

January 1986

Transborder Flows: Its Implications in Canada-United States Relations

Hugh P. Donaghue

Follow this and additional works at: <https://scholarlycommons.law.case.edu/cuslj>



Part of the [Transnational Law Commons](#)

Recommended Citation

Hugh P. Donaghue, *Transborder Flows: Its Implications in Canada-United States Relations*, 11 Can.-U.S. L.J. 289 (1986)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol11/iss/31>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Canada-United States Law Journal by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Transborder Flows: Its Implications In Canada-United States Relations**

*by Hugh P. Donaghue**

The past decade has witnessed the phenomenal growth of international services of all types. One of the major driving forces of the growth has been the emergence of the computer and telecommunications technology, giving us the ability to transmit data economically between most cities of the world.

Financial services, such as those represented by the Society for Worldwide Interbank Financial Telecommunications (SWIFT) network, have added new dimensions to international banking. Tourism, transportation, consulting, health and educational services have crossed national borders with their offering.

But this growth has also raised controversy at international meetings over such issues as invasion of personal privacy and violation of national sovereignty. Thus we have a situation in which advances in technologies with enormous potential for enhancing economic welfare become matters of concern to the international community when the services provided by these technologies cross borders or, as we say, involve "transborder data flows."

Transborder data flows are generally defined as the electronic movement of data across national borders for storage and/or processing by a computer. These data flows involve communications from a terminal in one country to a computer in another country or from a computer in one country to a terminal in another.

The concept is straightforward and sounds simple; but because one element exists in Country A and another one in Country B, governments around the world have become uneasy. Their concerns involve the protection and security of data, legitimate access to data by its owner, differing national laws or, as in many countries no laws at all with regard to the treatment of data.

It is useful to trace the early development of governmental interest in and concern with transborder data flow. My initial introduction came in 1976 when questions were raised by the Swedish government about the practices of my Company's data center in Sweden, and the additional processing of data outside of Sweden.

That issue was whether or not our procedures were in compliance

** Remarks given at Conference

* Executive Consultant, Control Data Corporation.

with Sweden's Data Act of 1973. In the early 1970's, Sweden had determined that abuses might occur in the collecting and processing of data on its citizens. In an attempt to prevent such abuses, the government established rules for the collection, storage and dissemination of personal data on its citizens. It also wrote into law the rights of a citizen to review information collected on him—and in some circumstances, to have it deleted and amended.

As this legislation was being drafted, Swedish authorities came to realize that a number of personal data files on Swedish citizens were stored abroad. This led to the question of whether the new legislation should address personal data that was stored only within the borders of Sweden or whether it should extend to data stored abroad. The government chose the latter course and the legislation was applied to all data files on Swedish citizens regardless of where they were stored. This in turn led to the establishment of the Office of the Data Commissioner, where all files, domestic and international, would be registered. It was further required that any organization storing personal data outside the country would have to provide assurances that those files would receive the same protection stored abroad as if they were stored within Sweden and that individuals would have the same rights of review and appeal.

Similar legislation was introduced into several other European countries about the same time. These laws differed in substance, however. The Council of Europe then called together a group of experts to try to harmonize the privacy protection laws through a treaty.

Now, neither Canada nor the United States are members of the Council of Europe. Therefore, some of us appealed to the OECD, that is the Organization of Economic Cooperation and Development, to undertake a related exercise aimed at developing a set of voluntary guidelines that would address the same issue of privacy.

Many individuals in the private sector were concerned that if there were restrictions placed upon us based on privacy protection, then, in effect, they could constitute a nontariff barrier to trade. We approached the United States government and asked that a governmental committee be established to address these issues, and that a private sector advisory committee also be established. The first meeting of the advisory committee was held in December 1977 and I was asked at that time to chair it.

As the privacy treaty of the Council of Europe was being developed and as work proceeded with regard to the privacy guidelines within the OECD, a number of seminars were held in Europe to discuss the general aspect of information flows. The first one was held in Vienna in September of 1977. This was before the U.S. had established a committee, but it was that symposium that led the U.S. government to realize that one was needed.

The concern over informatin flows was given substance by statements at that meeting by a number of our European officials involved in

the drafting of their national laws. For example, Louis Joinet, at that time France's Magistrate of Justice stated:

Information is power and economic information is economic power. Information has an economic value and the ability to store and process certain types of data, may well give one country political and technological advantage over other countries. This, in turn, may lead to a loss of national sovereignty through supranational data flows.

With regard to the privacy issue, the OECD started its meetings in early 1978; by June of 1980, the group of experts were able to agree on a final set of guidelines which were adopted by the OECD in September of 1980. The Council of Europe gave approval on September 23, 1980 of the treaty. The principles behind the treaty were very similar to those of the guidelines—the basic difference being that one was a treaty and legally binding, and the other was a set of voluntary guidelines. There were many in Europe that weren't too sure how the U.S. would react to voluntary guidelines. So, many of us on the U.S. Advisory Committee sent the word out to our industries that voluntary compliance with the guidelines was necessary. Within a year, over 150 companies and organizations endorsed the guidelines.

Many companies had to make extensive changes to their data processing programs and reduce the amount of data that they stored on their personnel. But, everyone felt that the privacy issue was important enough that we should comply with the OECD guidelines. It was a wise business decision because it was going to allow us to continue to have access to this data here in the United States.

At the same time that they were developing national legislation to protect personal data, some of the European governments began inquiries into other aspects of the computerization of society. European intellectuals led the way in asking about the possible economic, social and political consequences of the advance of computing and telecommunications technologies. They foresaw threats to national well-being, employment and sovereignty. A computerized society, it was suggested, would be vulnerable to the manipulation by owners and operators of the new technologies. For example, Alain Madec, who headed a study commission on this subject for the French Government, revealed at an OECD meeting in October of 1980 some of his thinking with regard to the issues raised by transborder data flows. He said:

International exchanges of information concern an asset of universal value which can generate wealth or power to those that hold it. Oddly enough though, these flows are largely untouched by the traditional rules governing trade in products; they seldom appear in the accounts of those concerned and where made between related bodies, are rarely invoiced at their transfer price. Neither are they recorded by customs and their volume often remains unknown to the authorities.

Consequently, the free circulation of data implies far more than the

concept of free trade, providing opportunities without any possibility of control for fraud, espionage, dumping, profit plight. Owing to the lack of adequate means of measurement, however, the impact of information flows remains distinctly underestimated. Madec further stated:

It is, therefore, necessary that states succeed in jointly promoting better understanding and control of information flows in order to preserve the advantages of free circulation and assure that its affects are equitable. This cooperative effort has become an urgent necessity. If economic analysis fails to keep in step with the growing awareness of real or supposed dangers, protectionist barriers will be bound to arise, especially in the Third World, which would then take decades to dismantle, as the history of the GATT shows us.

His views coincide with many others in the field, especially those in Europe.

Now, let's address Canada and the United States in this same context. Canada has also been regarded with some suspicion in the U.S. in the data communications services industry. That is why many of us welcomed the initiative by Rowland Frazee, Chairman of the Royal Bank of Canada, two years ago when he asked for an open and frank discussion of traded data services and went on to address the issue in the context of transborder data flows. I firmly believe that constructive discussion could lead to a better understanding of the concerns of both sides and possibly to an agreement on a basic set of principles that will enhance prospects for economic growth in both countries.

Let me touch upon a couple of points that he made. At the Brookings Institute, in Washington D.C., two years ago, Frazee gave a presentation furthering this initiative. He cited two examples, one from each of our countries:

In the United States there is the Dresser case, the prohibition of an American subsidiary company in France from supplying equipment and technology for the Trans-Siberian gas pipeline project. What, might we guess, happened to the economic value and reputation of Dresser France in the instant that access to expertise and information was removed?

For the second, he stated:

In Canada in 1980 the New Bank Act required all bank data processing and electronic record storage to be done within the country. What did that do to the operating costs of newly established foreign owned banks?

Now, the Dresser action was taken to support an American foreign policy position. The Canadian action was taken, not to support domestic data processing, but to ensure unquestioned access and availability of data to our bank regulators, the Inspectors General of Banks. In either case, the reasons may have been misunderstood and they may be debatable. What is not in question at all is the sovereign right and

ability for national authorities to interrupt flows of data and the very real cost to someone of such interruptions.

I would suggest to you that without international agreements, those interruptions, those barriers to services trade will increase, repeating the mistake with services that we made in the 1930s with goods. I do not believe that any national economy, certainly not the international economy, can afford another mistake of that magnitude.

One final instance involves the use of nonsensitive data and its control by governments, in particular the United States. The U.S. government cited foreign policy and national security reasons when it decided in 1981 to withdraw its support for the International Institute of Applied Systems of Analysis, an East-West think tank, in Vienna, Austria. The Institute was established in the early 1970's during the heady days of detente as a means of bringing intellectuals together from both the East and West to conduct in-depth studies on such issues as world energy, agriculture and other matters. In support of the decision to withdraw, the U.S. government cited the potential access by Soviet scientists at IIASA to commercially available data bases, such as the Lockheed Dialogue data base.

The European response to this action was one of indignation. One of England's prominent publications argued that much of the technical information the United States was reluctant to supply to the USSR had its origin in Western Europe, not in the United States. The article goes on to say:

We hold no brief for the Russians, the East Germans and the rest of that crew, but we do believe that countries considering large-scale dependence on U.S. supplied sources should know the U.S. attitude towards freedom of information and whether that freedom is a conditional one or a general one. We also regret that U.S. industry spends a lot of time huffing and puffing against real or imagined nontariff barriers, while closing their eyes against barriers raised by its own government against non-U.S. customers.

Now, these are just three incidents that have occurred over the last few years. One of the problems that we have is that our own countries (certainly I can speak for the U.S.), do not have a comprehensive set of objectives or a policy on international telecommunications; however, we are working towards them. But we need more than that. What we really need is to establish a dialogue with other countries in greater depth than we are doing now. We are using international or multilateral organizations, such as the OECD, but I think it is time now to start a dialogue with our Canadian counterparts. I really believe it is long overdue.

When Frazzi first proposed his initiative for U.S.-Canadian governmental and private sector discussions three years ago, although his focus for talks was narrow in scope, (that is, trade in computer services), it is obvious that many broader principles involving transborder data flows would also have to be addressed. It appeared at one time that the up-

coming trade talks might provide the vehicle for such discussions. This was at the time the talks were reportedly sectoral in approach. Now, it looks as though the trade talks are headed towards the broader issues of government procurement and national treatment.

I am concerned that this important issue of transborder data flows and the development of the "rules of the road" to establish a framework that will allow the freest flows, consistent with the protection of individual privacy, proprietary information, and national security, should not be lost. I know the U.S. private sector is prepared to engage in such dialogue. I hope the Canadians are too.