The Treaty Network Theory: Accessing Foreign Tax Information Networks Under the OECD Model Convention

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PRÉCIS
La mondialisation et la conjoncture économique ont contraint les États à améliorer l’accès aux renseignements fiscaux étrangers et nationaux et à mieux protéger leur propre assiette fiscale. Les dispositions sur l’échange de renseignements qui figurent dans pratiquement toutes les conventions fiscales bilatérales, dont plusieurs reposent sur le modèle de convention de double imposition de l’Organisation de coopération et de développement économiques (OCDE), sont au cœur de ces initiatives. Fait étonnant, certains changements actuels par rapport au modèle de l’OCDE indiquent que des États pourraient être obligés d’aider un signataire d’une convention en demandant à un autre signataire de donner des renseignements fiscaux ou en lui en fournissant. Cet article s’intéresse à la viabilité de cette « théorie sur le réseau des traités » dans le contexte du modèle de l’OCDE et des conventions fiscales en vigueur au Canada. L’auteur conclut que le texte de bon nombre de conventions canadiennes semble permettre cette résultante. On laisse ainsi entendre que les administrations fiscales et les responsables de la négociation des conventions devront désormais scruter leurs prochains travaux de près afin de déterminer si cette issue est voulue ou s’ils doivent mettre en place des mesures de protection contre cette éventualité.

ABSTRACT
Globalization and the current economic climate have forced states to work toward improving access to foreign and domestic tax information with a view to better protecting their own tax base. At the forefront of these efforts are the exchange-of-information provisions found in virtually all bilateral tax treaties, many of which are based on the model double taxation convention of the Organisation for Economic Co-operation and Development (OECD). Curiously, existing departures from the OECD model suggest that certain states may have the obligation to assist one treaty partner by requesting and providing tax-related information from another treaty partner. This article analyzes the viability of this “treaty network theory”

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in the context of the OECD model and Canada’s existing tax treaties. The author concludes that the text of many of Canada’s treaties appears to allow for such a result, suggesting that tax authorities and treaty negotiators should carefully consider, in their future work, whether this was intended, or whether they should protect against this possibility.

**KEYWORDS:** TAX TREATIES ■ INFORMATION EXCHANGE ■ CONFIDENTIALITY ■ DISCLOSURE ■ OECD ■ CANADA

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**EXCHANGE OF INFORMATION UNDER CANADA’S BILATERAL TAX TREATIES—POTENTIAL EXTENSION TO THIRD-PARTY STATES**

Canada’s international tax treaties provide for the collection and exchange of information relevant to the administration and enforcement of Canadian tax laws and those of Canada’s treaty partners. Curiously, a plain reading of many of these treaties suggests that Canada may have obligations to assist one treaty partner by requesting and providing tax-related information obtained from another treaty partner (“the treaty network theory”). This interpretation of Canada’s information exchange obligations could allow countries that have been disinclined to broaden their own treaty systems—or have been unsuccessful in attempting to do so—to gain access to Canada’s vast tax treaty network. In turn, this could have significant

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1 For a current listing of Canada’s tax treaties, see Canada, Department of Finance, “Notices of Tax Treaty Developments” (www.fin.gc.ca/treaties-conventions/treatystatus_-eng.asp).

2 Of course, the text of any particular treaty cannot be read in isolation. The paramount goal in interpreting Canada’s tax treaties is to give the text meaning based upon the language used and the intentions of the parties (see, for example, *Crown Forest Industries Ltd. v. Canada*, [1995] 2 SCR 802, at paragraph 29). This interpretive approach involves looking to the text of the treaty, academic literature, and other extrinsic materials that form part of the treaty’s legal context, including accepted model conventions and official commentaries thereon (see *Crown Forest*, ibid., at paragraph 30 et seq.). The approach recognizes that states draft tax conventions in general language, as compared with the level of detail and precision that tends to characterize the preparation of domestic tax legislation (*Pacific Network Services Ltd. v. Canada (Minister of National Revenue)*, 2002 FCT 1158, at paragraph 35).

3 There are numerous factors at play that help to explain why certain countries have entered into relatively few double taxation treaties. For example, tax haven states, which impose little or no tax or are highly secretive with respect to tax-related information, may be disinclined to exchange tax information on the international stage because it hurts their bottom line. Nearer to the other end of the spectrum, the United States’ commitment to certain principled treaty policies and
consequences with respect to associated administrative costs and the dissemination of confidential taxpayer information. It may also negatively affect Canada’s international relations to the extent that certain international partners consider the treaty network theory to go beyond the intended scope of their double taxation conventions with Canada.4

It is unclear whether any of Canada’s treaty partners have adopted such an interpretation of Canada’s treaty obligations, or whether they would actually expect to obtain tax information through Canada’s network of treaties in this manner. Nevertheless, gaining a better understanding of the scope of Canada’s information exchange obligations will assist in predicting future directions in this field and may help to protect against undesired effects flowing from Canada’s existing tax treaties. The viability of the treaty network theory is particularly important in today’s economic climate, where countries are making greater efforts to obtain foreign and domestic tax information, often in innovative ways, so as to better protect their own tax bases.5

Against this background, the analysis in this article considers whether the treaty network theory may operate under the information exchange provisions contained in article 26 of the model double taxation convention developed by the Organisation for Economic Co-operation and Development (OECD).6 This is significant because


4 See, for example, Organisation for Economic Co-operation and Development, Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Canada 2011: Combined: Phase 1 + Phase 2 (Paris: OECD, April 2011) (herein referred to as “Peer Review: Canada”) (http://dx.doi.org/10.1787/9789264110458-en), at paragraph 185. In particular, the global forum’s report expresses the common view that “[g]overnments would not engage in information exchange without the assurance that the information provided would only be used for the purposes permitted under the exchange mechanism and that its confidentiality would be preserved.”

5 Take, for example, the high-profile success of the US Internal Revenue Service (IRS) in obtaining the disclosure of records on approximately 4,450 Swiss bank accounts in the UBS AG case. By first pressing judicial action in US District Court against the Swiss bank UBS AG, the IRS was able to negotiate an out-of-court settlement with the bank and with Swiss tax authorities that covered the interpretation of the information exchange obligations in the US-Switzerland tax treaty. See, for example, Scavron, supra note 3, at 162-63 and 176-77; and Anand Sithian, “‘But the Americans Made Me Do It!’: How United States v. UBS Makes the Case for Executive Exhaustion” (2011) 25:1 Emory International Law Review 681-729, at 688-93 and 727.

many nations—including Canada—use the OECD model as the template for their bilateral tax treaties. A detailed analysis of article 26 of the OECD model reveals that the standard information exchange article implicitly protects against disclosure of treaty-based information to third-party states. However, almost a third of Canada’s 90 existing tax treaties depart from the very text in the model that normally protects against such disclosure. Although the intentions underlying those departures should be determined on the basis of individual analyses of the treaties in question, the departures themselves suggest a potential basis for applying the treaty network theory to relations with a large number of Canada’s treaty partners. Canadian tax authorities and treaty negotiators should therefore specifically consider the desirability of adopting (or protecting against the effects of) the treaty network theory when negotiating and renegotiating terms for Canada’s future double taxation conventions.

ANALYSIS OF ARTICLE 26 OF THE OECD MODEL

The OECD model is the most widely accepted model double taxation convention. More than 3,000 current bilateral tax treaties are based on it, and it is also often used as the basis for other model tax conventions. Similarly, its information exchange provisions are the most widely accepted framework for bilateral tax information exchange agreements.

Article 26 of the OECD model contains a broad code for the exchange of tax information between treaty partners. Among other things, it provides what is commonly referred to as a “major information clause,” which obligates the contracting states to exchange information relating to any domestic tax laws—not merely information that is necessary for carrying out the terms of a particular tax treaty. Paragraph 1 of article 26 contains the model tax information exchange commitment:

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7 See, for example, Pacific Network Services, supra note 2, at paragraph 36.

8 Although only a third of Canada’s tax treaties depart from the OECD model in a way that would permit the disclosure of information obtained under those treaties to third-party states, the other two-thirds of Canada’s treaty partners may also be able to request information via Canada’s treaty network. This may be so even if those requesting countries would not permit Canada to pass on their own information to third-party states under their respective treaties with Canada (but see the discussion above on the reciprocity principle and limits on information-gathering measures in paragraph 3 of the OECD model).


10 This latter, narrower obligation is commonly referred to as a “minor information clause.” See, for example, Lang, supra note 9, at paragraphs 511-17. See also paragraph 10.1 of the July 2012 commentary on article 26 of the OECD model, supra note 6.
1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

The imperative text (“shall”) suggests a mandatory obligation to exchange certain types of taxpayer information between the contracting states. The “foreseeably relevant” threshold qualifies this obligation, which is intended to provide for the widest possible exchange of information between treaty partners. The threshold requires only that there be a “reasonable possibility” when a request is made that the requested information will be relevant to the tax matters specified in the request. In the same vein, while the requested information cannot relate to taxation prohibited by the treaty, it is not restricted to either information relating to persons protected under the treaty or the taxes covered by the particular treaty. Similarly, the OECD model’s information exchange article is not limited to information contained in the contracting states’ tax files. Instead, where the requested information is not available in the supplying state’s files, the supplying state must use its information-gathering measures to seek to obtain the requested information for the requesting state.

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12 See paragraphs 1 through 9 of the July 2012 commentary on article 26 of the OECD model, supra note 6 (especially at paragraph 5).

13 Ibid.

14 For example, residents of the contracting states under article 1 of the OECD model.

15 That is, taxes described under article 2 of the OECD model.

16 See, for example, the OECD EOI manual, supra note 11, General Module, at paragraph 29; and paragraph 2 of the July 2012 commentary on article 26 of the OECD model, supra note 6.

17 See paragraph 4 of article 26 of the OECD model (reproduced in the appendix to this article and discussed in the text below, at notes 21-23). See also paragraph 19.7 of the July 2012 commentary on article 26 of the OECD model, supra note 6; the OECD EOI manual, supra note 11, General Module, at paragraphs 32 and 49; and Pacific Network Services, supra note 2, at paragraphs 25-26 and 29-34 (which considers an earlier version of the information exchange commitment then found in the tax treaty between Canada and France). Notably, it appears perfectly reasonable to view Canada’s reciprocal right to receive information through its bilateral tax treaty network as an extension of its domestic information-gathering measures. This suggests that Canada would have an obligation to use its broader treaty network to obtain information requested by any individual treaty partner.
As a result, article 26 creates a relatively sophisticated and extensive information exchange obligation. The article's text suggests the operative question for the purposes of the present analysis—namely, can taxpayer information requested under a treaty to assist a third-party state be “foreseeably relevant . . . to the administration or enforcement of the domestic laws concerning taxes . . . imposed on behalf of” the parties to that particular treaty? Two issues should be addressed when answering this question:

1. the meaning of the specification relating to the “domestic laws concerning taxes . . . imposed on behalf of” the contracting states, and
2. how the specification regarding the administration or enforcement of one of the contracting state’s domestic tax laws applies in the circumstances of Canada’s international treaty practices.

First, it is almost trite to note that the requirement that requested information be foreseeably relevant to “domestic laws concerning taxes . . . imposed on behalf of” the contracting states is not limited to situations where one tax is imposed by both contracting states. The simple reason for this is that the power to impose taxation is seen as a sovereign state’s right; multiple sovereign states will not (generally) impose a single tax. Indeed, there is no single tax that is jointly imposed by Canada and any other country, although Canada and many of its treaty partners each impose the same type of tax (such as a tax on income earned by residents). As well, even though multiple states may impose the same type of tax, paragraph 4 of article 26 of the OECD model suggests that the information exchange obligation is not restricted

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18 Since this article is concerned with the effect of a particular contracting state’s information exchange obligations under a bilateral treaty on that state’s relations with a third (non-party) state, the criterion that the information requested be foreseeably relevant “for carrying out the provisions of this Convention” is only of tangential significance. For example, where (1) country A has bilateral tax treaties with both country B and country C, and (2) country C requests taxpayer information from country A that country A does not possess but that country B possesses, the requested information will not normally be “foreseeably relevant” for carrying out the purposes of the treaty between countries A and B since those countries are only indirectly interested in the information. However, this criterion could conceivably be satisfied if, by way of further example, the underlying information related to an international tax plan in which each of the countries was interested for audit and assessment purposes.

19 See, for example, J.C. Sharman, Havens in a Storm: The Struggle for Global Tax Regulation (Ithaca, NY: Cornell University Press, 2006), at 81: “the power to tax and make fiscal policy is a quintessential prerogative of sovereign states.”

20 Exceptions to this rule exist where a state cedes some of its sovereign power over taxation to another body. For example, the members of the European Union have ceded certain of their taxation powers to the union (particularly in the context of indirect taxes: see, for example, Council Directive 2006/112/EC, “On the Common System of Value Added Tax,” November 28, 2006). It is not suggested that Canada or any of its political subdivisions have ceded any of their taxing powers to any non-Canadian body.
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to information relevant to a common type of tax imposed by each of the contracting states.21 That paragraph indicates that the information exchange duty applies “even though [the] other State may not need such information for its own tax purposes,” and even though the supplying state may have “no domestic interest in such information.”22 Furthermore, the OECD model’s official commentary emphasizes that the supplying state is not excused from its obligations where it is itself unable to use the requested information owing to domestic procedural rules or limitation periods.23 Thus, to come within the OECD model’s information exchange provision, the requested information need only be relevant to the administration of the domestic tax laws of one of the parties to a particular tax treaty, not to the laws of both contracting states.

Second, as a result of the OECD model’s reference to “domestic laws concerning taxes,” the intended boundaries of the information exchange obligation are not entirely clear in circumstances where a country’s tax treaties are enacted into domestic legislation. For this reason, it is important to understand Canada’s laws with regard to the entering into and the implementation of international conventions. In brief, although the executive branch of government formally enters into Canada’s tax treaties, those international conventions must be enacted through statute before they can affect domestic tax laws.24 As a matter of practice, Canada’s double taxation treaties are generally enacted into domestic law in their entirety through federal statute, such as the Canada-United States Tax Convention Act, 1984.25 This is significant since it suggests that activities conducted in respect of the administration or enforcement of any enacted Canadian tax treaty will be activities “foreseeably relevant . . . to the administration or enforcement of [Canada’s] domestic laws concerning taxes.” While one could advocate a narrower reading of this treaty provision,26 the breadth

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21 See also paragraph 1 of article 26, which expressly indicates that information exchange is not restricted to taxes referred to in article 2 of the OECD model.

22 For the full text of paragraph 4, see the appendix to this article.

23 See paragraphs 19.6 through 19.9 of the July 2012 commentary on article 26 of the OECD model, supra note 6.

24 See, for example, Hugh Kindred et al., International Law: Chiefly as Interpreted and Applied in Canada, 7th ed. (Toronto: Emond Montgomery, 2007), at 206-8.

25 SC 1984, c. 20. See, generally, Pacific Network Services, supra note 2, at paragraph 27.

26 For example, by taking the position that the laws in respect of which the information exchange commitment applies are only those that actually impose taxes, rather than those that protect against double taxation or those that merely provide a regulatory scheme for collecting taxes owed. However, it is reasonable to maintain that the drafters would have referred to “domestic laws imposing taxes,” rather than “domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States,” had they intended such a narrower meaning. The same type of response may be given to the argument that an enacted Canada-country B tax treaty constitutes Canadian domestic law concerning taxes for the purposes of a Canada-country C tax treaty only insofar as it relates to Canada’s taxes, not to country B’s taxes.
of the term “concerning” suggests that doing so would be inappropriate.27 Reading the model information exchange article in the Canadian context thus suggests28 that tax information requested by another state under one of Canada’s enacted tax treaties could legitimately form the basis of an information request made by Canada under another of its tax treaties.

It therefore appears that paragraph 1 of model article 26 permits the operation of the treaty network theory. It thus becomes necessary to consider further qualifications and restrictions on the model information exchange obligation before proceeding to analyze its incorporation into Canada’s tax treaties. Paragraph 3 of model article 2629 introduces the principle of reciprocity to limit contracting states’ information-gathering obligations to the mechanisms that exist under those states’ domestic laws, administrative practices, or public policies. A supplying state is only obligated to obtain information through the information-gathering measures that would be open to the requesting state in similar circumstances. This prevents a requesting state from taking advantage of the other state’s information-gathering system to the extent that the other system is wider than its own.30 Notably, however, there is no indication in the OECD model that a contracting state’s right to obtain information from its treaty partners is excluded from the class of information-gathering measures that it is obligated to use to fulfill a request under article 26.31

27 Merriam-Webster Online defines “concerning” as “relating to” and “regarding” (www.merriam-webster.com/dictionary). By way of comparison, the Supreme Court of Canada has explained that the words “in respect of” are “words of the widest possible scope [which] import such meanings as ‘in relation to,’ ‘with reference to’ or ‘in connection with.’ The phrase ‘in respect of’ is probably the widest of any expression intended to convey some connection between two related subject matters.” Nowegijick v. The Queen, [1983] 1 SCR 29, at 39.

28 To be clear, there may be room for further academic debate on this issue, particularly given that official commentaries on a number of other model provisions explicitly or implicitly indicate that certain references to domestic laws in the OECD model are intended to exclude tax treaties (see, for example, paragraph 10 of the July 2012 commentary on article 26 of the OECD model, supra note 6). On the other hand, the absence of such a specification in the context of the model information exchange article may itself be telling.

29 See the appendix to this article.

30 See, for example, the OECD EOI manual, supra note 11, General Module, at paragraphs 37, 38, and 49; and paragraph 15 of the July 2012 commentary on article 26 of the OECD model, supra note 6.

31 Furthermore, paragraph 16 of the July 2012 commentary on article 26 of the OECD model, supra note 6, indicates that information is “deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons, provided that the tax authorities would make similar investigations or examinations for their own purposes.” This excerpt from the official commentary deals only with the availability of particular information through “the normal course of the administration” of the contracting state, as opposed to information obtainable through other domestic information-gathering laws (see paragraph 3(b) of article 26). In any event, the operative question for determining what steps a supplying state
The reciprocity principle also creates a curious conceptual hurdle for countries that enact their tax treaties into domestic legislation when they enter into tax treaties with countries that do not. For example, let us say that one of Canada’s treaty partners—hypothetical country B—bases its tax treaties on the OECD model but follows a legal system in which international treaties have direct legal effect (that is, without the need for implementation through domestic statute). Country B’s tax treaties might thus not be considered to be part of that country’s “domestic laws concerning taxes” under a provision based on paragraph 1 of model article 26. If they are not, country B’s information exchange obligations would not require the exchange of information under one treaty for the purposes of a request under another. This is so even if some of country B’s tax treaties depart from the OECD model provisions in a way that would otherwise allow for the application of the treaty network theory. This suggests a potentially awkward need for each contracting party to analyze its treaty partner’s tax information-gathering laws and practices before responding to an information exchange request. Although this is a somewhat odd result, it flows from the structure of the model information exchange provision, not from the treaty network theory. What is more significant for present purposes is that, apart from this conceptual point, paragraph 3 of the model article does not prevent the application of the treaty network theory in the Canadian context.

In contrast, paragraph 2 of model article 26 presents a more substantial hurdle to the treaty network theory. It reads:

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

The requesting state is therefore generally obligated to treat information received from a treaty partner as “secret in the same manner as information obtained under the domestic laws of that State.” This reflects the view that the confidentiality of

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32 This is so even if some of country B’s tax treaties depart from the OECD model provisions in a way that would otherwise allow for the application of the treaty network theory.

33 See, for example, supra note 30 and the related text.
taxpayer information is largely a domestic legal matter; decisions as to how such “secret” information should be treated generally ought to be left to the receiving state.\textsuperscript{34} If the model provision stopped there, the treaty network theory could operate in the context of many bilateral tax conventions. For example, although Canadian tax statutes include extensive protections against the disclosure of taxpayer information,\textsuperscript{35} disclosure is generally allowed for the purposes of “a provision contained in a tax treaty with another country or in a comprehensive tax information exchange agreement between Canada and another country or jurisdiction.”\textsuperscript{36} Thus, quite apart from interpretive provisions or common-law rules elevating tax treaties over other domestic laws,\textsuperscript{37} Canadian federal laws do not themselves protect against the dissemination of information received from one treaty partner to another partner under a second treaty. Instead, paragraph 2 of model article 26 stands as an impediment to the treaty network theory because it goes on to circumscribe to whom disclosure may be made, irrespective of whether domestic laws would allow for disclosure to a wider range of parties.

Specifically, paragraph 2 provides that information received under the model article “shall be disclosed only to persons or authorities . . . concerned with the assessment or collection of, the enforcement or prosecution in respect of, [or] the determination of appeals in relation to the taxes referred to in paragraph 1”\textsuperscript{38} (collectively referred to herein as “assessment activities”). The paragraph similarly obligates any such receiving entities to use the information received only for purposes of those same assessment activities. The issue arising in the context of the treaty network theory is that, at first blush, the uses to which tax information can be put under paragraph 2 (absent express permission from the supplying state)\textsuperscript{39} appear to be narrower than the scope of the information exchange obligation in paragraph 1.\textsuperscript{40} The following example illustrates this.

\textsuperscript{34} See also paragraph 11 of the July 2012 commentary on article 26 of the OECD model, supra note 6.
\textsuperscript{35} See, for example, the Income Tax Act, RSC 1985, c. 1 (5th Supp.), as amended, section 241.
\textsuperscript{36} Ibid., subparagraph 241(4)(e)(xii).
\textsuperscript{37} See, for example, the Canada-United States Income Tax Convention Act, supra note 25, section 3(2).
\textsuperscript{38} See, generally, the OECD EOI manual, supra note 11, General Module, at paragraph 57. Although paragraph 2 also effectively permits disclosure to persons overseeing the contracting states’ assessment activities, this appears to have little significance for the treaty network theory.
\textsuperscript{39} As seen above, the final sentence of the OECD model’s paragraph 2 allows information to be used for purposes other than those specified in the paragraph if (1) such uses are permitted under the laws of both contracting states and (2) the supplying state authorizes those uses. Therefore, the treaty network theory will always be available as an optional measure where contracting states adopt the language of the OECD model, their domestic laws allow for the exchange of treaty-based tax information with third-party jurisdictions, and the supplying state expressly permits the exchange to the third-party state.
\textsuperscript{40} But see infra note 43.
Generally, if the treaty network theory applies, Canada may be requested (under a bilateral tax treaty with country C) to act as a conduit for obtaining tax information under Canada’s treaty with country B and providing that information to country C.

The requested information may be “foreseeably relevant” to the administration or enforcement of country C’s tax laws, and would thus satisfy the paragraph 1 requirement vis-à-vis country C’s treaty with Canada.

Similarly, given that the requested information is foreseeably relevant\(^\text{41}\) to the “administration or enforcement” of Canada’s domestic tax laws (that is, those enacting the Canada-country C tax treaty), Canada’s request for information from country B also satisfies the paragraph 1 requirement as regards its treaty with country B.

However, by virtue of the paragraph 2 restriction, Canada may disclose information obtained from country B only to entities concerned with assessment activities “in relation to the taxes referred to in paragraph 1” of the information exchange article in the Canada-country B tax treaty. That is, Canada may disclose information supplied by country B only to entities concerned with assessment activities relating to any tax imposed by either Canada or country B. Thus, unless country C’s tax authorities are pursuing assessment activities concerning taxes imposed by Canada or by country B,\(^\text{42}\) Canada is prohibited from providing any information that it receives under its treaty with country B to country C.\(^\text{43}\)

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\(^{41}\) Without taking into account particular legal restrictions on the disclosure of such information. See infra note 43 for further discussion of this point.

\(^{42}\) While in practice this may be unlikely, such enforcement activities could perhaps be grounded in the obligation to provide assistance in the collection of taxes under article 27 of the OECD model. However, that possibility is irrelevant to the present analysis since the main question being considered is how the treaty network theory might apply in the case of “conduit” countries that have no direct interest in the requested information.

\(^{43}\) One may suggest that this analysis is flawed because Canada seems to have an obligation/right to obtain information from country B for the purposes of a request for information from country C, and yet may at the same time be unable to transmit the requested information to country C by virtue of the model disclosure restriction. This potential circularity disappears when one considers that it will be difficult to maintain (for the purposes of satisfying the paragraph 1 requirement under the Canada-country B treaty) that the requested information is “foreseeably relevant” to Canada’s laws enacting the Canada-country C treaty if the information can never be disclosed to country C by virtue of paragraph 2. That is, if the disclosure prohibition in the Canada-country B treaty prevents Canada from disclosing information obtained from country B to country C, then Canada arguably has no obligation in the first place to obtain that information from country B further to a request from country C. Thus, treaties directly incorporating these aspects of the OECD model also prevent the application of the treaty network theory at this earlier stage of the analysis.
This example suggests that the treaty network theory cannot apply in the context of treaties that directly incorporate the disclosure restriction in paragraph 2 of model article 26.44

Official commentaries and extrinsic evidence regarding the object and purpose of the model information exchange provisions support the preceding interpretation.45 The available OECD information exchange guidance documents generally explain that the OECD model “does not permit disclosure to any other person, entity, authority or jurisdiction.”46 Furthermore, since 2005, the OECD model’s official commentary has explained that “information received by a Contracting State may not be disclosed to a third country unless there is an express provision in the bilateral treaty between the Contracting States allowing such disclosure.”47 Similarly, the current edition of the commentary indicates that the last sentence of paragraph 2 “allows the sharing of tax information by the tax authorities of the receiving State with other law enforcement agencies and judicial authorities in that State on certain high priority matters (e.g., to combat money laundering, corruption, [or] terrorism

44 Unless that country receives permission to use tax information in this manner from the supplying state as provided in the final sentence of model paragraph 2 (see supra note 39). See also supra note 43.

45 Model commentaries are a “widely-accepted guide to the interpretation and application of the provisions of existing bilateral [tax] conventions”: Canada v. Prévost Car Inc., 2009 FCA 57, at paragraph 10. Although judicial precedent interpreting the information exchange provisions of particular tax treaties or model conventions would be binding or persuasive in regard to future interpretations, it has only rarely been necessary for Canadian courts to analyze such treaty provisions. By way of example, as of 2011, the Canada Revenue Agency has had occasion to obtain only a single judicial compliance order in respect of treaty-based exchange of information requests (see Peer Review: Canada, supra note 4, at paragraph 143). As a result, the present analysis is effectively restricted to considering the text of the provisions themselves and the available secondary commentary, rather than reviewing an established body of Canadian jurisprudence on the underlying issues.

46 OECD EOI manual, supra note 11, General Module, at paragraph 57 (emphasis added). See also ibid., at paragraph 56. Notably, the prohibition against disclosure to any other jurisdiction is included by way of reference to the OECD’s April 2002 model Agreement on Exchange of Information on Tax Matters (www.oecd.org/ctp/harmful/2082215.pdf), which specifically permits disclosure of tax information only to persons or authorities in the jurisdiction of the receiving state (see especially article 8).

financing)."48 Unfortunately, these guidance documents do not identify the source of the apparent prohibition on the provision of information to entities in third-party jurisdictions. Nevertheless, the inclusion of these references suggests that the drafters of the OECD model intended such a prohibition—indeed, no OECD member state has issued an official reservation or observation relating to these aspects of the guidance documents.49 In view of the preceding textual analysis, the foundation for prohibiting disclosure to third-party jurisdictions appears to be the paragraph 2 specification that allows disclosure only in respect of assessment activities in relation to taxes imposed by one of the contracting states. While there is thus significant doubt as to the availability of the treaty network theory under bilateral treaties that explicitly incorporate the model disclosure prohibition,50 the provision of information to third-party jurisdictions may well be available where treaties depart from this aspect of the OECD model.

**APPLICATION TO CANADA’S TAX TREATIES**

Canada has one of the world’s most extensive tax treaty networks, comprising 90 double taxation conventions currently in force.51 As noted earlier, Canada generally uses the OECD model as the basis for its tax treaties. The OECD has expressed the view that each of Canada’s existing treaties meets the OECD model’s standard limits

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48 Paragraph 12.3 of the July 2012 commentary on article 26 of the OECD model, supra note 6 (emphasis added). While this “prior authorization clause” was first introduced as a provision of the OECD model in 2012, it had previously been set out as an optional provision in paragraph 12.3 of the commentary on article 26 of the OECD model (see paragraph 4.3 of the July 2012 commentary on article 26 of the OECD model, supra note 6). However, the reference to the ability of the tax authorities of the receiving state to share tax information obtained under a treaty with other agencies “in that state” was only included in the 2012 revision.

49 See, for example, the July 2012 update to the OECD model, supra note 6, at 17.

50 Particularly in the context of those treaties that incorporated the OECD model exchange-of-information provisions subsequent to the initial appearance of these types of statements in the official commentary and OECD guidance documents.

51 See the Department of Finance treaty website, supra note 1. Canada also has an additional 16 tax information exchange agreements (TIEAs) currently in force: see Canada, Department of Finance, “Tax Information Exchange Agreements: Notices of Developments” (www.fin.gc.ca/treaties-conventions/tieaerf-eng.asp). However, the significance of Canada’s TIEAs to the interpretation of its formal tax treaty information exchange obligations is not clear. Distinguishing characteristics include the following: TIEAs (1) may be pursued with a view to achieving different goals than formal tax treaties, (2) are not enacted into domestic laws, and (3) often incorporate express prohibitions on the disclosure of information to third-party states (see, for example, article 8 of the Agreement Between the Government of Canada and the Government of the Cayman Islands Under Entrustment from the Government of the United Kingdom of Great Britain and Northern Ireland for the Exchange of Information on Tax Matters, signed at George Town on June 24, 2010). In any event, in-depth consideration of particular Canadian TIEAs and corresponding model TIEAs falls outside the scope of this article.
on disclosure of treaty-based tax information. Notably, every version of the OECD model issued in the past 40 years has specified that information obtained under the convention shall be treated as secret and shall be disclosed only for the purpose of assessment activities relating to the taxes covered by the OECD model. That is, since its inception, the OECD model has continuously and explicitly restricted treaty information disclosure to entities concerned with the assessment of taxes imposed by one of the two parties to a particular bilateral tax treaty. Considering this long history, one might expect that any significant departure from the OECD model’s relatively narrow disclosure specification would constitute an intentional shift toward a broader right to disclose information received under a tax treaty.

Surprisingly, 29 of Canada’s 90 tax treaties depart from the OECD model’s disclosure specification in a significant way. Twenty-six of those treaties provide that any information received by a contracting state shall be treated as secret according to domestic laws, and, at a minimum, “shall be disclosed only to persons or authorities concerned with [assessment activities] in relation to taxes.” In other words, the text of almost one-third of Canada’s tax treaties merely restricts the disclosure of treaty-based information to assessment activities relating to “taxes” generally, rather than to the particular taxes covered by those treaties or, more broadly, to taxes imposed by one of the two contracting states. In addition, Canada’s treaty with Switzerland allows disclosure only to entities involved in assessment activities in relation to the somewhat less general “income or capital taxes,” but without expressly identifying which income or capital taxes the parties had in mind. Further along on

52 Peer Review: Canada, supra note 4, at paragraph 186.
53 See the history of article 26 contained in the full version of the OECD model, supra note 6, at M-62 to M-65. Since 1963, the relevant text of paragraph 2 of article 26 has varied in certain (immaterial) respects, but as regards the present analysis, it has remained substantively identical in successive revisions. In particular, it has provided that information received under the treaty shall be disclosed only to entities concerned with assessment activities in relation to “the taxes covered by the Convention,” “the taxes which are the subject of the Convention,” or “taxes of every kind and description imposed on behalf of the Contracting States.”
54 Specifically, Canada’s current treaties with Algeria, Austria, Azerbaijan, Belgium, Bulgaria, Chile, Colombia, Croatia, Estonia, Gabon, Greece, Iceland, Jordan, Kyrgyzstan, Latvia, Lithuania, Moldova, the Netherlands, Oman, Portugal, Senegal, Singapore, Slovenia, South Korea, Ukraine, and the United Arab Emirates. See the Department of Finance treaty website, supra note 1.
55 Emphasis added. This is a standardized version of the provision; some of the 26 treaties contain minor differences not relevant to this analysis, such as substituting “involved in” for “concerned with” assessment activities.
56 See article 25(2) of the Convention Between Canada and Switzerland for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital, signed at Berne on May 5, 1997, as amended by the protocol signed on October 22, 2010.
the treaty network theory

this end of the spectrum is the current Canada-Peru treaty, which restricts disclosure to assessment activities in relation to “any tax.”\textsuperscript{57} Finally, Canada’s treaty with South Africa contains perhaps the loosest disclosure restriction of any of Canada’s double taxation conventions: it requires nothing more than that the information be treated as “secret in the same manner as information obtained under the [receiving state’s] domestic laws.”\textsuperscript{58} On their face, these departures suggest that the treaty network theory may be available in the context of Canada’s relations with these 29 states.\textsuperscript{59}

There may be reasons for departing from the OECD model in each of these instances that implicitly demonstrate a continued intention between the contracting states to prevent disclosure to third-party jurisdictions. For example, because the vast majority of these 29 treaties were agreed to in the years since 1995, the relevant phrasing may simply reflect some unrelated policy consideration prevalent during this period. However, it is notable that Canada completed a significant number of other tax treaties during the same period without departing from the more explicitly defined scope of the OECD model’s disclosure prohibition.\textsuperscript{60} On the other hand, perhaps the departures constitute an attempt at simplifying the OECD model by removing unnecessary text but without changing the intentions expressed in the OECD guidance documents. Indeed, one may argue that any reference to “taxes” in the disclosure prohibition must necessarily relate to the taxes referred to in the first paragraph of the information exchange article, or in the initial treaty article specifying that a treaty applies (only) to taxes imposed on behalf of the contracting states (that is, article 2). However, this would also be unusual because the departure in question is relatively precise, and the remaining text of the information exchange article in many of these 29 treaties closely follows the OECD model. What is clear is that no explanation for these departures is apparent from the text of the treaties themselves. Thus, it will be important to consider further evidence of each contracting state’s intentions in order to determine whether one state could reasonably expect the other to obtain and provide information under the treaty network theory. The need to consider external interpretive aids also flows from Canadian case law,

\textsuperscript{57} See article 26(1) of the Convention Between the Government of Canada and the Government of the Republic of Peru for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, signed at Lima on July 20, 2001 (emphasis added).

\textsuperscript{58} See article 25(1) of the Convention Between the Government of Canada and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, signed at Toronto on November 27, 1995.

\textsuperscript{59} See also supra note 8.

\textsuperscript{60} By way of example, and despite the fact that the phrasing may depart from the model provisions in other ways, see Canada’s treaties with the Czech Republic (2001), Finland (2006), Germany (2001), India (1996), Luxembourg (1999), Mexico (2006), and the United Kingdom (2003).
which holds that the omission of a particular model provision in a tax treaty does not necessarily indicate an intention to deviate from the model on that particular issue.\footnote{See, for example, Pacific Network Services, supra note 2, at paragraph 39; and Crown Forest, supra note 2, at paragraphs 63-76. However, the courts’ views appear to have been significantly affected by the existence of other extrinsic evidence suggesting an intention not to depart from the model treaty on the issues in question. It is not clear that the same result would follow in the complete absence of extrinsic evidence explaining the departure from the model provisions or the contracting states’ intentions on such a fine point.}

The broad scope of the preceding analysis makes it impossible to conclude whether the treaty network theory will apply in the context of any of Canada’s 29 deviating tax treaties. However, it is significant that the particular departure from the model text found in each of these treaties appears to be precisely the type that would permit the use of one treaty’s information exchange provisions to assist in responding to another treaty partner’s information request. It is also notable that this is not merely a Canadian issue. Any similar departure from the OECD model (or the model convention developed by the United Nations)\footnote{United Nations, Model Double Taxation Convention Between Developed and Developing Countries (New York: UN, 2011). The UN model contains essentially the same information exchange obligation as the OECD model; see, for example, Lang, supra note 9, at paragraph 513. In particular, the paragraph 2 disclosure prohibition in the UN model is substantively identical to the OECD model’s prohibition against disclosure to entities other than those concerned with assessment activities in relation to taxes imposed by the contracting states. Thus, it is likely that the treaty network theory would apply equally to bilateral treaties based on the UN model and those based on the OECD model.} in other states’ bilateral tax treaties may provide additional support for information requests based on the application of the treaty network theory. Furthermore, such departures may have a broad impact on spontaneous or automatic exchange of taxpayer information between treaty partners where relevant information obtained from one partner is subject to a modified version of the model disclosure prohibition.\footnote{Article 26 of the OECD model is one legal basis for the automatic exchange of taxpayer information. The principle that exchanged information should be used only for the purposes allowed under the applicable information exchange instrument, such as a bilateral treaty based on the OECD model, supports the view that spontaneous or automatic exchange could include providing information received from one treaty partner to another under the treaty network theory. See, generally, Organisation for Economic Co-operation and Development, Automatic Exchange of Information: What It Is, How It Works, Benefits, What Remains To Be Done (Paris: OECD, 2012) (www.oecd.org/ctp/exchange-of-tax-information/AEOI_FINAL_with%20cover_WEB.pdf), at 13 and 25; and Keeping It Safe, supra note 47 (which generally discusses the framework for information exchange and various practices, policies, and recommendations for appropriately maintaining the confidentiality of information exchanged for tax purposes).} It is therefore important for treaty negotiators to expressly consider these issues in their work. Doing so will help to ensure that the resulting treaties are consistent with the contracting states’ true intentions and will protect against negative effects on international relations with treaty partners that do not subscribe to the treaty network theory. Similarly, the
Canada Revenue Agency may wish to consider (if it has not yet done so) the viability of the treaty network theory both in responding to future information requests and in considering whether to make such requests of Canada’s treaty partners for domestic tax administration purposes. In an age of growing international pressures and increases in international tax information exchanges, the treaty network theory may prove to be an innovative tool for better securing domestic tax bases.

APPENDIX: ARTICLE 26 OF THE OECD MODEL

The following is the current version of article 26 of the OECD model as approved by the OECD Council on July 17, 2012.64

1. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

   a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

   b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

   c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject

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64 See supra note 6.
to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.