

Jurisdiction still matters: The Legal Contexts of Extra-National Outsourcing

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The Prevailing View

“The risk of personal information being disclosed to government authorities **is not a risk unique to U.S. organizations**. In the national security and anti-terrorism context, Canadian organizations are subject to **similar** types of orders to disclose personal information held in Canada to Canadian authorities. ... [Also] there are longstanding formal **bilateral agreements** ... that provide ... for the exchange of relevant information.”

- OPC, PIPEDA Case Summary #2005-313
- Cited in IPC Privacy Investigation Report PC12-39

What's Missing?

1. The Constitutional Question
2. This is not just about the USA PATRIOT Act
3. We are Non-US Persons



1. The Constitutional Question

Q: access to what information, on what standards, and with what mechanisms of accountability and oversight?



US-Canada Constitutional Comparison

US

“[I]n *Smith v. Maryland*, [metadata is] not protected by the Fourth Amendment. ... The proposition that was espoused by the Supreme Court in *Smith v. Maryland* is applicable today.”

- Robert Mueller, outgoing director of the FBI, Senate Judiciary Committee June 19, 2013

Canada

“Canadian jurisprudence has emphatically rejected the “risk analysis featured in American Fourth Amendment jurisprudence. ... According to that jurisprudence, voluntary disclosure to third parties defeats Fourth Amendment claims: e.g. see *Smith v. Maryland*”

- *R v Ward*, 2012 ONCA 660 at para 76

Recent Notable Canadian Constitutional Decision

- *R v Spencer* (SCC, 2014)
 - Anonymity is a privacy interest protected by s.8 of the Charter
 - Authorities need a warrant to obtain subscriber information from telecoms
 - *R v Cole* (SCC 2012)
 - Reasonable expectation of privacy in a computer even when it is a work computer to which the employer has access.
 - *R v Vu* (SCC, 2013)
 - Search warrant for a home does not include the authority to search a computer.
 - *R v Wakeling* (SCC 2014)
 - The Charter is engaged when Canadian authorities share wiretap information with US authorities.
 - *R v Fearon* (SCC 2014)
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Applying the Constitutional Q

Myth: There are international treaties that allow law enforcement authorities to share information, so jurisdiction doesn't matter.

Fact: Mutual Legal Assistance Treaties ensure that the constitutional standards of the sharing state are the ones that apply.

Canadian norms apply when Canada assists the US and they are more protective.



Example of Different Standards

US: FBI

- Compelled collection where reasonable grounds to believe “relevant” for an investigation to obtain
 - “foreign intelligence information” not about a US person
 - “protect against international terrorism or clandestine intelligence activities”

Canada: CSIS

- Compelled collection where reasonable grounds to believe “required” to investigate a
 - “threat to the security of Canada”
- Have to show that other investigative techniques have/will fail, or there is urgency, or there is likely no other way to obtain this information.

2. This is Not Just the USA PATRIOT Act

- ***Electronic Communications Privacy Act***
 - US authorities can access communications **without a warrant** once they have been stored for 180 days
 - **Not discussed** by OPC or IPC outsourcing decisions – b/c those were not about communications
 - This would be **unconstitutional** in Canada
- S.702 of US ***Foreign Intelligence Surveillance Act*** (FISA)
 - Legal authority for the NSA's PRISM program
 - Allows US authorities to access communications data (both content and metadata) **without a warrant**
 - **Not discussed** by OPC or IPC outsourcing decisions – partly because it was adopted in 2008
 - This would be **unconstitutional** in Canada

PRISM and FISA 702

Our data, our laws

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LISA M. AUSTIN, HEATHER BLACK, MICHAEL GEIST, AVNER LEVIN AND IAN KERR, NATIONAL POST | December 12, 2013 | Last Updated: Dec 11 3:15 PM ET
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Canadians are increasingly using U.S.-based computer servers for work and pleasure. But none of that private data is protected by our laws. DIEGO TUSON/AFP/Getty Images

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Over the past six months, the steady stream of disclosures from former U.S. National Security Agency (NSA) contractor Edward Snowden has revealed a massive surveillance infrastructure that seemingly touches all Internet and telephone communication across the globe.

There is no Canadian Equivalent to FISA 702

“The **2008 FISA Amendments Act**, for example, permits American authorities to seek broad certification to collect categories of foreign intelligence information for up to a year. ...

...

Surveillance with such lax privacy protections is fundamentally inconsistent with the values of a free and democratic society. **There is simply no comparable Canadian law that applies similar standards to Canadians. If there was such a law, it would be a gross violation of our constitutional rights.**”

- “Our data, our laws”
- signed by Lisa M Austin, Heather Black, Michael Geist, Avner Levin, Ian Kerr

3. We Are Non-US Persons

PATRIOT Act US Persons

- Investigation of a US person where relevant to **international terrorism or clandestine intelligence activities**
- Investigation cannot be based on **speech** activities
- Subject to **minimization** procedures

PATRIOT Act Non-US Persons

- Investigation of non-US person to obtain **“foreign intelligence information”**
- Not subject to speech and minimization protections

We Are Non-US Persons

FISA 702 US Persons

- May not be intentionally targeted
- Subject to US Constitutional protection
- Subject to minimization procedures

FISA 702 Non-US Persons

- Broad (warrantless) authorization to target non-US persons located outside of the US
- Collection of “foreign intelligence information”—content and metadata
- Compelled assistance of electronic communication service providers

Conclusion: No Similar Risk

- US authorities can get access to Canadian persons communications information within US jurisdiction:
 - On standards that would be unconstitutional if applied within Canada
 - With no protection from US constitutional law
 - Under US statutory authority for which there is no Canadian equivalent
 - With fewer statutory protections than those granted to US persons
 - Mutual Legal Assistance Treaties ensure that Canadian constitutional norms govern when Canadian authorities share information with US authorities