# Privacy Rights in Crisis Across Country

A major international conference in Montreal last month raised concerns about diminishing privacy rights in Canada. Although a general right to privacy is constitutionally protected under sections 7 and 8 of the Charter of Rights and Freedoms, the extent to which the state will uphold this protection has been questioned over the past few years.

One issue addressed at the conference was the impact of modern technology on privacy, given the increasing presence of computer chips in household products, the use by employers of global positioning systems and hidden cameras to track employees, and the creation of government no-fly lists by electronic data mining [1].

Another issue addressed at the conference was the growing tendency for government agencies to obtain personal information about consumers from companies. The relevancy of this issue is apparent in a recent initiative by Public Safety Canada and Industry Canada to facilitate the RCMP's access to personal information held by telephone and Internet service providers [2]. The idea behind the initiative is to allow the RCMP to obtain the information without a court order, thus expediting the investigation process. The initiative has been heavily criticized by Canadian privacy and civil liberties organizations, who allege that they have not been properly consulted in the matter [3].

The Federal Court of Canada recently approved the provision of personal information held by a company to a government agency. In a decision dated September 18, 2007 Justice Hughes of the Federal Court approved an order by the Canada Revenue Agency (CRA), compelling eBay Canada Ltd. to release information to the agency about its high-volume sellers [4]. The CRA wanted the information to ensure that eBay sellers were complying with the Income Tax Act. In response, eBay Canada Ltd. argued that as a subsidiary of eBay Incorporated, "all of the [personal] records are kept in digital files outside of Canada" [5]. A possible implication of this argument is that the American government could compel eBay Inc. to release this information to them under the Patriot Act [6].

The far-reaching investigative powers of the Patriot Act were somewhat limited by a September 6, 2007 decision of a federal judge in Oregon, who ruled that two provisions of the Patriot Act were a violation of the Fourth Amendment under the American Constitution [7]. In that case, a lawyer had been detained and questioned after fingerprints identical to his were found on a bomb detonator used in the 2004 Madrid train bombings. The judge ruled that the disputed provisions were unlawful because they allowed warrants to be granted without the need for the government to show reasonable and probable cause [8]. Earlier in September, a federal judge in New York struck down the Patriot Act's National Security Letter (NSL) provision. In particular, the judge ruled that the "gag" power under the Act, which forced the recipient of the letter to refrain from discussing it with anyone, was an unconstitutional violation of the First Amendment [9]. Both decisions appear to be

consonant with the views of privacy and civil liberties organizations regarding the unconstitutionality of the Patriot Act, and may indicate a shift in American society's attitude towards the broad investigative powers granted by the Act to the U.S. government.

Striking a balance between privacy and national security remains a difficult task for most Western states in the post 9-11 era. For example, a representative from the U.S. Homeland Security Department announced at the conference in Montreal that Canadians "must be willing to surrender personal information, submit to electronic body scans at airports, and prepare for other technological invasions" to guard against potential terrorist threats [10]. The Department also announced at the conference that the same measures will be applied to European travellers, pursuant to a recent agreement between the U.S. government and the European Union allowing the Americans to collect personal passenger information such as names, addresses, and phone numbers [11]. Civil liberties and privacy organizations questioned whether such measures would be effective, as well as the underlying assumption that national security is enhanced by reducing the privacy rights of citizens.

However, the state is not the only watchdog in a surveillance society; Canada's Federal Privacy Commissioner, Jennifer Stoddart, reminded conference attendees that technology and the Internet "are turning ordinary citizens into spies who can post pictures of [their] neighbours' yards online" [12]. Stoddart warned that "social networking sites like Facebook…can be corrupted by the unwanted circulation of false or malicious postings" [13]. Indeed, this was apparent in two separate incidents involving Facebook in early September [14]. In Winnipeg, a union "saved the jobs of six workers after they ridiculed [their] supervisor on Facebook" [15]. Later the same week and also in Winnipeg, a mother reported that "pictures of her son [that] she had placed on the Internet had been used to create a new personality for the boy on an international website" [16]. The article documenting the story debated the legal issue of whether personal photos on the Internet are considered to be in the "public domain" and therefore could be used lawfully without permission by other individuals or companies. As is the case regarding emerging technologies (and statutes legislating these technologies), the law appears to be unclear in this area.

Cases

- *eBay Canada Ltd v Canada (National Revenue)*, 2007 FC 930.
- *Mayfield v US*, F Supp 2d, (D.Or. 2007)
- *Doe v Gonzales*, 500 F Supp 2d 379 (S.D.N.Y. 2007).

[1] Carly Weeks, "Army of Little Brothers as bad as Big Brother: Privacy Czar" CTV News (24 September 2007)
[2] Carly Weeks, "Privacy rights loss alarm Canada's civil libertarians" Edmonton Journal (13 September 2007).
[3] "Government moving to access personal info, sparking privacy fears" CBC News (12 September 2007).
[4] See: eBay Canada Ltd. v. Canada (National Revenue), 2007 FC 930.

[5] “Court rules Revenue Canada can monitor eBay sales” CTV News (27 September 2007).
[6] See: Martha Peden, “Privacy is not absolute: An update on the USA Patriot Act” Centre for Constitutional Studies.
[7] “U.S. judge rules 2 provisions of Patriot Act unconstitutional” Canadian Press (26 September 2007); see also: Mayfield v US, F Supp 2d, (D.Or. 2007). The Fourth Amendment states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”
[8] In Canada, section 8 of the Charter of Rights protects an individual’s right to be free from unreasonable search and seizure.
[9] Doe v Gonzales, 500 F Supp 2d 379 (SDNY 2007).
[10] Carly Weeks, “Security justifies privacy intrusion – official” Edmonton Journal (27 September 2007).
[11] Ibid.
[12] Supra note 1.
[13] Ibid.
[14] For a detailed discussion of Facebook and privacy, see: Martha Peden, “Guess Who’s Creeping on Your Facebook” Centre for Constitutional Studies (27 June 2007).
[15] “Union Settles Facebook Issue” The Winnipeg Free Press (13 September 2007).
[16] “Mom upset after son’s photos scalped from website” CBC News (22 September 2007).