions limiting personal information apply, *the information within a securities register is personal information*. Both statutes place responsibilities on organizations to protect the privacy of personal information.[59]

Thus, by analogy, if the financial information of a trust requested by a foreign government contains the name or address of a beneficiary, such information should be considered as “personal information” protected under the *Quebec Private Sector Act*. There can also be no doubt that the names of the beneficiaries contained in trust deeds is personal information.

**Evaluating the risk of harm for beneficiaries prior to disclosure**

The definitions of “personal information” that have emerged over the last forty years in various data protection statutes around the world are similar and have been found to be vague, especially in light of big data and sophisticated technologies. Any information can be linked to an individual, and with new types of information (IP addresses, biometric information, etc.), such definitions raise a myriad of uncertainties. As a consequence, various European and North American authors are proposing new methods for determining which types of information should qualify as personal.[60] One approach suggests that in case of uncertainty the emphasis should be on the “risk of harm” to an individual should the information be disclosed. The nature of such risk may either be subjective (e.g., humiliation, embarrassment) or objective (e.g., financial harm, physical harm or discrimination).

Using this new approach to interpretation, in the event that a trustee wishes to outsource certain aspects involving the management of personal information to a foreign service provider, or upon a trustee receiving a request by a foreign government to communicate certain information

59. 2005 ABCA 439 at 25, 262 DLR (4th) 279 [emphasis added].
pertaining to a trust, the trustee should determine if the communication may create a risk of harm to the beneficiaries, for example, identify theft or tax liability. If, for instance, the beneficiaries may suffer harm resulting from this communication, the trustees should assume that the information qualifies as "personal information" and therefore refuse to disclose the information to the foreign government (unless such communication is authorized by law or the beneficiaries of the trust have consented to it).

If a beneficiary is not an individual, one may not invoke the Quebec Private Sector Act as a source of protection, since the legal person's information (such as its name) is not personal information regarding individuals. However, if the information requested allows for the identification of natural persons within the legal person, the Quebec Private Sector Act should provide protection for their right to privacy, if there exists a serious possibility that the information in itself, or combined with other available information, would allow for the identification of natural persons.\textsuperscript{61} Even information already accessible on a public registry such as the Quebec Enterprise Register or Corporations Canada (e.g., names of main shareholders, directors, officers) is still governed by the Quebec Private Sector Act since there is no exclusion for publicly available information.

Once it is determined that the Quebec Private Sector Act might apply to a trust, the next step is to ascertain whether conflict of law rules nonetheless stand in the way of its application.

2. Conflict of laws issues

a. Foreign law governing the administration of a trust

The first paragraph of article 3107 of the CCQ sets out the basic conflict of laws rule regarding trusts:

\begin{quote}
Where no law is expressly designated by, or may be inferred with certainty from, the terms of the act creating a trust, or where the law designated does not recognize the institution, the applicable law is that with which the trust is most closely connected.\textsuperscript{62}
\end{quote}

A choice of law may be implicit where the construction of the terms of the constituting act or deed of trust clearly reveal that the settlor wished

\textsuperscript{61} Gordon, supra note 45 at para 34.

\textsuperscript{62} [Emphasis added]. In its Official Commentary, the Quebec legislature mentions that article 3107 is inspired by the Hague Convention of 1985, (Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition) and enacts the principle of the autonomy of the settlor's intent and the specificity of the trust with respect to its constituting act. Therefore, in principle, a trust will first be governed by the law that is specified in its constituting act or that was implicitly chosen by the settlor (which may be the same person as the trustee in the case of a common law trust).
to create a trust governed by the law of a specific state. For instance, if the constituting act borrows typical language used in provisions regarding trusts contained in the CCQ, one could reasonably conclude that the settlor intended to create a Quebec civil law trust.

As for an express choice, a typical choice of law clause contained in a trust deed or constituting act would read as follows:

This trust shall be exclusively governed and construed according to the laws of [Country or Province], without regard to the conflict of laws rules of such state.63

In the absence of a choice of law clause, a court will have to determine the jurisdiction in which the trust is most closely connected through a series of proximity factors. The law applicable to a trust will be assessed according to, in particular, “the place of administration of the trust, the place where the trust property is situated, the residence or the establishment of the trustee, the objects of the trust and the places where they are to be fulfilled.”64

b. Can the Quebec Private Sector Act prevail over the laws of another state?

If the law of another state or province applies to a trust, one may argue that the Quebec Private Sector Act cannot apply, and that the privacy or

63. Gérald Goldstein, Droit International Privé, volume 1, Conflits de lois: dispositions générales et spécifiques (Cowansville, Quebec: Éditions Yvon Blais, 2011) at 382 [emphasis added]. In standard clauses such as this one, the choice of law specifies that the conflict of laws rules of the law of the chosen state do not apply. Such a stipulation is redundant where a motion is presented in a forum in which the doctrine of renvoi has been rejected by the legislature or the courts. In Quebec, article 3080 of the CCQ expressly rejects the doctrine of renvoi, which means that if a request for access to personal information is made in Quebec, the competent court will only consider the conflict of laws provisions of the CCQ to determine the applicable law. Whether express or implicit, the choice of law is paramount and the criteria contained in the second paragraph of article 3107 will not apply if the law of a specific state was chosen in the act that created the trust. Professor Goldstein further opines that courts should also avoid using, where the act that created the trust contains a choice of law, the third paragraph of article 3107 to perform a dépeçage by virtue of the principle of proximity to sever the trust and apply different laws, since the wishes of the settlor should prevail on this principle (Ibid at 382-383). In short, where the act or deed that created the trust contains a choice of law, the proximity of the trust to another state (such as Quebec) is not akin to the question of the trust’s applicable law.

64. Art 3107(1) CCQ.
data protection legislation of the other state is the applicable law (if such legislation even exists).\textsuperscript{65}

It is not entirely evident, however, whether the handling of a request for the disclosure of personal information relating to a trust or its beneficiaries is part of the trustees’ administrative tasks according to Quebec conflict of laws provisions. In addition, one may argue that public order laws such as the Quebec Private Sector Act apply nonetheless to the disclosure of personal information pertaining to trust beneficiaries, regardless of the fact that the administration of the trust is governed by the laws of another state, if the trust is carrying on business in Quebec.\textsuperscript{66} Moreover, even if Quebec private international law provisions point to the law of another state, certain Quebec statutes that are considered of “public order” or that have a “particular object” may still apply to a trust governed by foreign legislation, especially for issues that may not necessarily be included in the administration or validity of a trust. These points are discussed next.

\textit{Can the processing of a request for the communication of personal information be considered as an aspect pertaining to the administration of a trust?}

Whether the handling of a request for the disclosure of personal information by trustees and compliance with data protection and privacy laws pertain to the administration or validity of a trust are questions that must be determined in accordance with the law governing the trust.\textsuperscript{67}

According to Professor Goldstein, under Quebec law, what the administration of the trust consists of is very extensive and comprises the rights of the beneficiaries and the settlor.\textsuperscript{68} On the other hand, Professor Waters argues that under common law, “an issue will not be administrative

\textsuperscript{65} For instance, in the US, there is no private sector data protection statute such as PIPEDA or the Quebec Private Sector Act that covers all personal information governed by any organization, although certain types of sensitive information are protected by sectoral laws. The following acts protect specific types of information in specific contexts: The Family Educational Rights and Privacy Act of 1974, 20 USC § 1232g(b)(1) (2000) requires educational agencies or institutions that receive government funding not to disclose students and education records without written consent; The Cable Communications Policy Act of 1984, 47 USC §§ 551(b)–(c) (2000) limits the extent to which a cable service may collect or disclose PII about subscribers; The Video Privacy Protection Act of 1988, 18 USC § 2710(b)(1) (2000) enacts civil liability for video stores that disclose PII about any customer and protects against unconstrained dissemination of video rental records; The Driver’s Privacy Protection Act of 1994, 18 USC §§ 2721–2725 (2000) restricts the use of personal information contained in state motor vehicle records; The Health Insurance Portability and Accountability Act of 1996, 42 USC §§ 1320d–1320d-8 (2000) protects the privacy of personal health information in electronic health care transactions.

\textsuperscript{66} See part 11b of this paper entitled “Can a trust be considered to be “carrying on an enterprise” under the Quebec Private Sector Act?”.

\textsuperscript{67} Art 3108(1) CCQ.

\textsuperscript{68} Goldstein, supra note 63 at 384-385.
if it involves the nature or quantum of the beneficial interests." In other words, the scope of the notion of *administration* appears narrower under common law than under Quebec civil law. Thus, if the law of a common law province has been chosen for the administration of a trust, the beneficiaries’ right to the protection of their personal information could be viewed by a Quebec court as an aspect separate from the administration of the trust.

One should note that under the Canadian common law, trustees have a duty to disclose certain information to beneficiaries. The Court of Queen’s Bench of Saskatchewan has confirmed that the duty to disclose trust information and provide an accounting to beneficiaries is an aspect encompassed within the administration of the trust:

*This duty to account is an aspect of trust administration. As noted in Schmidt v. Rosewood Trust Limited, [2003] UKPC 26, [2003] 3 All E.R. 76, at para. 66, in the context of access to trust documents:*

Their Lordships have already indicated their view that a beneficiary’s right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court’s inherent jurisdiction to supervise (and where appropriate intervene in) the administration of trusts.

In the leading Ontario case, *Sandford v. Porter*, the Ontario Court of Appeal described the duty to disclose as “*[t]he duty of a trustee or other accounting party is to have his accounts always ready, to afford all reasonable facilities for inspection and examination, and to give full information whenever required.*” This duty has also been described as follows by Professor Waters:

*A trustee is essentially one who is managing the affairs of others. He may have a personal beneficial interest, indeed, he may for all apparent purposes be the only beneficiary, *but as a trustee he still remains subject to the obligation to account for his administration to those who may have an interest in the trust fund, whether as beneficiary or creditor. This obligation has been called the duty to disclose.*

Trust beneficiaries are not the only persons who may obtain accounting from trustees. Professor Waters explains that creditors and persons with an

70. *Tinline v Larente*, 2013 SKQB 167 at para 18, 420 Sask R 81 [emphasis added].
71. (1889), 16 OAR 565 at para 21 (Ont CA).
“interest” may also request accounting from trustees, but that their right is not absolute:

Creditors will normally have the right to demand an account as a consequence of statute, but the question arises as to what persons with an interest in the trust can claim an accounting. An “interest” is in fact broadly construed. Persons with vested or contingent interests are entitled to seek an inspection or request the court for an accounting, and next-of-kin and personal representatives of such interested persons are recognized. As far as asking the court for an accounting is concerned, none of these persons has an absolute right.\(^7\)

Considering the broad interpretation of “interest” and the uncertainty as to whom has a right to obtain trust information from trustees, the author opines that in principle, the safest practice for trustees would be to disclose trust information to anyone who has an interest in the trust, even if such interest is potential.

According to the extensive scope of “interest” proposed by such a practice, trustees might be inclined to disclose information to a foreign authority, such as one who would have an interest in obtaining trust information and accounting for the purpose of collecting taxes in its jurisdiction. However, Professor Waters states that trustees may choose to refrain from disclosing where they are asked to release information that does not constitute “trust information,” as a request for such information would not fall under their duty to disclose.\(^4\)

The author further mentions that the information requested may be personal information:

Quite apart from the reasons the trustees had for reaching their distributive decisions, the written material originated by the trustees and sought by the beneficiary may reveal personal information about another beneficiary. References to an individual’s drug usage, health problems, marital situation, or similar private circumstance would be this type of information.\(^5\)

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73. Ibid.
74. Ibid. Waters also notes that:

Having this basic duty in mind, plus a prima facie willingness to release information concerning the existence and terms of the trust, and the trust accounts, trustees might well be advised to follow a practice of releasing written information to any person with a vested, contingent, or potential interest. This would be done on the interested party’s request, but without previous request except where the interest of the beneficiary is remote in the sense that vesting is most unlikely, or the opportunity for the power or discretion to be exercised is equally unlikely (Ibid, [emphasis added]).
75. Ibid.
Thus, it can be argued that where the information requested relates to the personal information of beneficiaries, the release of such information is, as Professor Waters states, "extraneous to the exercise" of the trustees’ powers. While trustees may have a duty to disclose trust information to creditors or persons with an interest in the trust, they certainly do not have a duty to disclose personal information relating to beneficiaries. Therefore, it would seem that one may not use the duty to disclose to argue that the trustees’ processing of requests for personal information relating to beneficiaries is part of the administration of the trust pursuant to conflict of laws rules.

Finally, it can simply be asserted that the right to privacy found in the Quebec Private Sector Act, a fundamental right, cannot be interpreted to be part of the administration of a trust, therefore rendering the Quebec Private Sector Act applicable to the management of personal information pertaining to the beneficiaries of the trust. In Lawson v. Accusearch Inc., Harrington J. of the Federal Court of Canada held that “PIPEDA...does not, I would think, embrace conflict of laws rules[.]” While this view was provided in connection with PIPEDA, given that the Quebec Private Sector Act has essentially the same purpose as PIPEDA (protecting the privacy of individuals, amongst other things), this provides for an additional argument in support of the view that data protection laws should always apply, whether in the context of outsourcing activities that involve the transfer of personal information to a foreign jurisdiction or when managing a request for access to personal information by a foreign government, regardless of conflict of laws rules.

Can the conflict of laws public order exception apply?

Even if a Quebec court were to find that the Quebec Private Sector Act would not normally apply to information relating to trust beneficiaries because of conflict of laws rules, it could still cite the “public order exception” set out in article 3081 of the CCQ. It provides:

The provisions of the law of a foreign country do not apply if their application would be manifestly inconsistent with public order as understood in international relations.

To determine whether this exception applies where the law of a foreign country or province governs a trust, a court will have to review the law

76. 2007 FC 125, [2007] 4 FCR 314.
77. Ibid at 37.
78. See Gratton, supra note 34 at 14 ff.
79. [emphasis added].
of that country or province to determine whether it sufficiently protects the right to privacy of the beneficiaries. As professor Goldstein points out, Quebec courts have usually applied the “public order exception” restrictively. A statute that may be considered of public order under Quebec internal law will not always be of “public order as understood in international relations.” The exception will only arise where there exists a concrete and serious conflict between Quebec law and the law of the foreign country (e.g., if there is seriously deficient privacy legislation or simply no private sector legislation or privacy protection statute in the foreign state). There must also be actual contact with Quebec public order (e.g., if a beneficiary domiciled in Quebec or if assets located in Quebec may be affected in an unacceptable way).

Where a choice of law or proximity factors renders PIPEDA, ABPIPA or BCPIPA applicable to a trust, it is very unlikely that its enforcement could command the application of the public order exception, since such privacy or data protection laws, if compared with the Quebec Private Sector Act, may offer adequate and similar levels of protection of personal information. This being said, even if the public order exception is not found to be applicable, the Quebec Private Sector Act may nonetheless override the law of another province or country that offers similar data and personal information protection if, by reason of its “particular object” and its fundamental statuts, it can be considered to apply regardless of conflict of laws provisions.

Can the Quebec Private Sector Act override foreign privacy laws? Parliamentary debates reveal that the Quebec Private Sector Act was enacted to enhance the protection of personal information already provided by the CCQ and the Quebec Charter. In 2002, during the debates on Bill

80. Goldstein, supra note 63 at 63.
81. Ibid at 58.
82. Ibid at 61.
83. Ibid at 62.
84. In provinces where no private sector act was enacted (e.g., Ontario).
85. This being said, while the Quebec Private Sector Act was found as being substantially similar to PIPEDA by the federal government, the Quebec Private Sector Act is still more stringent than PIPEDA. For instance, under sections 91 and 93, the Act provides for director and officer’s liability and for potential fines and penalties. PIPEDA follows an ombudsman model under which the privacy commissioner has no enforcement powers, although this may change in the future. See Eloise Gratton, “Reforming PIPEDA with Stronger Enforcement Powers, Mandatory Breach Notification and Accountability Obligations” (2013) 10:7 Canadian Privacy Law Review.
86. Québec, Assemblée nationale, Commission de la Culture, 34th Leg, 2nd sess (23 February 1993) at CC-337, (14 June 1993) at 7635.
which, inter alia, sought to amend certain provisions of the *Quebec Private Sector Act*, MNA Fatima Houa-Pepin reiterated the primary purposes underlying the adoption of this *Quebec Private Sector Act*:

\[\text{[A]nd, Mr. President, fundamentally, these two laws are intended, on the one hand, to promote the respect of the right to privacy, which is a fundamental right, and secondly, to promote access to documents, access to information. These are the objectives.}\]

Thus it can be argued that the *Quebec Private Sector Act*, which constitutes public order legislation, applies regardless of the fact that the information concerns the beneficiaries of a trust governed by the laws of another state or province, where there exists Quebec proximity factors supporting the application of the Act.

This is further supported by article 3076 of the *CCQ*, which provides that conflict of laws rules "apply subject to those rules of law in force in Québec which are applicable by reason of their particular object." The Minister of Justice’s official comments state that article 3076 aims to safeguard the application of imperative Quebec provisions, which in consideration of their particular object, must be enforced, even if a conflict of laws rule would point to the application of foreign legislation, in order to protect political coherence and domestic legal order.

Unlike article 3081 of the *CCQ*, this provision does not require manifest inconsistency with Quebec law. It must nonetheless be interpreted restrictively and cannot be read to have the effect of making all Quebec public order laws prevail over foreign laws. The Court of Appeal has opined that there must be a "vital interest objective" for the local law to prevail over the foreign legislation.

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87. This bill relates to *An Act to amend the Act respecting Access to documents held by public bodies and the Protection of personal information, the Act respecting the protection of personal information in the private sector, the Professional Code and other legislative provisions*.
88. Québec, Assemblée nationale, *Journal des débats de la Commission de la culture*, 36th Leg, 2nd sess, n 23 (6 December 2001) [translation by the authors] [emphasis added].
90. See, e.g., Guay, *supra* note 20. The Court of Quebec mentioned that the *Quebec Private Sector Act* applies to information held by any person carrying on an enterprise in Quebec, regardless of the nature of its support and the form in which the information is accessible.
93. *B(G) v C(C)*, 2001 CanLII 20627 (QC CA) at para 33.
It can be argued that legislation, such as the *Quebec Private Sector Act*, which aims to complete the protection of personal information (and further protect the right to privacy provided by the *Quebec Charter*, a quasi-constitutional act), should be considered to have been enacted pursuant to a "vital interest objective," therefore discarding any provincial or foreign law governing a trust as the applicable law to a request for the communication of personal information. In a decision rendered in 2010, the Quebec Court of Appeal held that the *Quebec Private Sector Act* has special status:

The Act respecting the Protection of Personal Information in the Private Sector is not an ordinary law. It enshrines the important protection that the legislator intended to grant to a fundamental right that is the right to privacy, also recognized in sections 3 and 35 to 41 CCQ as well as section 5 of the Charter of Rights and Freedoms.

The *Quebec Private Sector Act* may even be regarded as quasi-constitutional. In the decision of *Pearson v. Peninsula Consumer Services Cooperative*, the Supreme Court of British Columbia refused to recognize *BCPIPA*, which is similar to the *Quebec Private Sector Act*, as having a quasi-constitutional purpose. However, in *United Food*, this conclusion was contradicted by the Supreme Court of Canada, at least in respect of *ABPIPA*. The Supreme Court observed that "[i]nsofar as [AB] PIPA seeks to safeguard informational privacy, it is ‘quasi-constitutional’ in nature" and that "legislation which aims to protect control over personal information should be characterized as ‘quasi-constitutional’ because of the fundamental role privacy plays in the preservation of a free and democratic society[.]"

Furthermore, the *Quebec Private Sector Act* provides that it has precedence over any subsequent statute:

The provisions of this Act have precedence over those of any subsequent general or special Act which would be contrary thereto, unless the latter Act expressly provides that it applies despite this Act.

95. *Syndicat de Autobus Terremont ltée (CSN) c Autobus Terremont ltée*, 2010 QCCA 1050 at para 98 [ Syndicat ] [translated by author].
96. 2012 BCSC 1725.
97. *United Food*, supra note 7 at 22.
98. *Ibid* at 19.
99. *Quebec Private Sector Act*, supra note 9, s 94.
The Quebec Act respecting access to documents held by public bodies and the Protection of personal information, which the Quebec Court of Appeal has described as having quasi-constitutional status, includes a provision to the same effect.

Given its quasi-constitutional purpose in protecting privacy and special status, the Quebec Private Sector Act could be held as having a “vital interest objective,” therefore displacing the application of foreign law for data protection and privacy issues. Consequently, there is a strong argument to be made that such a status is sufficient to conclude that the Quebec Private Sector Act was enacted pursuant to a “vital interest objective” in accordance with article 3076 of the CCQ, therefore discarding the conflict of laws rules that would point to the application of foreign legislation.

Another argument against the application of foreign law is that a choice of law clause contained in a trust should not affect the application of the Quebec Private Sector Act, because the Act applies to all, including third parties. It would be inconsistent with the intent of the Act to allow enterprises carrying on activities in Quebec to avoid its application by contract, especially where such enterprises may hold personal information pertaining to individuals that are not party to the contract. A choice of law clause included in a trust should not be construed as meaning that these individuals have relinquished their rights under the Quebec Private Sector Act.

100. CQLR, c A-2.1 [Quebec Public Sector Act].
101. Québec (Conseil de la magistrature) v Québec (Commission d’accès à l’information), 2000 CanLII 11305 (QC CA) at para 48. Interestingly, section 168 of the Quebec Public Sector Act has been considered by the Quebec Court of Appeal to grant the Quebec Public Sector Act quasi-constitutional status. Moreover, the Court of Appeal has taken the position that the Quebec Private Sector Act’s attachment to fundamental rights such as the right to privacy and the right to information provided by the Quebec Charter grants the Quebec Public Sector Act “fundamental legislative status” (ibid at para 50).
102. For instance, trustees may carry personal information relating to natural persons that are not trust beneficiaries and that may require communication of their information. See Quebec Private Sector Act, supra note 9, § 27.
103. One should also note that both the Quebec Private Sector Act and the Quebec Public Sector Act were revised by the Quebec National Assembly a few years ago, which led, in June 2006, to the enactment of Bill 86 (An Act to amend the Act respecting Access to documents held by public bodies and the Protection of personal information and other legislative provisions, 2nd Sess, 37th Leg, Québec, 2006, c 22). Notably, section 17 of the Quebec Private Sector Act, which restricts the communication of personal information outside of Quebec, was amended to withdraw the requirement that personal information be related to “Quebec residents.” The Parliamentary debates show that the Quebec National Assembly wanted to ensure that the province of Quebec did not become a transit jurisdiction for personal information on residents of other jurisdictions. This re-enforces the argument that this protection was meant to be broad and to encompass any individual’s personal information held or collected by enterprises carrying on business in Quebec, regardless of proximity factors, including the individual’s nationality or domicile.
II. Application of the Quebec Private Sector Act

Under the *Quebec Private Sector Act*, when a person carries on an enterprise and holds personal information, its duty is not to disclose this information to third parties unless the concerned individual consents or the Act allows for the communication without consent. As the Court of Appeal mentioned, "the protection is the rule and the disclosure is the exception, which the interpreter cannot and must not ignore." As the Court of Appeal mentioned, "the protection is the rule and the disclosure is the exception, which the interpreter cannot and must not ignore."

1. Outsourcing of the processing of personal information to a foreign service provider

Many Canadians have concerns that the U.S. *Patriot Act* may allow U.S. intelligence to obtain access to their personal information with minimal procedural hurdles, and others see the transfer of personal information to foreign countries as a real threat to their privacy, including risks of identity theft given the recent revelations regarding the PRISM clandestine data surveillance program developed by the U.S. government and the National Security Agency.

At the federal level, the OPCC has issued "Guidelines for Transferring Personal Information Across Borders," which summarizes the OPCC's position on the issue. Recent decisions by the OPCC rendered under PIPEDA, following the concerns of individuals about their personal information being transferred to the United States and thus subject to U.S. laws, indicate that while the outsourcing of the processing of personal information to a U.S. service provider is not unlawful and there is no need to obtain the concerned customers' prior consent, these individuals should at least be notified that their personal information will be transferred to and/or stored in a foreign country, and further, that their information will be subject to foreign laws and may be disclosed to foreign authorities.

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104. This is so because of the fundamental right to privacy, which is embedded in the *Quebec Charter* and the *CCQ*. See *Quebec Charter*, supra note 13, s 5, and arts 3, 35-41 of the *CCQ*.

105. *Syndicat*, supra note 95 at para 98 [translated by author].


under such laws. The OPCC has taken the position that while PIPEDA does not prohibit organizations from outsourcing their operations across international borders, it is important that they assess the risks which could jeopardize the security and confidentiality of customers' personal information when it is transferred to foreign-based third party service providers, and the measures by which personal information is protected must be formalized by using contractual or other means.

It is not clear if these OPCC decisions can be transposed to Quebec. Cross-border transfers of personal information are restricted under the Quebec Private Sector Act, Quebec being the only Canadian jurisdiction that has specifically prohibited the outsourcing to a foreign country unless certain precautions are followed.

In Quebec, section 17 of the Quebec Private Sector Act specifically governs the transfer of personal information outside of Quebec. Sections 17 and 20 of the Quebec Private Sector Act provide:

17. Every person carrying on an enterprise in Quebec who communicates personal information outside Quebec or entrusts a person outside Quebec with the task of holding, using or communicating such information on his behalf must first take all reasonable steps to ensure

(1) that the information will not be used for purposes not relevant to the object of the file or communicated to third persons without the consent of the persons concerned, except in cases similar to those described in sections 18 and 23;...

109. See PIPEDA case summary #2008-394, Outsourcing of Canada.com e-mail services to U.S.-based firm raises questions for subscribers (19 Sept 2008); PIPEDA case summary #2006-333, Canadian-based company shares customer personal information with U.S. parent (19 July 2006); and PIPEDA case summary # 2005-313, Bank’s notification to customers triggers PATRIOT Act concerns (19 October 2005), online: Office of the Privacy Commissioner of Canada <http://www.priv.gc.ca>. 110. The OPCC has articulated the view that no contractual provision can override the laws of a country to which the information could be subject once it has been transferred. With respect to the US Patriot Act, the OPCC went as far as stating that Canadian laws would be equivalent with respect to granting to public bodies the right to access personal information for statutorily covered investigational purposes.

111. For instance, while PIPEDA qualifies the outsourcing of services as a “use” of personal information in respect of which the consent of the individual concerned was obtained, the Quebec Private Sector Act sees this instead as a communication or disclosure of information. But this communication does enjoy one exemption from the principle of consent under section 20 of the Quebec Private Sector Act.

If the person carrying on an enterprise considers that the information referred to in the first paragraph will not receive the protection afforded under subparagraphs 1 and 2, the person must refuse to communicate the information or refuse to entrust a person or a body outside Québec with the task of holding, using or communicating it on behalf of the person carrying on the enterprise.113

Section 20 imposes a duty on enterprises to take the appropriate measures in order to limit access and use of personal information to only those employees, agents and contractors who need the information for the execution of their mandates or the performance of their duties.

Where third parties are involved, such as mandataries114 or agents, jurisprudence issued by the CAI requires that transfers of information be governed by a written contract containing specific details.115

Over seven years ago, the Quebec Private Sector Act and the Quebec Public Sector Act were both revised by the Quebec National Assembly.116 Section 17 of the Quebec Private Sector Act was modified as follows:

If the person carrying on an enterprise considers that the information referred to in the first paragraph will not receive the protection afforded under subparagraphs 1 and 2, the person must refuse to communicate the information or refuse to entrust a person or a body outside Québec with the task of holding, using or communicating it on behalf of the person carrying on the enterprise.117

Two interpretations may be made of this modification to section 17—a less restrictive interpretation under which using the proper contractual protections (as well as perhaps also informing individuals of the transfer and obtaining their consent) would be sufficient and a second, more stringent interpretation, under which an analysis of the foreign legislation

113. Quebec Private Sector Act, supra note 9, s 17.
114. A mandatary is a person empowered to represent another party, the mandator, in the performance of a juridical act (art 2130 CCQ).
115. In Deschesnes c Groupe Jean Coutu, [2000] CAI 216, the CAI indicated that mandataries or agents may have access to the personal information of an enterprise without the consent of the person concerned in accordance with the conditions set out in section 20, but only where the agreement between the enterprise and the mandatary is in writing and where the contract specifies the scope of the mandate, the purposes for which the mandatary (agent) wants to use the information (re: the object of the file), the category of individuals who would have access to the information and the obligation to keep the information confidential. According to the CAI, this written contract requirement is necessary in order to accomplish its role of supervising the implementation Quebec Private Sector Act. The absence of a written agreement could result in situations where personal information could circulate without any real control being exercised by the organization that has the responsibility to protect the information. This illustrates that very real concerns pertaining to cross-border transfers of personal information are at the heart of sections 17 and 20 of the Quebec Private Sector Act.
116. See text accompanying footnote 103.
117. Quebec Private Sector Act, supra note 9, s 17.
would have to be performed in order to ensure similar levels of protection by the foreign law.

a. *Less restrictive interpretation: contractual measures*

The less restrictive interpretation of sections 17 and 20 of the *Quebec Private Sector Act* would imply that an organization transferring personal information to a foreign jurisdiction would need to, prior to transferring personal information to third parties, enter into contracts with such persons providing for the protection of their personal information in accordance with relevant data protection legislation. Such a contract would also address or prohibit any re-transfer of the data and be reflective of the kinds of security obligations that may apply.

It is noteworthy that in Quebec, section 26 of *An Act to Establish a Legal Framework for Information Technology,* provides for a specific obligation for an organization to actually inform a service provider as to the privacy protection required for a technology-based document:

Anyone who places a technology-based document in the custody of a service provider is required to inform the service provider beforehand as to the privacy protection required by the document according to the confidentiality of the information it contains, and as to the persons who are authorized to access the document.

During the period the document is in the custody of the service provider, the service provider is required to see to it that the agreed technological means are in place to ensure its security and maintain its integrity and, if applicable, protect its confidentiality and prevent accessing by unauthorized persons. Similarly, the service provider must ensure compliance with any other obligation provided for by law as regards the retention of the document.

This translates into an additional obligation for an organization to actually inform its service providers on what kind of security measures the service provider should adopt when handling its technology-based document containing personal information.

In light of these requirements, the contract in place with the foreign service provider should provide details regarding (extent and modalities of) the trustee’s instructions pertaining to information to be issued to the foreign service provider, and the relevant penalties (financial or otherwise including the ability to sue the service provider) in case of non-compliance. The appropriate clauses are outlined in Appendix A.

118. CQLR, c C-1.1.
As detailed below, even when using such extensive contractual measures (even if the consent of the beneficiaries are also obtained), it is not entirely certain that a trust will be complying with the restrictions imposed by the Quebec Private Sector Act.

b. *More restrictive interpretation: analysis of foreign law required*

According to some commentators, section 17 of the Quebec Private Sector Act may also require organizations to make an evaluation of the privacy framework in the receiving jurisdiction, in order to determine whether or not it allows the organization to transfer the personal information. More specifically, author Karl Delwaide, in connection with the amendment of section 17, states:

The effect of this paragraph is not clear...The second interpretation, more restrictive, is to the effect that the foreign jurisdiction’s laws must be examined in detail in order to verify if the statutory protection is sufficient in comparison with that provided by the Quebec Private Sector Act before any transfer can be made.

With respect to the USA Patriot Act, although not coming from the CAI, we should consider the ruling #313 of the Office of the Federal Privacy Commissioner, where it was stated that even if one were to consider the issue of ‘comparable protection’ from the perspective of US -vs- Canadian antiterrorism legislation, it was clear that there is a comparable risk that the personal information of Canadians held by any organization and its service provider—be it Canadian or American—can be obtained by government agencies, whether through the provisions of US law or Canadian law.

The author goes on to suggest that under this section, the individual’s consent would not be sufficient to justify and legitimize a cross-border transfer of personal information to a foreign jurisdiction. It is noteworthy that section 8(3) of the Quebec Private Sector Act generally requires that persons be notified of the “place” where their personal information will be held.

It is not clear from this provision whether by using the word “place,” the legislature intended that a physical or civic address should be provided or, instead, the jurisdiction, since there is no case law providing an interpretation of this section. This position is definitely challenging for

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121. Ibid, at 3.

122. Quebec Private Sector Act, supra note 9, s 8.
organizations or trusts that wish to use cloud service providers, in which case the information may be moving from one jurisdiction to another.\textsuperscript{123}

For additional protection, trustees transferring the information to a foreign jurisdiction may wish to conduct an analysis of whether the information, once transferred to the foreign jurisdiction, will be protected in the same manner as under the \textit{Quebec Private Sector Act}. To be taken into account though is the fact that the information, once in the foreign jurisdiction, will be subject to those foreign laws. Some of the foreign laws may be unrelated to data protection. For instance, they may relate to the \textit{Patriot Act}\textsuperscript{124} or other surveillance programs in the United States, or to tax assessments.

As discussed above, some take the position that to ensure that the \textit{Quebec Private Sector Act} protects the information as initially intended, one should also analyze the “risk of harm” to an individual which may be triggered upon certain information being disclosed or transferred.\textsuperscript{125}

2. \textit{Trustees disclosing personal information to a foreign government upon request}

To determine whether a trustee can disclose personal information to a foreign government, we will first discuss the situation under which the information in question would also qualify as the personal information of the trustees (in which case we need to determine if these trustees can disclose their own personal information). Second, we will analyze if the \textit{Quebec Private Sector Act} can be construed to authorize any such disclosures.

a. \textit{Can trustees disclose information if it is considered as their own personal information?}

Given the very broad definition of “personal information,” there is a possibility that information such as financial information pertaining to a trust can also be considered as being the personal information of trustees

\textsuperscript{123} See Gratton, “Dealing with Canadian and Quebec Legal Requirements,” \textit{supra} note 112.

\textsuperscript{124} 115 US Stat 272 (2001). With respect to the amendments introduced to section 17 of the \textit{Quebec Private Sector Act}, Bill 86 brought a special amendment to the penal provisions (\textit{An Act to amend the Act respecting Access to documents held by public bodies and the Protection of personal information and other legislative provisions}, \textit{supra} note 103). Section 91 was specifically amended in order to raise the penalty imposed following illegal cross-border transfers of personal information. This is yet another indication that cross-border transfers are sensitive and of concern to the legislator. Indeed, under section 91 of the \textit{Quebec Private Sector Act}, the penalties are higher in the case of an illegal cross-border transfer (e.g., section 17) than for any other non-compliant activity.

\textsuperscript{125} Gratton, \textit{supra} note 34.
As previously discussed, unlike PIPEDA, the Quebec Private Sector Act does not expressly exclude from the scope of its definition of personal information, business contact information, which is information relating to "professional/employment status" (such as an individual's name, title or business address or telephone number at work). Nonetheless, some CAI decisions appear to exclude from the definition of "personal information" some information regarding an employee when acting as a representative of a corporation and the reasoning to support this is as follows: since a corporation may only act through its employees, the name of an employee acting as representative of the company is not personal information. It is noteworthy, however, that although the trustees' names or their business contact information will not necessarily be considered "personal information" under the Quebec Private Sector Act, there may be an argument to be made that the financial information of the trust is the "personal information" of the trustees. For instance, in a case rendered under PIPEDA, it was decided that while information about a company does not usually constitute personal information, personal information regarding the owner of a small business may constitute personal information, since it is closely linked to the individual behind the business.

If this line of reasoning is followed, and if certain information relating to a trust is considered as "personal information" of the trustees, there are still restrictions pertaining to the trustees' communication of information relating to the trust (such as financial information) without the beneficiaries' prior consent, since there is an argument to be made that this information should also qualify as the "personal information" of these beneficiaries.

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126. The same information can be personal to more than one individual, where, for example, it contains the views of one individual about another individual, or where the same information reveals something about two identifiable individuals. See, e.g., Wyndowe, supra note 36.

127. See PIPEDA, supra note 4, s 2.

128. Lavoie c Pinkerton du Quebec Ltée, [1996] CAI 67 [Lavoie]. This approach was also adopted by the CAI in Leblond c Assurances générales des Caisses Desjardins, [2003] CAI 391 [Leblond] (CQ), in which the CAI stated that the name of employees who act on behalf of a corporation, their title or functions, their address and phone number at work, as well as their written notes and signatures should not be considered "personal information." The CAI concluded by stating, however, that should these employees be acting in their "personal capacity," their identity and their other personal information should be protected.

129. See the case law discussed in Lavoie, ibid. See also, X c Maison de la Famille DV$ , CAI 04 12 89, 11 juillet 2005, c D Boissinot.

130. See PIPEDA Case Summary #2003-181, Alleged inappropriate disclosure of personal information to a third party (10 July 2003), online: Office of the Privacy Commissioner of Canada <http://www.priv.gc.ca>, for a summary of the investigation.
Canadian data protection laws such as PIPEDA and the Quebec Private Sector Act still restrict, in certain situations, the communication or disclosure of someone's own personal information, if this communication would reveal the personal information of another individual. For example, according to subsection 9(1) of PIPEDA, an organization shall not give an individual access to personal information if doing so would likely reveal personal information about a third party (such as the beneficiaries of a trust) except if the third party consents or the individual needs the information because someone's life, health, or security is threatened.

Under section 40 of the Quebec Private Sector Act, an enterprise also has the duty to refuse to grant access to (or to communicate) personal information of an individual (such as their own personal information, for example, the information of a trustee) if, by doing so, the disclosure would likely reveal personal information about a third person (such as the beneficiaries of a trust) or if the existence of such information and its disclosure may "seriously harm that third person[.]" While there is no case law on point, an argument can be advanced that the communication of financial information pertaining to a trust to a foreign government may be potentially harmful to the beneficiaries of the trust (as it can potentially cause financial harm). For instance, this issue has been more frequently examined from the perspective of a person's right to obtain access to his or her file, including the name of the persons who filed a complaint against him or her. Comparing section 40 of the Quebec Private Sector Act with section 88 of the Quebec Public Sector Act, the CAI refused to grant access to an individual's file where he would be able to find the name of a person who filed a complaint against him, because of the likelihood that the individual might take action against the complainant on the basis of the information obtained.

The CAI has generally recognized that under the Quebec Public Sector Act the name of a complainant is considered personal information about a third person where the disclosure may seriously harm this third person.

131. The third party protected contemplated in this exception is an individual in his or her personal capacity. See Lavoie, supra note 128 and Poudin c Caisse Populaire de Ste-Marguerite-de-Lingwick, [2002] CAI 316. This exception generally takes "precedence" over an access request, since third parties are often not parties to the access and rectification dispute. The tribunal takes it upon itself to protect the third parties in order to avoid that prejudicial personal information be disclosed, even if the Quebec Private Sector Act does not explicitly impose that duty on the tribunal. See Turgeon c Compagnie d'assurances Bélair, [1995] CAI 11; Gravel c Sécurité (La), assurances générales, [1999] CAI 83.


The “serious harm” test was held to be met in a case where the person concerned was seeking the name of third parties in order to initiate legal proceedings. In a converse case, where there was insufficient evidence of actual harm resulting to a third party, the third party exception was set aside and access was granted.

In light of this, even if we take the view that some of the information pertaining to a trust, such as its financial information, may qualify as the “personal information” of its trustees, there is an argument to be made that the latter should refrain from communicating this information to a third party (such as a foreign government) without the prior consent of the beneficiaries of the trust to whom the information also relates. Moreover, in the event that the third party requesting access to the information is a foreign government that intends to use the information in order to make a decision that may have a negative impact on the beneficiaries of a trust, additional caution should be used before communicating this personal information, since data protection laws (such as the Quebec Private Sector Act) were enacted to protect individuals against objective types of harm (e.g., financial) that may be triggered by the communication of their personal information.

b. Can trustees be compelled by a foreign government to communicate personal information without contravening the Quebec Private Sector Act?

Under the Quebec Private Sector Act, a person carrying on an enterprise may, in certain specific cases, communicate personal information it holds on someone without consent. For instance, one may communicate the information regarding a person “to prevent an act of violence, including a suicide,” to an archival agency carrying on an enterprise, or for research purposes, if the information is communicated in a way that preserves the confidentiality of the person concerned. Another exception listed under section 18(3) of the Act relates to a communication for law prevention:

To a body responsible, by law, for the prevention, detection or repression of crime or statutory offences who requires it in the performance of his duties, if the information is needed for the prosecution of an offence

134. XY v La Capitale assurances géréales inc, CAI 03 04 91, 13 novembre 2003, c H Grenier.
136. See generally Gratton, supra note 34 at 208 fl.
137. Quebec Private Sector Act, supra note 9, s 18.1(1).
138. Ibid, s 18.2.
139. Ibid, s 18.2.
Since this exception specifies that such communication is only authorized if it is made for the prosecution of an offence under an act applicable in Quebec, it cannot be used as a basis for a legitimate disclosure of personal information to a foreign government upon request.

There are two exceptions under sections 18(5) and (6) of the Act that require further analysis in order to determine if a trustee could potentially be allowed to communicate personal information relating to the beneficiaries of a trust to a foreign government:

18. A person carrying on an enterprise may, without the consent of the person concerned, communicate personal information contained in a file he holds on that person...

(5) to a public body within the meaning of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1) which, through a representative, collects such information in the exercise of its functions or the implementation of a program under its management;

(6) to a person or body having the power to compel communication of the information if he or it requires it in the exercise of his or its duties or functions.

Section 18(5) disclosure exception: public body in the exercise of its function
Under PIPEDA, the Privacy Commissioner of Canada has not ruled on the question of whether a foreign government could be considered a "government institution" under section 7 of PIPEDA. There is, to our knowledge, no decision in which a Quebec court or the CAI has taken a position on whether a foreign government could be considered as a "public body" under the Quebec Private Sector Act. However, unlike PIPEDA, which has not defined the term "government institution" in its regulations, the notion of "public body" is clearly defined in sections 3 to 7 of the Quebec Public Sector Act as including the provincial government, the Conseil executif, the Conseil du trésor, provincial government departments...
and agencies, municipal and school bodies, health services and social services establishments, the Lieutenant Governor, the National Assembly and agencies whose members are appointed by the Assembly, and every person designated by the Assembly to an office under its jurisdiction, together with the personnel under its supervision.

As the Supreme Court pointed out, this list is exhaustive: "courts have declined to extend that definition to entities that are not expressly referred in that Section of the Act."144 Clearly, a foreign government cannot be considered as a "public body" within the meaning of both the Quebec Public Sector Act and the Quebec Private Sector Act.

Section 18(6) disclosure exception: body having the power to compel communication

Section 18(6) provides that "personal information" may be communicated to "a person or a body having the power to compel communication of the information."145 It would be incongruous to consider that the Quebec legislature intended to allow enterprises to freely communicate personal information that they hold on individuals to any foreign government. Manifestly, this exception was enacted to allow government officials, public bodies, and judges to compel communication of personal information where a federal or Quebec law has empowered them to do so. For example, government audits such as Ministry of Employment and Social Solidarity inspectors empowered under the Individual and Family Assistance Act,146 or the Act Respecting Parental Insurance147 "may require, examine and make a copy of any information or document."148

145. Quebec Private Sector Act, supra note 9.
146. CQLR, c A-13.1.1.
147. CQLR, c A-29.011.
148. Individual and Family Assistance Act, supra note 146, s 120; Act respecting Parental insurance, ibid, s 88. Moreover, section 18(6) of the Quebec Private Sector Act would not allow a foreign government to hire the services of local counsel to serve a brief of subpoena duyces tecum to trustees to directly and automatically compel the communication of personal information relating to beneficiaries, as the power granted to lawyers under s 280 of the Code of Civil Procedure is limited: they may only compel a person to bring the documents to the court, which will then analyze the legality of the subpoena before allowing the communication (McCue v Younes, 2002 CanLII 30581 (QC CS)). The court will not allow personal information protected under the Quebec Private Sector Act to be disclosed to another other party, if such information is not relevant to the proceedings. One may also file a motion to quash the subpoena duyces tecum before the subpoenaed individual even appears in court to present the documents.
c. Information already in the hands of the federal government which may be disclosed

The extent of the protection is different where the personal information relating to the beneficiaries has been submitted to the federal government or was otherwise obtained by the latter. In Canada, federal government institutions are subject to the federal Privacy Act, a statute that was in part enacted to protect personal information held by the federal government and prescribe situations in which such information may be disclosed. The Privacy Act was designed in concert with the Access to Information Act in order to restrict access to information, where such information regarding an identifiable individual is concerned.

However, while the Privacy Act has clearly been considered quasi-constitutional and its definition of personal information is broad enough to encompass personal information relating to trusts, the protection offered under the Privacy Act appears considerably weaker than the one proposed by the Quebec Private Sector Act because of the very broad exceptions enacted in the federal legislation. While the general rule is the confidentiality of the personal information under the Privacy Act, this rule has many limitations and exceptions. For instance, the general rule will not apply if other Canadian statutes authorize the disclosure, or if the disclosure is authorized by some of the other exceptions found in the Privacy Act.

A federal institution may invoke two exceptions to justify its disclosure of a trust’s information to a foreign state:

Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed...

(b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

(f) under an agreement or arrangement between the Government of

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149. RSC 1985, c P-21.
150. RSC 1985, c A-1.
151. The Privacy Act has been considered by courts as having a quasi-constitutional status. In Lavigne v Canada, ([2002] 2 SCR 773), the Supreme Court recognized that the Privacy Act has a quasi-constitutional purpose and reiterated its twofold objective which is to protect personal information held by government institutions and to provide individuals with a right of access to personal information about themselves. “The Privacy Act is also fundamental in the Canadian legal system. It has two major objectives. Its aims are, first, to protect personal information held by government institutions, and second, to provide individuals with a right of access to personal information about themselves (s 2). Obviously, it is the second objective that is in issue in these appeals...In view of the quasi-constitutional mission of that Act, the courts have recognized its special nature.” (Ibid at para 27).
152. Privacy Act, supra note 149, s 8(1).
Canada or an institution thereof and the government of a province, the
council of the Westbank First Nation, the council of a participating First
Nation—as defined in subsection 2(1) of the First Nations Jurisdiction
over Education in British Columbia Act—, the government of a
foreign state, an international organization of states or an international
organization established by the governments of states, or any institution
of any such government or organization, for the purpose of administering
or enforcing any law or carrying out a lawful investigation.¹⁵³

The exception of subparagraph 8(2)(b) is drafted in broad enough terms
to include any statute that would expressly allow a government entity to
communicate personal information to a foreign authority. In such a case,
trust beneficiaries would have little to no argument, under the Privacy Act
alone, against a disclosure made to a foreign government.

Unlike the Quebec Private Sector Act, the Privacy Act does not take
precedence over other statutes. Sections 7 and 8 of the Privacy Act do
not override over specific provisions of other statutes that regulate the
use or communication of personal information, such as the Income Tax
Act (s. 241), the Statistics Act, the Department of Human Resources and
Skills Development Act, the Proceeds of Crime (Money Laundering) and
Terrorist Financing Act, the Department of Immigration and Citizenship
Act, and the Canadian Security Intelligence Service Act.¹⁵⁴

As for subparagraph 8(2)(f), it states that personal information
under the control of a government institution may be disclosed under an
agreement or arrangement between the Government of Canada and the
government of a foreign state for the purpose of administering or enforcing
any law or carrying out a lawful investigation. This provision is also very
broadly drafted and would seem to encompass any agreement, in writing
or not,¹⁵⁵ that the government of Canada could enter into with any foreign
state, such as a treaty.

In USA v. Wakeling,¹⁵⁶ the accused argued that section 8(2)(f) was
impermissibly vague and overly broad. The Supreme Court of British
Columbia upheld the constitutionality of this section:

¹⁵³. Ibid, s 8(2).
¹⁵⁴. Government of Canada, Guidance on Preparing Information Sharing Agreements Involving
Personal Information, online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca>
[Guidance on Preparing]. In USA v Wakeling, (2012 BCCA 397 [Wakeling]) the British Columbia
Court of Appeal confirmed a trial judge’s finding that section 193(2)(e) of the Criminal Code, which
governs the disclosure of certain intercepted private communications, had priority as a specific
provision over the general sharing rules of the Privacy Act.
¹⁵⁵. The Government of Canada recommends that a written agreement or arrangement be drafted.
See Guidance on Preparing, ibid.
¹⁵⁶. USA v Wakeling, 2011 BCSC 165, 268 CCL (3d) 295 [Wakeling BCSC].
But even if the Privacy Act is applied, the provision is not, in my view, overbroad. Disclosure permitted under the Privacy Act is intended to regulate residual privacy interests which are significantly diminished in this case by the fact that their lawful interception was pursuant to judicial authorization. Disclosure permitted under the Privacy Act is not therefore unreasonable, particularly considering the contextual factors identified above including the important state interest in unimpeded and timely sharing of lawfully obtained information between law enforcement agencies to ensure the effective investigation of criminal activity with inter-jurisdictional dimensions.\textsuperscript{157}

On appeal, the trial judge’s decision was upheld, but the Court of Appeal refused to rule on the constitutionality of section 8(2)(f), reasoning “that it [was] not necessary to consider the constitutional attack on the Privacy Act provisions.”\textsuperscript{158} An application for leave was granted.\textsuperscript{159}

At first glance, one could think that the legislature only meant to cover situations where the disclosure of personal information would help Canadian authorities enforce Canadian or provincial laws in the context of a local investigation. Yet, the manner in which section 8(2) was drafted points to the fact that the legislature intended to allow Canadian government institutions to communicate personal information to foreign states for the enforcement of foreign laws and the conducting of foreign investigations, even where the disclosure does not help a Canadian investigation in return. In contrast with section 8(2)(f), section 8(2)(e) specifies that information regarding an identifiable individual may be disclosed to an investigative body listed in the regulations “for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation.” “Given the presumption that the legislature does not speak in vain,”\textsuperscript{160} it seems unlikely that the latter intended to encompass solely Canadian statutes and investigations in section 8(2)(f). Had the legislature wanted to limit the

\textsuperscript{157} Ibid at para 33.
\textsuperscript{158} Wakeling, supra note 154 at para 21.
\textsuperscript{159} United States of America v Wakeling, 2013 CarswellBC 1760 (WL Can).
\textsuperscript{160} Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City), [2000] 1 SCR 665 at para 69.
scope of subparagraph 8(2)(f) to Canadian legislation and investigations, it would have drafted the section in a manner similar to section 8(2)(e).\(^{161}\)

Therefore, where personal information relating to a trust is in the hands of the Federal Government and where an international treaty entered into by the government with a foreign state legally allows for the exchange of information with that foreign state, trustees and beneficiaries have little to no argument under the *Privacy Act* alone to impeach a disclosure of personal information. This means that trustees have an obligation to limit the disclosure of personal information to the federal government to what is strictly required by law, in order to avoid liability under the *Quebec Private Sector Act* towards beneficiaries.

### III. Consequences of an unauthorized communication under the *Quebec law*

A violation of the *Quebec Private Sector Act* may incur both the penal and civil liability of the offender. First, every natural or legal person that collects, holds, communicates to third persons, or uses personal information on other persons other than in accordance with the provisions of the *Quebec Private Sector Act* is

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\(^{161}\) This interpretation was followed by the Supreme Court of British Columbia in *Wakeling*: What the *Privacy Act* guards against is indiscriminate disclosure of private information in a manner not permitted under s 8(2). Thus, while it would be permissible under the *Privacy Act* for the police to provide private information which is evidence of a crime in another jurisdiction to law enforcement officials in that jurisdiction, it would be impermissible under the *Privacy Act* for the police to provide information to the press or the public at large, see *R v Szalontai*, [1993] BCJ No. 2934 (*Wakeling BCSC, supra* note 156 at 30 [emphasis added]).
liable, for a contravention of section 17 (cross-border transfer) or section 13 (transfer to a third party without consent), to a fine.\textsuperscript{162}

Secondly, transfers of personal information to third parties made in breach of section 13 of the Act have been held to constitute torts under Quebec civil law. A trustee may incur civil liability for moral and financial damages caused to the beneficiaries as a consequence of the

\textsuperscript{162} A violation of section 17 (cross-border transfer) carries a fine ranging from $5,000 to $50,000 and, for a subsequent offence, $10,000 to $100,000. A violation of section 13 (transfer to a third party without consent) carries a fine ranging from $1,000 to $10,000 and, for subsequent offences, $10,000 to $20,000 (Quebec Private Sector Act, s 91). The administrators, directors or representatives of a legal person may also be held personally liable for the payment of the fine, if they ordered, authorized or consented to the illegal communication (Where an offence under the Quebec Private Sector Act is committed by a legal person, the administrator, director or representative of the legal person who ordered or authorized the act or omission constituting the offence, or who consented thereto, is a party to the offence and is liable to the prescribed penalty. See Quebec Private Sector Act, s 91). It should be noted that the Commission may not impose fines. Only the Court of Quebec, which has competence in penal matters, may condemn a person under the penal provisions of the Act. See Quebec Private Sector Act, supra note 9, s 93; Courts of Justice Act, LRQ, c C-25.1, s 82; HR c Quebec (Curateur public), 2011 QCCA 204 at para 20-21.

As mentioned earlier, the CAI or Commission is the administrative court specialized in the application of the Quebec Private Sector Act (Eidda v Crédit Jaguar Canada Inc, 2005 CanLII 25913 (QC CS); Grenier v Equifax Canada Inc, 2003 CanLII 19492 (QC CS); Monette v Westbury Canadienne, compagnie d’assurance-vie, 1999 CarswellQue 1250 (WL Can) (CS); Therien v News Marketing Canada, 2000 CarswellQue 3324 (WL Can) (CS)). Final judgments rendered by the Commission can be appealed before the Court of Quebec (Quebec Private Sector Act, s 61), but the decisions of the latter are without appeal (Quebec Private Sector Act, s 69), except for judicial review by the Quebec Superior Court in certain specific situations. For instance, where there has been an excess of jurisdiction under s 846 of the Code of Civil Procedure, such as disregard for procedural fairness. The Commission may not itself present a motion for judicial review, as it does not have judicial interest. See Commission d’accès à l’information v Conseil de presse du Québec, 2006 QCCA 1282). More specifically, under the Quebec Private Sector Act, the CAI is vested with the powers to issue recommendations (following an inquiry) of such remedial measures as are appropriate to ensure the protection of personal information. The Quebec Private Sector Act does not grant the CAI specific power to award damages for a violation of a duty imposed on an organization with respect to the protection of the personal information (PF c Compagnie A, 2009 QCCAI 192). Under the civil law regime, however, an organization may become liable for damages should it collect, retain, use or disclose personal information in violation of the Quebec Private Sector Act. Such remedy should be sought before the appropriate court of justice.
communication of illegal and unauthorized communication of the trust beneficiaries’ personal information.\textsuperscript{163}

Finally, since the \textit{Quebec Private Sector Act} enshrines the protection of the fundamental right of privacy,\textsuperscript{164} an illegal communication of personal financial information may constitute an unlawful violation of the beneficiaries’ right to privacy. The beneficiaries could therefore invoke section 49 of the \textit{Quebec Charter} to claim punitive damages as a result of the infringement, in the case of “unlawful and intentional interference.”\textsuperscript{165} Exemplary damages “may not exceed what is sufficient to fulfill their preventive purpose”\textsuperscript{166} and “are assessed in the light of all the appropriate circumstances, in particular the gravity of the debtor’s fault, his patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where such is the case, the fact that the payment of the damages is wholly or partly assumed by a third person.”\textsuperscript{167} Exemplary damages have been awarded in a few cases.\textsuperscript{168}

\begin{itemize}
\item \textsuperscript{163} Roy \textit{c} Société sylvicole d’Arthabaska-Drummond, 2004 CanLIi 49387 (QC CQ) [Roy]. In the few reported decisions, sums awarded under this type of compensatory damages have ranged from $500 to $5,000 (ibid; Chartrand \textit{c} Corp du Club de l’amitié de Plaisance, BE 97BE-878 (CQ); Demers \textit{c} Banque Nationale du Canada, BE 97BE-330 (CQ); Basque \textit{c} GMAC Location Limitée, 2002 IJCan 36125 (CQ) [Basque]; St-Amant \textit{c} Muebles Morigeau Idée, JE 2006-1079 (SC) [St-Amant]; Séguin \textit{c} Général Motors Acceptance Corporation du Canada Idée, 2007 QCCQ 14509; Boulerice \textit{c} Acrofax inc, [2001] RL 621 (CQ) [Boulerice]; Stacey \textit{c} Sauvé Plymouth Chrysler (1991) Inc, JE 2002-1147 (CQ) [Stacey]). However, the quantum of damages awarded is fact dependant and relies heavily upon each case. Where a disclosure of personal information may trigger a higher risk of identity theft, a subjective harm resulting from the feeling of being under surveillance (moral damages, stress, etc.) (See Gratton, supra note 34 at 228 FL), or cause a foreign government institution, such a fiscal authority, to investigate and claim very large sums of money in taxes, actual damages incurred as a result of the communication may be much higher than $5,000.

The fact that the information disclosed is true or useful to a third party (such as a foreign government) is not relevant, where the disclosure of personal information is made without having obtained prior consent from the individual. In Basque, the plaintiff sued GMAC for damages following GMAC’s communication of personal information to credit companies (Equifax and Trans-Union) that resulted in credit card companies refusing the plaintiff’s applications for the issuance of a credit card. The court ruled that GMAC transferred the information to Equifax and Trans-Union without the plaintiff’s valid consent. The court did not consider the veracity of the information communicated and awarded $500 in damages.

\item \textsuperscript{164} Syndicat, supra note 95 at para 98.

\item \textsuperscript{165} According to the Supreme Court, “there will be unlawful and intentional interference within the meaning of the second paragraph of s 49 of the \textit{Charter} when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause”: Quebec (Public Curator) \textit{v} Syndicat national des employés de l’hôpital St-Ferdinand, [1996] 3 SCR 211 at para 121.

\item \textsuperscript{166} Art 1621(1) CCQ.

\item \textsuperscript{167} Ibid.

\item \textsuperscript{168} Sums ranging from $1,500 to $5,000 have been granted by courts for illegal transfers of an individual’s personal information. See Roy, supra note 163; St-Amant, supra note 163; Boulerice, supra note 163; Stacey, supra note 163.
\end{itemize}
Nowadays, trusts are used as international business and investment vehicles in which trustees may manage assets, securities, real estate, natural resources or public utilities. In this article, we have sought to make the case that the Quebec Private Sector Act applies to income trusts, asset management consultants, and trust companies that carry on activities in Quebec. Given the very broad interpretation of the notion of “personal information” applied by the courts, cogent arguments can be made that most information pertaining to a trust would likely be considered as “personal information” of trust beneficiaries or perhaps even of trustees, where these beneficiaries or trustees are natural persons. The Quebec Private Sector Act may also apply to trusts even in cases where conflict of laws rules point to the law of another state, for matters which pertain to the protection of personal information, where the trust has some connection with Quebec. Thus, trustees should be cautioned about potential liability if they disclose information pertaining to the trust in situations in which trustees are outsourcing part of their business operations to foreign jurisdictions, or where a foreign authority requests the communication of such information.

Quebec is the only Canadian jurisdiction specifically prohibiting the outsourcing to a foreign country unless certain precautions are followed. Where an organization communicates personal information to a third party when outsourcing certain of its operations or when such transfer is authorized by law, it should, as a security measure, enter into a signed agreement to confirm the third party’s security commitments. This agreement should also include, at a minimum, the types of provisions detailed in Appendix A to ensure that the service provider is acting in compliance with the relevant Quebec laws. Trustees should also, at a minimum, notify their beneficiaries and employees that their personal information will be transferred to a service provider in a foreign jurisdiction and that, as such, their information will be subject to such foreign country’s laws and disclosure requirements. Moreover, trustees, should obtain consent from these beneficiaries and employees.

For additional protection, trustees transferring information to a foreign jurisdiction may wish to conduct an analysis on whether the information, once transferred to the foreign jurisdiction, will be protected in the same manner as under the Quebec Private Sector Act. One must however take into account the fact that the information, once in the foreign jurisdiction, will be subject to foreign laws. Some of these foreign laws may be unrelated to data protection. For instance, they may relate to the Patriot Act or another surveillance program in the United States, or to a
stringent tax regime that may be found in certain European countries for foreign trusts. The transferor (the trustee) may therefore take the position that these risks should also be taken into account prior to deciding whether to transfer the information to a foreign service provider.

In the event that a foreign government requests access to the information managed by the trust, trustees should keep in mind that this information is considered as the personal information of the beneficiaries of the trust and that nothing in the *Quebec Private Sector Act* can be construed as authorizing any such disclosure. This being said, where personal information relating to a trust is in the hands of the federal government and where an agreement entered into by the government with a foreign state legally allows for the exchange of information with that foreign state, trustees and beneficiaries have little to no basis upon which to impeach a disclosure of personal information.
The contract should include the type of security measures that the foreign service provider must comply with, depending on the risks represented by the processing and the nature of the information to be protected which may be sensitive (such as financial and health information). It is of great importance that concrete technical and organizational measures be specified as per the Quebec law requirements.

The agreement should also include a confidentiality clause, binding both upon the foreign service provider and any of its employees who may be able to access personal information relating to the trust. There should be an obligation on the foreign service provider's part to support the trust in facilitating the exercise of its beneficiaries' rights to access, correct or delete their personal information, whatever the case may be.

The contract should prohibit any re-transfer or re-exportation of the information and expressly establish that the foreign service provider may not communicate the information to third parties, even for preservation purposes, unless it is provided for in the contract that there will be subcontractors. The contract should specify that subcontracting may only be commissioned on the basis of consent that can generally be given by the trust in line with a clear duty for the foreign service provider to inform the trust of any intended changes in this regard with the trust, retaining at all times the possibility to object to such changes or to terminate the contract. There should be a clear obligation of the foreign service provider to name all the subcontractors commissioned. It must also be ensured that contracts between the foreign service provider and subcontractors reflect the stipulations of the contract between the trust and the foreign service provider. In particular, there must be a guarantee that the foreign service provider and all subcontractors shall act only on instructions from the trust.

The contract should also include specification of the conditions for returning or destroying the personal information once the service is concluded. The contract may provide that the foreign service provider agrees, upon termination of the contract, to return to the trust all the documents and files containing personal information it has in its possession or control. The contract should further detail the specific procedure to be followed in order to destroy the information upon termination of the agreement. Furthermore, the contract should provide that personal information is erased securely upon the request of the trustees.
should detail the responsibilities of the foreign service provider to notify the trust in the event of any security breach that affects the information of the trust should be detailed.\textsuperscript{170}

A trust may still be liable for the security of the personal information, even when it is in the hands of the foreign service provider, and it may be held responsible towards its employees or customers in the case of a security breach originating on the service provider’s side. The agreement should therefore provide for logging and auditing of relevant processing operations on personal information that are performed by the foreign service provider or subcontractors. Organizations are increasingly including in the contract a right of oversight, monitoring, and the right to perform an audit of the services being provided as well as an inspection of the premises of the service provider to ensure that the latter is acting in compliance with relevant laws.

Finally, it should be contractually provided that the foreign service contractor must inform the trust about relevant changes concerning the respective services provided, such as the implementation of additional functions. There should be a notification to the trust about any legally binding request for disclosure of the personal information by a foreign law enforcement authority unless otherwise prohibited, such as a prohibition under criminal law to preserve the confidentiality of a law enforcement investigation.

In order to provide for more protection at the compliance level, trustees may wish to notify trust beneficiaries (as per the OPCC recommendations) that their information will be outsourced to a foreign third party and obtain their prior consent, but these measures may not be sufficient under the \textit{Quebec Private Sector Act}.

\textsuperscript{170} In 2009, the CAI adopted a security breach guide entitled: “Aide-mémoire à l’Intention des organismes et des entreprises—Que faire en cas de perte ou de vol de renseignements personnels?” Since guidelines on the issue of the handling of security breaches exist (which will soon become mandatory in Quebec), any transfer of personal information should ensure that the foreign service provider undertakes to follow these guidelines and promptly discloses any such breach to the trust.