

## Select privacy issues in the payment card industry

David T.S. Fraser (david.fraser@mcinnescooper.com)  
Payment card compliance in Canada – Toronto  
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Atlantic Canada's Law Firm  
New Brunswick Newfoundland & Labrador Nova Scotia Prince Edward Island mcinnescooper.com

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## Outline

- Breach notification – additional points
- Outsourcing – the view from the provinces

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## Breach notification

- No Canadian law, other than Ontario's *Personal Health Information Protection Act*, requires breach notification.
- But that **doesn't** mean you are off the hook.
- You probably have disclosure requirements that you didn't know about.

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## US breach notification laws

- Example:
  - Must US breach notification laws pertain to information about **residents** of those states.
  - California SB1386, amending civil code section 1798.29, 1798.82 and 1798.84
    - 1798.29. (a) Any agency that owns or licenses computerized data that includes personal information shall disclose any breach of the security of the system following discovery or notification of the breach in the security of the data to **any resident of California** whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The disclosure shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subdivision (c), or any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system.

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## US breach notification laws

- Example: My father-in-law
  - Retired professor
  - Moved to California – a resident of that state
  - Maintains Canadian pension and Canadian bank accounts
  - Holds Canadian credit cards
  - If his “personal information” is breached, even if in Canada, you have a legal requirement to notify him.
  - Canadian banks have thousands of customers like him.

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## Cross-border issues

- PIPEDA does not regulate cross-border information flows
- OSFI Guidelines regulate outsourcing
- But ... beware of provincial public sector privacy laws

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## 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 – including payment card processing

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## The Canadian Patriot Act 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

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## 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.

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## 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.

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## Effect on payment card processing

- Credit card/debit card information is “personal information” under provincial privacy laws
- If your customer is a public body in BC, AB, NS, the export of that data *may be* regulated
- Don’t have authority on whether the payment card processor is the
  - agent of the public body or
  - agent of the individual customer
- In any event, increasing number of RFPs call for all processing to take place in Canada. Usually not possible to fully comply.

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## David T.S. Fraser

Direct Dial 902 444 8535  
Email david.fraser@mcinnescooper.com

David is the chair of McInnes Cooper's Privacy Practice Group, working with large and small clients to implement compliance programs for the *Personal Information Protection and Electronic Documents Act* (PIPEDA) and provincial privacy laws. He regularly provides opinions related to Canadian privacy law for Canadian and foreign organizations and is a frequently invited speaker on this topic. In addition, David is the Vice-Chair of the Privacy Law Subsection of the Canadian Bar Association and the President of the Canadian IT Law Association.

David is also the author of “The Canadian Privacy Law Blog”, an online privacy blog at <http://www.privacylawyer.ca/blog>.

In 2002, David was invited to be an associate of the Institute of Law and Technology. He is a member of the faculty of Dalhousie Law School, where he teaches Privacy Law, Internet and Media Law, Law and Technology, and Law and Policy for Electronic Commerce. He is on the editorial board of the *Canadian Journal of Law and Technology*. Active in the Halifax technology community, David is secretary and director of advocacy for the Information Technology Industry Alliance of Nova Scotia (ITANS).

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