# When is it legal to repurpose publicly available information for commercial purposes?

**October 25, 2019**

The Superior Court of Québec recently rendered a decision that, albeit limited in scope, raises important concerns with respect to the commercial use of publicly available information. The Court concluded that the Québec Enterprise Registrar (Registrar) did not have the legal authority to monitor and control the use of information found in the Registre des entreprises du Québec (Register) – a publicly constituted database – once it is lawfully obtained. Since 2016, the Registrar updated its website's terms of use to prohibit users of the Register from compiling and disseminating its contents for commercial purposes – a fact that was largely accepted and left undisturbed by the parties. Nonetheless, OpenCorporates challenged the Registrar's assertions that it could compel OpenCorporates to stop publishing data it had collected from the Register prior to the new terms of use. Although the court ultimately ruled in favour of OpenCorporates, its conclusions were limited to assessing the responsibilities of the Registrar. In so doing, it wholly ignored the privacy concerns raised by OpenCorporates' commercial re-use of publicly available personal information. By sidestepping a discussion about the privacy implications of OpenCorporates practices, the Court missed a valuable opportunity to provide clarity with respect to the use of publicly available information for commercial purposes.

## Background

On September 6, 2019, the Superior Court of Québec, in *Opencorporates Ltd. c* Registraire des entreprises du Québec,[1] issued a declaratory judgment against the Registrar stating that it did not have the authority under its constituting Act – the *Act respecting the legal publicity of enterprises* (ALPE)[2] – to prevent the applicant from publishing and distributing the data it had lawfully collected from the Register.

The Registrar, a public officer whose functions are established under the ALPE,[3] ensures that businesses constituted and/or operating in Québec are duly registered, and renders the information it collects public by publishing it in the Register.[4] The applicant, OpenCorporates, is a U.K.-based publisher of one of the largest publicly available databases, and provides access to reliable data concerning corporations operating in roughly 130 jurisdictions, including Québec.[5] From 2012 to 2016, OpenCorporates collected–through various automated data scraping processes–information from the Register, and aggregated this information in its own database. In March 2016, however,

in an effort to curtail these sorts of practices, the Registrar modified its website's terms of use to prohibit the compilation and dissemination of the Register data – effectively preventing contractually OpenCorporates from continuing to collect information from the Register. That said, the Registrar's efforts to protect the Register data did not end there; in November 2016, it sent a demand letter to OpenCorporates requiring the data publisher to remove information it had already collected prior to the amended terms of use–a request that the applicant contends was issued without legal authority.

# Decision

As a preliminary matter, the Registrar readily acknowledged that nothing in its enabling statute, nor in any other legislation, explicitly granted it the ability to monitor how the Register data is used once it is lawfully obtained.[6] That said, the Registrar argued that the applicant's use of the Register data violated the broader object and purpose of the ALPE, thereby entitling it to take action against OpenCorporates. Considering that OpenCorporates' database did not restrain the manner in which searches could be conducted – unlike the Register, which was expressly designed to prevent users from conducting searches based on a natural person's name or address[7] – the Registrar alleged that the applicant was violating the purpose of the ALPE. In addition, the Registrar advanced that the ALPE granted it the exclusive authority to maintain and publish information with respect to Québec enterprises and, to that end, it was empowered to ensure the security of the Register data.

At the outset, the court clarified what the case was not about – namely, the legality of the OpenCorporates' database itself. The court explicitly left open the possibility that a natural person, whose personal information is concerned by the applicant's activities, may contest those practices under applicable privacy laws.[8]

Turning to the issue of whether the Registrar had the ability to monitor and prohibit OpenCorporates' use of the Register data, the court engaged in an analysis of the ALPE's words, context and purpose. In so doing, the court opined that nothing in the Act limited the ability of organizations, such as OpenCorporates, to collect information from the Register using automated data collection processes, and to publish and disseminate that data in a separate database. While certain restrictions are indeed imposed on the Registrar with respect to the maintenance of the Register,[9] those restrictions neither extend to other entities nor provide the Registrar with a monopoly over the constitution of a corporate database concerning Québec businesses. In effect, the Registrar could not prohibit OpenCorporates from using the data that was collected prior to the implementation of the new terms of use.

# Analysis and Business Takeaways

From an open data standpoint, the case is laudable on two fronts. First, it clearly establishes that the Registrar, a public officer, does not have the exclusive authority to publish data with respect to corporations operating in Québec. In other words, businesses are allowed to create their own databases regarding Québec enterprises. Second, it affirmatively concludes that the Registrar does not have the legal authority to monitor and protect the Register data that was lawfully obtained prior to the new terms of use – a conclusion that, albeit limited in scope, provides clarity with respect to the Registrar's role under the ALPE.

Conversely, the decision also confirms that terms of use can effectively be relied upon by organisations to restrict the unauthorized reproduction and use of data included on their website, in line with prior decisions pertaining to data scraping.

While the decision answers certain key questions, it nonetheless leaves others unanswered. Most notably, the court left open the possibility that a natural person, under applicable privacy legislations, could challenge OpenCorporates' practices. For example, in Québec, *An Act respecting the Protection of Personal Information in the Private Sector*[10] (Québec ARPPIPS) operates in place of federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) for intra-provincial matters, and, as a result, applies to personal information collected within the context of this case. OpenCorporates would be subject to Québec ARPPIPS if it is considered as collecting the Register's information in a commercial capacity[11] even if it is a U.K.-based publisher that has no place of business in Québec.[12]

The Register's information includes personal information and it should be noted that the Québec ARPPIPS does not include an exception for personal information that is publicly available, although certain parts of the act do not apply to personal information, which, by law, is public.[13] In similar type of cases rendered under PIPEDA, the Office of the Privacy Commissioner articulated the view that it was illegal for foreign-based entities to collect publicly available information of Canadians and repurpose/republish such information.[14]

The decision did not address whether there were limits to the terms of use that could validly be placed on information that is otherwise publicly available, such as under competition law requirements.[15] It is noteworthy that outside of Québec, the applicable private sector data protection laws include certain types of exclusions for publicly available information[16] and business contact information;[17] however,these exclusions have certain limits and may prevent the republishing of these publicly available databases. As such, businesses should nonetheless exercise caution before disseminating personal information contained in publicly constituted registers.

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[1] OpenCorporates Ltd. c. Registraire des entreprises du Québec, 2019 QCCS 3801 [*OpenCorporates*].

[2] *Act respecting the legal publicity of enterprises*, RSQ c P-44.1.

[3] *Ibid*, ss 1-2.

[4] *Ibid*, s 3.

[5] *OpenCorporates*, *supra* note 1 at para 1.

[6] *Ibid* at para 20.

[7] Indeed, the Registrar was required under the *Act to establish a legal framework for information technology* to limit the Register's search functions to the purpose for which

the Register was created– namely, to enable the public to find information about a corporation, as opposed to an individual. See generally *ibid* at paras 72-80.

[8] *Ibid* at paras 44-47.

[9] *Ibid* at paras 72-80.

[10] *An Act respecting the Protection of Personal Information in the Private Sector*, RSQ 1993, c P-39.1 [Québec ARPPIPS].

[11] See *ibid*, s 1: "in the course of carrying on an enterprise within the meaning of article 1525 of the Civil Code". See also *Firquet* c. *Acti-Com*, 2018 QCCAI 245 at para 14.

[12] See Institut d'assurance du Canada c. *Guay*, [1998] CAI 431. See also *Institut* d'assurance du Canada c. *Guay*, 1997 CanLII 6532 (QC CQ). Outside of Québec, it has been established that PIPEDA can apply to a foreign-based organization engaged in a commercial activity where there is a real and substantial connection to Canada. See *Lawson v Accusearch Inc*, 2007 FC 125; *AT v. Globe24h.com*, 2017 FC 114.

[13] See Québec ARPPIPS, *supra* note 10, s 1: "Divisions II and III of this Act do not apply to personal information which by law is public."

[14] PIPEDA Report of Findings #2015-002, "Website that generates revenue by republishing Canadian court decisions and allowing them to be indexed by search engines contravened PIPEDA", June 5, 2015; PIPEDA Report of Findings #2018-002, "Company's re-use of millions of Canadian Facebook user profiles violated privacy law: Complaints under the Personal Information Protection and Electronic Documents Act against Profile Technology Ltd", June 12, 2018.

[15] See generally, *Toronto Real Estate Board v. Commissioner of Competition*, [2018] 3 FCR 563, leave to appeal to SCC refused, 37932 (August 23, 2018).

[16] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 s 7(1)(d),(2)(c.1),(3)(h.1) [PIPEDA]; *Regulations Specifying Publicly Available Information*, SOR/2001-7; *Personal Information Protection Act*, RSA 2003, c P-6.5 ss 14, 17, 20 [*Alberta PIPA*]; *Personal Information Protection Act Regulation*, Alta Reg 366/2003, s 7; *Personal Information Protection Act*, RSBC 2003, c 63 ss 12(e), 15(e), 18(e) [*BC PIPA*].

[17] PIPEDA, *ibid*, s 2(1); Alberta PIPA*, ibid*, s 4(3)(d); BC PIPA*, ibid,* s 1.

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