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## Executive Summary of Findings:

## WHOIS Stakeholder Consultation

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# WHOIS Stakeholder Consultation: Executive Summary of Findings

## Background and Research Objectives

*The Strategic Counsel* is pleased to present the following executive summary of findings from a broad stakeholder consultation intended to obtain feedback on CIRA's WHOIS Privacy Policy and Disclosure Procedure. On June 10, 2008, CIRA implemented a new WHOIS Privacy Policy. Under the new Policy, the personal information of Individual Registrants is no longer publicly displayed in the WHOIS directory. In order to enable Registrants to be contacted, CIRA created an online message delivery form which allows people to send messages to Registrants without access to their personal information. However, CIRA recognized that there are instances where it is necessary to know the identity of the Registrant and where the message delivery form may not resolve a dispute with a Registrant. In an effort to balance the requirements of its numerous stakeholders, CIRA developed a procedure that permits the disclosure of Registrant information in specific limited circumstances.

While CIRA had received some feedback about its Privacy Policy and Disclosure Procedure prior to the consultation, it sought to obtain input from a broad range of stakeholders in order to fully understand their views and to assess whether changes are needed to the Policy. To this end, a multi-phased research process was undertaken to solicit the views of dot-ca domain name holders (Individual and Non-Individual Registrants), CIRA members, Certified Registrars, and specific interested constituencies in the areas of law enforcement and national security, internet governance, and intellectual property.

In broad terms, the consultation focused on generating answers to the following questions:

- What is your level of satisfaction with the new WHOIS Disclosure Policy?
- What are the main advantages and disadvantages of the Policy, given the specific experience of the past 12 months since it was introduced?
- How effective is the Policy in striking an appropriate balance between the privacy concerns of Registrants and the legitimate need to know Registrant information in certain situations by other stakeholders such as intellectual property interests and law enforcement agencies?
- What specific changes, if any, would you recommend to make the Policy more effective at striking this balance? Why would you recommend these changes?

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Specific objectives of the research were to:

- Measure awareness of CIRA and its organizational role and responsibilities;
- Assess awareness and impressions of the WHOIS Disclosure Policy implemented on June 10, 2008;
- Examine the impact of the WHOIS Disclosure Policy;
- Measure overall satisfaction with the WHOIS Disclosure Policy and with discrete elements of the Policy;
- Examine attitudes toward the balance struck between accommodating personal privacy concerns and the need for accountability of website operators; and
- Make recommendations about whether any of the impacts of the WHOIS Disclosure Policy on the interested stakeholder groups are sufficient to warrant changes to the Policy.

## Methodology

The consultation employed both qualitative and quantitative research methods in order to provide an opportunity for all interested stakeholders to participate, as well as to solicit feedback from a representative sample of dot-ca domain name holders:

- 1) At the outset, eight in-depth interviews were conducted with key stakeholders in the areas of law enforcement (3), intellectual property (3), and internet governance (2) regarding their level of satisfaction with the WHOIS Privacy Policy. Findings from the interviews were used to understand and frame the issues to be examined in the surveys of Registrants, Members and Registrars.
- 2) In order to ensure all interested individuals and/or groups had an opportunity to provide feedback on the WHOIS Privacy Policy and Disclosure Procedure, CIRA issued a press release on July 6<sup>th</sup>, 2009 that provided instructions on how to submit comments by email, regular mail, or by using an online form. A total of 19 individuals provided feedback in this way (4 by email and 15 by online form).

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- 3) An online forum was created specifically for CIRA members. All members were sent an email invitation to the forum which included log-in information as well as a User ID and temporary password. The forum was open from July 7<sup>th</sup> to September 24<sup>th</sup>, 2009. A total of 67 individuals participated in a variety of discussion chats and threads in which they shared their views and opinions on the Policy. Members were also able to provide feedback during an Open Microphone session held at CIRA's Annual General Meeting on September 22<sup>nd</sup>, 2009.
- 4) In order to generate feedback that can be considered representative of the views of dot-ca domain name holders overall, an online survey was conducted among a random sample of CIRA Registrants (Individual and Non-Individual) and CIRA members. A total of n=1,846 Registrants completed the online survey in September, 2009. They were invited to participate via an email invitation that outlined the purpose of the research and that contained a unique URL that they could click on to complete the survey.
- 5) The views of Certified Registrars were also sought using an online survey methodology. To encourage their participation, Registrars were initially sent a letter, by regular mail, outlining the purpose and the value of the research and informing them that they would be receiving an email invitation to participate. Registrars were also offered a cash incentive of \$25 for participating, payable to either the Registrar or to a charitable organization of his/her choosing. In total, 12 of 84 Registrars completed the survey. This final sample size is insufficient to be considered representative of Registrars as a whole and as such, the findings for Registrars must be interpreted with caution.

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## Key Findings

### A. Awareness of CIRA's WHOIS Privacy Policy and Disclosure Procedure

#### 1. Among dot-ca domain name holders overall, there is limited awareness of CIRA's policies and procedures relating to its WHOIS.

While CIRA had received some feedback about its WHOIS Privacy Policy and Disclosure Procedure prior to the launch of the consultation in the beginning of July, 2009, the extent to which dot-ca domain name holders as a whole are engaged with the topic was unknown. In fact, the findings from the online survey show that just over one-quarter of Registrants know that CIRA implemented a new WHOIS Privacy Policy and Disclosure Procedure on June 10<sup>th</sup>, 2008, and only 3-in-10 are aware that no personal contact information for individuals is made publicly available online. Most Registrants “don't know” if there have been any changes to CIRA's policies and procedures relating to the public availability of contact information for dot-ca domain names in the last several years, indicating a relatively low level of engagement with the topic. Individual Registrants who are CIRA members are most likely to be aware of the new policy, while Non-Individual Registrants who are not members are least likely to be aware of it.

Most of the Registrars who responded are aware that CIRA implemented a new Policy, and more than one-half are aware that personal contact information for Individual Registrants is not made publicly available online.

### B. Overall Level of Satisfaction with the Policy

#### 1. Intellectual property as well as law enforcement and national security interests tend to be dissatisfied with the changes to the Policy, while privacy advocates believe it does not go far enough to protect the privacy of Individual Registrants.

Among those interviewed on behalf of intellectual property organizations and law enforcement/national security agencies, satisfaction with the new Policy is relatively low. For instance, stakeholders in the area of intellectual property view the new Policy as “*cumbersome*”, time-consuming and more costly in terms of accessing information.

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From the perspective of law enforcement and national security agencies, the new Policy has the potential to create investigative delays, provides insufficient information, and limits the types of crimes for which they can receive assistance. It was also argued that the notification requirement (i.e., that Registrants are notified within 60 days that their information has been requested by law enforcement) can hinder an investigation and/or make a request for information unwise: *“divulging the law enforcement request might hinder the investigation as a whole, might hinder the case more than the little information we might get”*. The perceived disadvantages of the Policy from the perspective of intellectual property and law enforcement interests are outlined in greater detail in Section C.

The counterview to the concerns of both IP and law enforcement interests, expressed by some privacy advocates, is that the new Policy does not go far enough to protect the privacy of Individual Registrants, and that there should be no exceptions for either IP interests or law enforcement agencies. Some argued that requests from disclosure by IP interests can be used to “unmask” Registrants and to place pressure on them without having to sue them, while the law enforcement requests are viewed as unnecessary because officers are able to obtain a warrant for WHOIS information.

### **2. Comparatively, most dot-ca domain name holders are either satisfied with or hold no opinion about the Policy.**

The feedback from participants in both the online forum (CIRA Members) and the open consultation about the changes to the Policy was largely positive. Individual domain name holders commented that they now feel that they have some degree of control over the public display of their information. As such, many are satisfied that the Policy does well to protect their privacy. A number of forum participants indicated that the implementation of the new Policy is a proactive move on CIRA’s behalf in addressing the privacy issues that exist among dot-ca domain name holders. Some mentioned that CIRA’s standards should be adopted more widely, and stated that CIRA is a leader on the privacy front.

The feedback from the forum and open consultation was not uniformly positive however. A minority commented the new Policy is too bureaucratic and some made it clear that they prefer CIRA’s previous approach. In general, they felt that it is appropriate for a name and email address of the owner/administrative contact to be publicly available. Several of the Registrars who participated in the discussion commented that restricting the public availability of information makes it difficult for them to respond to customer requests, since many of their clients forget or lose track of their domain name registration. This concern was echoed in the open-ended responses of Registrars who completed the online survey.

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Findings from the online survey of dot-ca domain name holders indicate that most are satisfied with or neutral about the Policy. While just over one-half are satisfied with it, one-quarter are neither satisfied nor dissatisfied, and more than one-in-ten have no opinion. Overall, one-in-ten indicate that they are dissatisfied with the Policy. The neutrality of many Registrants is not surprising given their generally low level of engagement with the topic. The Registrars who completed a survey also tend to be satisfied with the Policy; few are dissatisfied.

There are few differences between Individual and Non-Individual Registrants in overall satisfaction with the Policy. This is striking, given that Individual Registrants benefit personally from the changes while Non-Individual Registrants do not. The similarity in their views suggests that there is broad support for the principle of protecting the privacy of individual dot-ca domain name holders.

Registrants who are satisfied with the Policy are most likely to mention increased privacy and protection of information, or that it adopts a balanced approach, as the main reasons for their satisfaction. Those who are dissatisfied tend to be split between believing that WHOIS information should be public or that the Policy doesn't go far enough with respect to privacy/protection of information. In general, dissatisfaction with the Policy tended to relate to privacy principles, rather than to specific elements of the Policy.

### C. Perceived Advantages and Disadvantages of the Policy

#### 1. From the perspective of dot-ca domain name holders, CIRA's WHOIS Policy is effective at protecting the privacy of their personal information, and in turn, at protecting them from unwanted intrusions such as spam.

As noted, the main perceived advantage of CIRA's WHOIS is that individual dot-ca domain name holders now have greater control over their personal contact information. Some forum participants also commented that they like having the option of whether or not to make their contact information public. Many also commented that the new Policy has greatly reduced or eliminated the spam that they receive:

*"My satisfaction level is excellent. I feel that my receipt of spam and unwanted contact has been kept at an acceptable level due to the non disclosure policies in place. I have not had anywhere near this measure of success with my non .ca domains."*

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Several of the Registrars also commented that the Policy is now more effective at protecting the privacy of their customers. As such, dot-ca domain name holders may not feel compelled to lie about their contact information when they register their domain name, and this makes the relationship between Registrar and Registrant more effective.

### 2. However, intellectual property and law enforcement/national security stakeholders voiced a number of perceived disadvantages.

While the stakeholders interviewed in the areas of intellectual property and law enforcement/national security could appreciate the advantages of the Policy for individual dot-ca domain name holders, both groups outlined a number of concerns from their own perspectives. The following points summarize the main criticisms and/or perceived disadvantages of the Policy among IP stakeholders:

- **Procedural “hoops”:** Whereas previously the process for obtaining contact information from the WHOIS was straightforward, now it is necessary to go through a number of steps, including using the online message delivery form.
- **Time-consuming:** The time required to submit a request and obtain contact information is considered too long and the waiting period of 14 days, excessive. Further, it was pointed out that the waiting period slows down the process for initiating a CDRP, if that step is taken.
- **Cost:** Whereas previously contact information could be obtained from the WHOIS at little or no cost, now some clients who feel that their rights are being infringed may feel that they need to hire a lawyer to submit a complaint. It was suggested that the cost might be from \$100-\$500, and that if the infringement is at a low level, a smaller company or an individual might not want to incur the cost (or time) to make a request.
- **Requirement for a trademark registration/Definition and requirement of “dispute”:** It was pointed out that while the CDRP allows for unregistered trademark rights to be asserted, the new Policy requires requestors with a trademark dispute to have a registered trademark. Further, the Policy is considered to give a too narrow definition of a “dispute”, and it was also suggested that in some cases it is difficult to know if a dispute exists without first reviewing the information contained in the WHOIS.

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- **Questions about whether process could be used for a CDRP:** IP stakeholders expressed concerns that the new mechanism cannot legitimately be used when the end result is intended to be a CDRP.
- **Loss of strategic/tactical approaches for resolving potential disputes:** Stakeholders argued that with the inability to look up WHOIS information, they cannot achieve a sense of how to approach a potential infringement, and in some cases, cannot conduct due diligence. For instance, they many have no idea of whether it is an actual, intentional infringement versus an “honest mistake”, and that the information contained in the WHOIS is often important in determining the first steps and how to approach the problem. Stakeholders also indicated that by notifying Registrants through use of the online message delivery form, the process warns them and gives them a chance “flip” the domain name to someone else.

From the perspective of law enforcement/national security agencies, the primary disadvantages of the new Policy are as follows:

- **Creates investigative delays:** Law enforcement often does not have the reasonable and probable grounds to obtain a search warrant at the outset of the investigation and the WHOIS information could be used with additional corroborative information to obtain the search warrants required to advance the investigation. Therefore, requiring a search warrant for basic WHOIS information can either delay an investigation or adversely affect it to the point that it does not advance.
- **The information provided is insufficient:** Whereas previously a WHOIS look-up provided information similar to what one might find in a regular phonebook and could be useful, now the information obtained through a request is very limited (e.g., a name). It was suggested that the information provided is insufficient to validate and/or cross-reference with other information.
- **Limits the types of crimes for law enforcement can receive assistance:** At least one stakeholder indicated that the new Policy limits what is considered “law enforcement activity” and that CIRA should not play a role in defining what is considered criminal activity on the Internet. Further, it was noted that Schedule A does not correspond to articles contained in the Criminal Code, that is, it doesn’t represent how the Criminal Code is structured.

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- **Alerts Registrants to the request from law enforcement:** Similar to the criticism from intellectual property interests, the fact that Registrants are notified within 60 days that their information has been requested by law enforcement is seen as a significant issue and a deterrent to using the mechanism. In many cases, the risk is not considered worth it, and that combined with the delays in receiving information and the insufficiency of the information released, the process is not effective.
- **Interferes with law enforcement's ability to act in the best interests of Canadians:** Stakeholders expressed concern that the Policy adversely affects law enforcement efforts in matters pertaining to Internet safety and the reduction of crimes committed on or facilitated by the Internet, and that this may put public safety at risk. It was noted that law enforcement tries to respond to the concerns of the Canadian public as a whole, and that in making requests, there is no motive for personal gain or to discredit any Registrant, or CIRA itself. In this way, it was suggested that law enforcement needs to be viewed differently than the general public (for instance, law enforcement is not using the information for purposes of phishing or spam).

Dot-ca domain name holders or CIRA members did not tend to share the specific concerns expressed by stakeholders in the areas of intellectual property or law enforcement/national security. As noted, those who are dissatisfied with the Policy sometimes characterized it as “overly bureaucratic”. Others feel that contact information should be publicly available as a matter of course, or alternatively, that the Policy does not go far enough in protecting domain name holders’ privacy. For instance, some commented that the information should be available by court order only.

### 3. Some CIRA members voiced concerns about the lack of public availability of contact information for the Technical Contacts of dot-ca domain names.

Several of the forum participants commented on the lack of ability to quickly identify and reach a technical contact for a dot-ca domain name with the new Policy, and as such, this can make it difficult to resolve technical issues. Overall, survey respondents are divided over whether CIRA should change its Policy to address this concern; fewer than one-half support displaying the WHOIS information of Technical Contacts for all Registrants, while about one-quarter oppose it and 3-in-10 are neutral or undecided.

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## D. Striking an Appropriate Balance

### 1. Most dot-ca domain name holders are supportive of CIRA's approach toward balancing privacy concerns and the legitimate need for access to a domain name holder's WHOIS information in certain situations.

The online surveys informed Registrants and Registrars about the major, specific elements of CIRA's WHOIS Policy and also provided them with details about how it has been used since its implementation. Respondents were asked to rate **and** provide feedback on specific elements of the Policy that are aimed at creating a balance between privacy concerns and the need for disclosure in some instances (and to rate the overall effectiveness of the Policy). Overall, one-half of Registrants believe that the Policy has been effective in achieving an appropriate balance between the privacy of Registrants and allowing for timely disclosure mechanisms for other stakeholders. Few Registrants characterize the Policy as ineffective. Rather, as with overall satisfaction, most of those who are not explicitly positive instead are neutral or hold no opinion.

Largely in response to concerns expressed by law enforcement agencies and intellectual property interests, CIRA's WHOIS Policy allows for specific circumstances whereby the information of Individual Registrants may be disclosed, including to law enforcement or national security agencies to investigate possible breaches of a child exploitation law in Canada, possible espionage, sabotage or terrorist threats, or threats to the stability or integrity of the Internet. Eight-in-ten or more Registrants support disclosure in all of these circumstances, and most strongly support it. A similar proportion of Registrants supports disclosure if it is believed that a dot-ca domain name holder is using someone else's personal information without their knowledge for the purposes of identity theft. Slightly fewer Registrants, but still almost seven-in-ten, favour disclosure when it is believed the domain name infringes on an individual's or an organization's Canadian intellectual property rights. Thus, overall, Registrants support all of the circumstances under which CIRA allows for disclosure of an individual's WHOIS information. Furthermore, most believe that this is "about the right number of circumstances".

However, notwithstanding the strong levels of support for disclosures at the request of law enforcement and/or national security agencies, a firm majority of Registrants would like CIRA to maintain the 30-60 day notification requirement to domain name holders if their information is disclosed.

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There was some debate in the members' forum regarding access to contact information for law enforcement agencies. While some commented that law enforcement agencies in Canada should have access as needed within the scope of individual rights under common law, others felt that CIRA should be reluctant to hand over information without "a very good reason" (e.g. a court order or subpoena).

### **2. Most dot-ca domain name holders support CIRA's procedures relating the message delivery form and the 14-day waiting period before a "Request for Disclosure" can be submitted.**

Almost two-thirds of Registrants surveyed believe that the requirement to use a message delivery form to contact domain name holders without providing access to their WHOIS information is a good idea. The same proportion also supports CIRA's requirement of a 14-day waiting period if no response is received from a domain name holder, before the requestor is able to submit a "Request for Disclosure". Again, this indicates that most Registrants support CIRA's approach toward striking a balance between privacy concerns and the necessary access to WHOIS information in some situations, and that the concerns of Intellectual Property stakeholders with respect to the Request for Disclosure process are generally not shared by dot-ca domain name holders.

### **3. There is no clear consensus over whether CIRA should continue to provide privacy protection for individual domain name holders who are using their domain for commercial purposes.**

One issue raised in the members' forum and in-depth interviews is the privacy protection that the WHOIS Policy affords to Individual Registrants who may be using their dot-ca domain name for commercial purposes. Some argued that, "*under the logic of business law*", sole-proprietorships should not be protected. In order to gauge the views of Registrants on this issue, they were asked whether CIRA should change the policy to display the WHOIS information for individuals who are using their domain name for commercial purposes, or whether it should continue to not display the WHOIS information for individuals regardless of whether the domain name is being used for personal or commercial purposes. Overall, Registrants are more likely than not to believe that CIRA should continue to not display the WHOIS information for individuals regardless of how the domain name is being used; however, a significant proportion (almost one-third) believe that CIRA should change the policy, and close to one-quarter are undecided.

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## E. Conclusions and Recommendations

- 1. Overall, the consultation findings indicate that most Registrants and CIRA members feel that CIRA has been successful in its attempt to strike an appropriate balance between privacy concerns and the need for accountability of individual dot-ca domain name holders in some circumstances.**

Most Registrants and members who are engaged with the issues being addressed with CIRA's Policy are satisfied with the approach CIRA has taken, both overall and on specific aspects of the Policy, such as the Request for Disclosure process. While some stakeholders have voiced strong opposition to the Policy and Procedures -- particularly those in the area of Intellectual Property -- their concerns are not widely shared by dot-ca domain holders as a whole. Further, the finding that Non-Individual Registrants tend to share many of the same views on the Policy as Individual Registrants suggests that it is not just those with a stake in the shift toward greater privacy protection who favour CIRA's approach.

There appears to be widespread support for CIRA's attempt to accommodate some of the concerns of law enforcement and national security agencies; however, most Registrants want the notification requirement maintained, and many see no need for CIRA to take steps with its Policy beyond what is legally required.

The minority of dot-ca domain name holders who are dissatisfied with the Policy tend to cite reasons related to principle rather than to problems they might have with specific elements of the Policy or its procedures; that is, their dissatisfaction stems from a belief that contact information should be private under all circumstances, or alternatively, that it should be public for all dot-ca domain name holders.

- 2. There are few specific recommended changes to the Policy.**

Participants in all phases of the consultation process were asked what specific changes, if any, they would recommend to make the Policy more effective at striking an appropriate balance between the privacy concerns of Registrants and the legitimate need to know Registrant information in certain situations. Beyond the desire of some to see a return to the previous policy (i.e., when all information was publicly available) or alternatively, to see CIRA restrict disclosure in all instances except for a court order, there were few specific recommended changes to the Policy.

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However, one compelling issue that emerged from the forum discussions and for which there was no clear consensus among Registrants as a whole, is how to make it relatively easy for both Registrars and Registrants to resolve technical and/or administrative issues that may emerge with respect to a dot-ca domain name (but that do not involve a dispute per se). This is an issue that CIRA may want to consider if it wishes to further improve the experiences of dot-ca domain name holders in terms of managing their domain name.