

# Crossing the Canadian/US Border: Are Your Electronic and Personal Data and Information at Risk? The Canadian Perspective

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# Outline

- Border searches by Canadian authorities
- Canadian regulations re export of information
- Questions

# Border searches by Cdn authorities

- Governed by *Customs Act*,
  - s. 98 – Search of the person
  - s. 99 – Examination of goods
- Subject always to the *Charter*
  - 8. *Everyone has the right to be secure against unreasonable search or seizure.*

# Customs Act, s. 99

- **Broad authority:**
- 99. (1) An officer may
  - (a) at any time **up to the time of release**, examine any goods that have been imported and open or cause to be opened any package or container of imported goods and take samples of imported goods in reasonable amounts;
  - (b) at any time **up to the time of release**, examine any mail that has been imported and, subject to this section, open or cause to be opened any such mail that the officer suspects on reasonable grounds contains any goods referred to in the Customs Tariff, or any goods the importation of which is prohibited, controlled or regulated under any other Act of Parliament, and take samples of anything contained in such mail in reasonable amounts; ...
  - (e) where the officer **suspects on reasonable grounds** that this Act or the regulations or any other Act of Parliament administered or enforced by him or any regulations thereunder have been or might be contravened in respect of any goods, examine the goods and open or cause to be opened any package or container thereof; or
  - (f) where the officer **suspects on reasonable grounds** that this Act or the regulations or any other Act of Parliament administered or enforced by him or any regulations thereunder have been or might be contravened in respect of any conveyance or any goods thereon, stop, board and search the conveyance, examine any goods thereon and open or cause to be opened any package or container thereof and direct that the conveyance be moved to a customs office or other suitable place for any such search, examination or opening.

# Customs Act

- While in Customs, no threshold suspicion or reasonable or probable grounds necessary
- *R. v. Simmons*, [1988] 2 S.C.R. 495, 1988 CanLII 12: per Dickson C.J. (case dealing with search of person)
  - 48. The crux of the Crown's argument is that the reasonableness of border searches within the meaning of s. 8 ought to be treated differently from searches occurring in other circumstances. The Crown relied heavily on the rationales articulated in American cases for carving out customs procedures as a general exception to standard search and seizure protections. The dominant theme uniting these cases is that border searches lacking prior authorization and based on a standard lower than probable cause are justified by the national interests of sovereign states in preventing the entry of undesirable persons and prohibited goods, and in protecting tariff revenue. These important state interests, combined with the individual's lowered expectation of privacy at an international border render border searches reasonable under the Fourth Amendment. **In my view, the state interests enunciated throughout the American jurisprudence that are deemed to make border searches reasonable, are no different in principle from the state interests which are at stake in a Canadian customs search for illegal narcotics. National self-protection becomes a compelling component in the calculus.**
  - 49. **I accept the proposition advanced by the Crown that the degree of personal privacy reasonably expected at customs is lower than in most other situations. People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries.** For the general welfare of the nation the state is expected to perform this role. Without the ability to establish that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function. Consequently, travellers seeking to cross national boundaries fully expect to be subject to a screening process. This process will typically require the production of proper identification and travel documentation and involve a search process beginning with completion of a declaration of all goods being brought into the country. Physical searches of luggage and of the person are accepted aspects of the search process where there are grounds for suspecting that a person has made a false declaration and is transporting prohibited goods.
  - 50. In my view, routine questioning by customs officers, searches of luggage, frisk or pat searches, and the requirement to remove in private such articles of clothing as will permit investigation of suspicious bodily bulges permitted by the framers of ss. 143 and 144 [Now s. 98 and 99] of the Customs Act, are not unreasonable within the meaning of s. 8. Under the Customs Act searches of the person are not routine but are performed only after customs officers have formed reasonable grounds for supposing that a person has contraband secreted about his or her body. The decision to search is subject to review at the request of the person to be searched. Though in some senses personal searches may be embarrassing, they are conducted in private search rooms by officers of the same sex. In these conditions, requiring a person to remove pieces of clothing until such time as the presence or absence of concealed goods can be ascertained is not so highly invasive of an individual's bodily integrity to be considered unreasonable under s. 8 of the Charter.

# Conclusion

- **Before customs clearance**, customs officers have the authority to search your goods, which would include an electronic device
- **After customs clearance**, customs officers have search authority where they suspect on reasonable grounds violations of *Customs Act* or other federal law (including *Criminal Code*)
- Both would likely withstand *Charter* challenge

# Export of certain information from Canada

- Canadian freak-out about the *USA Patriot Act*
- Restricted to the ***public sector***, but with some spillover concern about the private sector

# The Canadian freak-out

- First vocal response came from the British Columbia Government Employees Union (BCGEU)
- Against outsourcing of medicare processing to Maximus (American IT service provider)
- BCGEU launched its “Right To Privacy Campaign” – May 10, 2004



# BCGEU Campaign

**your \$\$ records!**


**I want you**

US federal authorities could soon have access to your confidential financial information, including bank account numbers, credit history, RRSPs... even your monthly living expenses.

That's because the Canadian Liberals are contracting out the administration of Provincial Revenue to an American multi-national corporation, making your personal tax and financial records subject to secret scrutiny under the USA Patriot Act.

MSP, PharmaCare... And now, Provincial Revenue.

There's only one foolproof way to protect your personal information: leave it in government... where it belongs.

 B.C. Government and Service Employees' Union

[www.bcgeu.ca](http://www.bcgeu.ca)  
cep-487

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# BCGEU Campaign

**Don't Care Card**

PERSONAL HEALTH ID  
91191191191  
BIRTH/DEATH/ISSUE 01/12/48  
GORDON CAMPBELL

**Premier Campbell wants to sell off the services that make Medicare work**

**P**rivatizing critical health care services like the Medical Services Plan and PharmaCare is a bad decision. It's risky. It's potentially costly. The only sure benefit will go to large corporations. Yet the Campbell government continues to push to privatize this important and sensitive work.

**It won't work**  
The final bidders include three American multinational corporations whose record does not inspire confidence. And there's one Canadian company with no experience in health care.

The American corporations have a track record of unexpected costs, failures to deliver services, and improper billing.

**It failed in the US**  
The State of Connecticut commissioner says letting one of these companies handle Medicaid claims was "the worst fiscal

and policy decision of the decade for the state of Connecticut."  
A grand jury was convened in Texas to investigate concerns that the state was being overcharged.  
In Wisconsin and Arizona it's a similar story—unmatched expenses and higher costs than the public services.

**A threat to privacy**  
Private companies are already answering your phone calls about MSP and PharmaCare issues. This has created delays for callers in getting the information they need, and long backlogs of calls.

New the government wants to make it even worse. Premier Campbell wants to put private corporations in charge of all the personal information in the MSP and PharmaCare computers.

This ill-considered plan, driven by ideology rather than facts, makes protecting the Coquitla look sensible.

**Gordon Campbell's privatization plan is a threat to your privacy, and to B.C.'s health care system.**

**Don't sell off the Medical Services Plan or PharmaCare**  
Sign the petition at: [www.petitiononline.com/publicpc](http://www.petitiononline.com/publicpc)

B.C. Government and  
Innovative Economy Union

# BCGEU Campaign



Should your private medical records be given to American corporations?

## Please help stop Campbell from selling off MSP and Pharmacare

The Gordon Campbell Liberals plan to sell off the Medical Services Plan and Pharmacare to either IBM or Maximus – both American multi-national corporations – by August 31. The government will give an American-owned corporation access to private records on every British Columbian. This includes health treatment, pharmacy, income tax, mental health and criminal records, as well as records from the ministries of Children and Family Development and Human Resources.

A New York expert on the

new USA Patriot Act says this could even give the FBI access to our private medical records.

The Patriot Act allows the FBI to demand corporations secretly hand over medical records and other personal information of innocent people. And U.S. legal precedents suggest even if the information is held by a Canadian subsidiary,

the American parent company could be required to hand it over.

Our personal medical information should not be made available to private corporations that don't answer to our privacy laws. It should remain in the care of public employees who are bound by an oath of office to keep it confidential.

For more information, and to sign the petition, visit [www.bcgeu.ca/1710](http://www.bcgeu.ca/1710)



# BC Commissioner's Inquiry

- Information and Privacy Commissioner of BC began an inquiry into the *USA Patriot Act* and British Columbians' privacy – Spring 2004
- Particularly focused on s. 215 – secret court orders allowing seizure of “any tangible thing”.
- Received over 500 submissions, including from the FBI and Maximus.

# Provincial responses

- British Columbia – ***public sector and specifically applies to service providers:***
  - Offense to store personal information outside of Canada
  - Offense to not notify Minister of foreign demand for disclosure
  - Whistleblower protection
- Alberta – ***public sector:***
  - Offense to disclose in response to a subpoena, etc. that is not binding in Alberta
- Quebec – ***public sector:***
  - Places stronger obligations on exporter
- Nova Scotia – ***public sector and specifically applies to service providers:***
  - Can't export personal information or allow it to be access outside of Canada. (Can be over-riden by necessity.)
  - Can't take devices with personal information outside of Canada. (Can be over-riden by necessity.)
  - Offense to not notify Minister of foreign demand for disclosure.
  - Whistleblower protection.

# Conclusion

- On entering Canada, laptops are likely as vulnerable to search as entering US
- Some provincial laws regulate the export of personal information, even on portable devices
- Lawyers, as service providers of public bodies, may be equally affected

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