Supreme Court of Canada upholds data matching practices

Report by Eugene Oscapella

PL&B EXAMINES A CASE of how government snooping on the unemployed was upheld by the Supreme Court. A challenge launched by former Canadian Privacy Commissioner, Bruce Phillips, has been lost.

The challenge concerned the practice of taking data obtained from Canadian travellers returning to their homeland and comparing the data with an employment insurance database held by a separate federal department. The object was to determine whether individuals who were claiming eligibility for employment insurance benefits were, in fact, available for work. Evidence that they were out of the country during periods where they claimed eligibility could be used to deny them benefits.

Phillips summarised the legal issues in his 1997-98 annual report. The first was whether or not Canada's customs legislation took priority over the government's obligation in the Privacy Act to use personal information only for the purpose for which it is collected, unless the individual consents. The second was whether or not searching every returning traveller on suspicion of defrauding Canada's employment insurance scheme offended the "reasonable search and seizure" provision of the Canadian Charter of Rights and Freedoms.

On December 7th 2001, the Supreme Court of Canada upheld a decision by Canada's Federal Court of Appeal that the data match was permissible. It relied on the reasons delivered by the Federal Court of Appeal.

In 2000, the Court of Appeal rejected the argument that the Privacy Act requires that personal information be disclosed only for the purpose for which it was collected or for a use consistent with that purpose. The requirement in the Act that a government institution, such as the employment insurance commission, collect personal information intended to be used for an administrative purpose directly from the individual to whom it relates, was also not absolute.

The Court found that in a self-reporting scheme, such as employment insurance, the commission must be able to collect information from an outside source when a claimant fails to report it voluntarily.

Secondly, the Court of Appeal held that the wide range of the exceptions permitted under subsection 8(2) of the Privacy Act unquestionably attested to the intention of Parliament to allow disclosure of personal information to persons who have no connection whatsoever with the disclosing institution and for purposes other than those for which the information was collected.

The Court of Appeal further concluded that the Privacy Act allows Parliament to confer on any cabinet minister a wide discretion as to the disclosure of information his department has collected. The Court stated that Parliament, in part through the broad disclosure provisions in the Privacy Act, left itself a "considerable margin of manoeuvre" with respect to its own legislation, and took advantage of it.

In his last annual report as Privacy Commissioner, Phillips stressed that "electronic rummaging" through government files makes a mockery of constitutional privacy protection against unreasonable search or seizure, and of the presumption of innocence - particularly when the search is based on no reasonable grounds for suspicion, and subject to no independent review. "Should these data matches become routine, government will no longer protect any of its citizens' personal information against access (except in specific circumstances set out in the law), no matter whether the information was freely given or compelled by law." If the Privacy Act was to be interpreted in the manner suggested by the Federal Court of Appeal, and if Canadian constitutional law provided no protection against this type of data matching, "then nothing prevents government assembling and circulating huge databases of personal information among federal agencies – and possibly beyond."

Phillips stressed that fair information practices that limit the collection and restrict the use and disclosure of personal information must not be subject to broad exceptions. Exceptions to such limits must be as few in number and as narrow in scope as possible.

Further information:
www.fja.gc.ca/documents.cfm?org=vol&doc=21017&start=1
www.lexum.umontreal.ca/csc-scc/en/rec/html/privacy.en.html.

The Privacy Commissioner's annual report for 1999-2000 can be found at: www.privcom.gc.ca/information/ar/02_04_08_e.asp.