**Focus** INFORMATION TECHNOLOGY

# Outcry may curtail police social media surveillance

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Real-time surveillance of social media by police breaches privacy rights and may infringe basic rights protected by the *Canadian Charter of Rights and Freedoms*.

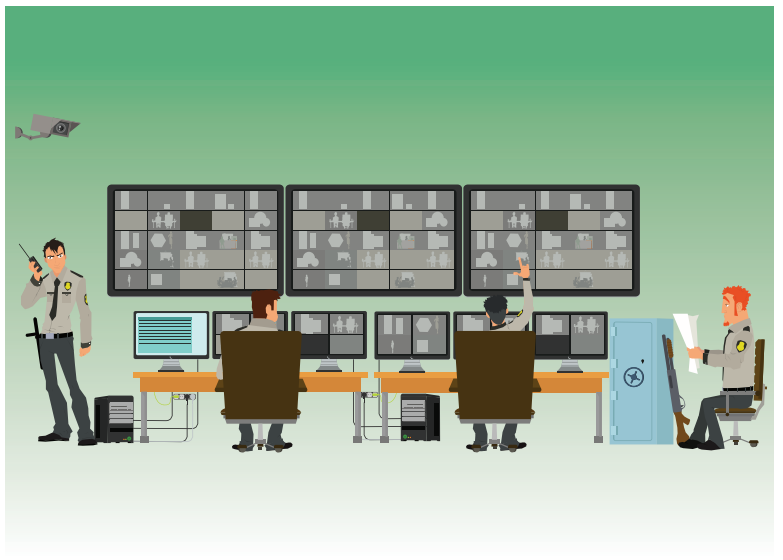
The recent revelation of the use of real-time, location-based social media surveillance by police in the United States, such as during protests in Baltimore over the death of Freddie Gray, has attracted strong criticism from civil liberties groups. In the wake of the objection of police use of social media surveillance, many social media channels including Facebook, Twitter, Instagram and YouTube have reportedly cut ties with certain companies which provide the surveillance services.

This type of surveillance technology is legally available and is regularly used in retail marketing and advertising. Many privacy concerns have been raised about using individual social media and Internet activity for commercial purposes.

The use of social media surveillance by police may raise additional privacy concerns. In Canada, the acquisition of social media surveillance by police could engage the *Charter,* and specifically freedom from unreasonable search and seizure.

The debate surrounds the targeted and covert use of "publicly available" social media information. In the U.S., the police have asserted that the analysis of location-based social media information is an effective tool to maintain public safety and to identify potential criminal activity as it unfolds. There is little doubt that the surveillance information is useful to police, but is the acquisition and use of this information lawful?

To address this issue pursuant to *Charter* rights, consideration must be given to the "subject matter" of the information at issue, whether the use of the information engages a "privacy interest," and finally whether there is a "reasonable expectation of privacy" deserving of constitutional protection over that information. If a reasonable expectation of privacy exists, then it would be unlawful for police to use the surveillance information without a search warrant (see *R. v. Spencer* 2014 SCC 43 and *R. v. Ward* 2012 ONCA 660).



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Real-time, location-based social media surveillance uses information that is voluntarily and publicly exchanged on social media channels during large public gatherings, such as during sporting events, entertainment, public interest rallies and political protests.

Of primary significance, in addition to accessing the social media communication, the surveillance includes an analysis to reveal trends occurring within a specific location.

The use of the public information for surveillance purposes engages an established privacy interest of anonymity (*Spencer* and *Ward*). The interest of anonymity permits individuals to act in public places, free from identification and surveillance. This concept is particularly foundational to Internet activity. Although Internet activity may occur in the public domain, the courts respect that people want to keep private their personal connection to their Internet activity (*Spencer*).

In addition, a territorial privacy interest is probably engaged with the location-based surveillance.

To consider whether there is a reasonable expectation of privacy over the information deserving of constitutional protection, the courts look to the "totality of the circumstances" (*Spencer*).

A significant factor to consider is the voluntarily public sharing of information on social media, which police seem to be able to legally access without the need for search warrants. Simplistically, by its very nature, social media communication is not private.

However, the courts acknowledge that voluntary disclosure of information does not automatically forfeit privacy (*Spencer*). The courts also recognize the concept of "public privacy" which occurs when an individual is in a public place but still seeks freedom from identification and surveillance.

The obvious value of the surveillance purchased by police is the analysis showing emerging patterns to facilitate targeted responses to potential criminal activity. However, the courts warn that whether an individual is engaged in criminal activity is not relevant to the totality of the circumstances — one cannot rely on the discovery of criminal activity to justify a breach of a reasonable expectation of privacy (*Spencer*).

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Courts often turn to privacy legislation, such as the *Personal Information Protection and Electronic Documents Act* (PIPEDA) to assist in determining expectations of privacy in relation to the collection, use and disclosure of personal information. Although PIPEDA would not apply to accessing social media communication in its original form, it may be engaged on the purchase of the otherwise legal technology to collect and analyze the data. The commercial acquisition of social media for "surveillance" purposes, without notice or consent, likely contravenes PIPEDA.

Based on the totality of the circumstances, civil libertarians will claim that real-time location-based surveillance of social media by police during public events raises a reasonable expectation of privacy deserving of protection under the *Charter*. This form of surveillance goes far beyond mere accessing social media in a manner that is entirely distinct from its original purpose. However, it is unclear that the purchase of social media surveillance by police constitutes a seizure of public information so as to engage *Charter.* Regardless, the strong public outcry of breach of privacy may curtail the use of social media surveillance by the state.

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## Love locks and bridges no match in Brooklyn

A certain expression of romantic love has recently become illegal in New York City. Anyone attaching a so-called "love lock" to the Brooklyn Bridge will be liable for a US$100 fine, reports yahoo.com. The trend of clipping a small padlock, often engraved with a couple's names, on to a bridge is a worldwide phenomenon. The trouble is that too many locks can pose a hazard, as when a section of fencing on a Paris bridge collapsed in 2014 under the weight of the locks. Last year, 11,000 locks were removed from the Brooklyn Bridge at a cost of US$116,000. Worse, a wire attached to a street light on the bridge broke under the weight of dozens of locks, closing a lane of the bridge for several hours while crews fixed it. "While we welcome and appreciate the enthusiasm of couples sharing the walk on this New York City landmark, we ask that they abide by a variation of a maxim heard in our national parks," Department of Transportation commissioner Polly Trottenberg said in a statement. "Take nothing but selfies, leave nothing but footprints." – **STAFF**