SCC Court File No: 37524

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA
APPELLANT
(Appellant)

- and -

PHILIP MORRIS INTERNATIONAL, INC.
RESPONDENT
(Respondent)

MOTION RECORD
OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC
(Motion for leave to intervene)

Pursuant to Rules 47 and 55 of the Rules of the Supreme Court of Canada

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TABLE OF CONTENTS

TAB 1

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PHILIP MORRIS INTERNATIONAL, INC.
RESPONDENT
(Respondent)

NOTICE OF MOTION
OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC
(Motion for leave to intervene)

Pursuant to Rules 47 and 55 of the Rules of the Supreme Court of Canada

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TAKE NOTICE that the Proposed Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), hereby applies to a Judge of the Court pursuant to Rules 47, 55 and 59(2) of the *Rules of the Supreme Court of Canada*, SOR 2002/156, as amended, for an order:

1. granting CIPPIC leave to intervene in this appeal;

2. permitting CIPPIC to file a factum of no greater length than 10 pages;

3. permitting CIPPIC to present oral arguments for 10 minutes at the hearing of this appeal; and

4. any further or other order as said Judge or this Honourable Court may deem appropriate.

AND FURTHER TAKE NOTICE that the following documentary evidence will be relied upon in support of this motion:

1. the affidavit of Tamir Israel, Staff Lawyer at CIPPIC, sworn November 13, 2017; and

2. such further and other material as counsel may advise and this Honourable Court may permit.

AND FURTHER TAKE NOTICE THAT this motion shall be made on the following grounds:

1. CIPPIC has a direct and significant interest in this appeal, and will leverage its expertise to provide useful submissions different from those of other parties to the appeal:

   (i) CIPPIC is a legal clinic with a mandate to advocate in the public interest on legal and policy issues arising at the intersection of law and technology. Included in this mandate is concern that anonymization practices are currently insufficient to ensure the privacy of Canadians' medical records. Litigation in the digital context raises distinct questions of privacy and the protection of sensitive and personal information in databases, and fall within CIPPIC's purview;

   (ii) since its founding in 2003, CIPPIC has participated in numerous legal and policy processes relating to digital privacy. This has included interventions before the courts, testimony before parliamentary committees, appearances in quasi-judicial processes, as well as participation in various international policy-making fora on related issues;

   (iii) the matters raised by this appeal have implications that extend beyond those of the immediate parties. CIPPIC has a special and direct interest in these broader implications, arising from its mandate. This case raises important issues about the right to challenge the outcomes of analytics, and what that right should entail, and how such rights will affect the privacy afforded to medical records of individual Canadians;

   (iv) if granted leave to intervene, CIPPIC will draw on its extensive institutional expertise in matters related to government transparency, privacy rights, and digital platforms, in order to

provide useful submissions that are different from those of other parties; and

(v) this Court has recognized CIPPIC's contributions to and expertise in this field by granting it intervener status on a number of prior occasions involving privacy issues including *Douez v Facebook Inc*, 2017 SCC 33, which addressed privacy concerns in a claim with respect to online content, *AB v Bragg Communications Inc*, 2012 SCC 46, which addressed the need to ensure privacy rights are protected in the context of the open court principle, and *R v Marakah*, 2017 SCC File No. 37118, which will address the expectation of privacy in personal text messages;

2. if granted leave, CIPPIC proposes to place this case into the context of this Court's rapidly evolving jurisprudence addressing privacy and anonymity rights afforded to Canadians;

3. CIPPIC will further provide the Court with specific guidance on the issue of whether a party is entitled to challenge the results of the analysis of a large data set – in this case, by getting access to the data in order to conduct its own analyses. Specifically, CIPPIC will offer the Court insight on mechanisms to protect privacy and anonymity while at the same time addressing important issues about the right to challenge the outcomes of analytics, and what that right should entail. These issues will be of fundamental importance as governments increase their reliance on big data analytics and on artificial intelligence;

4. the proposed intervention will not cause delay or prejudice to the parties;

5. CIPPIC does not seek costs and asks that it not be liable for costs to any other party in the event it is granted leave to intervene in this appeal;

6. Rules 47, 55, 57, 59 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, *as amended*; and

7. such further and other grounds as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of November, 2017.

[original signed]

David Fewer

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Agent for the Respondent,
Philip Morris International, Inc.

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.

TAB 2

SCC Court File No: 37524

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

APPELLANT
(Appellant)

- and -

PHILIP MORRIS INTERNATIONAL, INC.

RESPONDENT
(Respondent)

AFFIDAVIT OF TAMIR ISRAEL

I, Tamir Israel, of the City of Ottawa, DO SOLEMNLY AFFIRM THAT:

I. INTRODUCTION

1. I am Staff Lawyer at the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) based at the Centre for Law, Technology and Society (CLTS) at the University of Ottawa. This Affidavit is sworn in support of CIPPIC's motion for leave to intervene in this appeal.

2. Except as otherwise indicated, I have personal knowledge of the matters to which I depose in this Affidavit. Where I lack such personal knowledge, I have indicated the source of my information and I verily believe such information to be true. Where specific CIPPIC activities are referred to below in which I have had no personal participation, I have familiarized myself with the relevant files, and base my account thereof on this knowledge.

3. CIPPIC is a legal clinic founded at the University of Ottawa, Faculty of Law. It was established in September 2003 with funding from the Ontario Research Network on Electronic Commerce and an Amazon.com *Cy Pres* fund with the purpose of filling voids in public policy debates on technology law issues, ensuring balance in policy and law-making processes, and providing legal assistance to under-represented organizations and individuals on matters involving the intersection of law and technology. In 2007, CIPPIC received additional funding from the Samuelson-Glushko

Foundation, enabling CIPPIC to continue fulfilling its mandate and to join the international network of Samuelson-Glushko technology law clinics.

4. CIPPIC operates under a Staff Lawyer and a Director, presently myself and David Fewer, respectively. Both are called to the bar of Ontario and work for CIPPIC full time. CIPPIC benefits from the expertise of an internal Advisory Committee comprised of faculty members of the Centre for Law, Technology and Society, as well as of an external Advisory Board composed of five highly respected lawyers and academics in the technology law field from across North America.

5. CIPPIC's core mandate is to advocate in the public interest in debates arising at the intersection of law and technology. CIPPIC has the additional mandate of providing legal assistance to under-represented organizations and individuals on law and technology issues, and a tertiary education-based mandate that includes a teaching component and a public outreach component. In pursuit of these mandates, CIPPIC's activities regularly extend to provision of expert testimony to parliamentary committees, participation in regulatory and quasi-judicial proceedings and strategic interventions before the Courts. CIPPIC is also deeply involved in research and advocacy on the nature and social impact of technological change, and the manner in which the evolving legal landscape interacts with the distinct challenges of a technology-driven world.

6. Some of CIPPIC's general expertise in internet policy issues is described below, with particular emphasis on activities relating to online platforms, transparency in government decision-making, and consumer protection in digital settings. Specific CIPPIC experience on these issues includes interventions before courts on privacy and government transparency, and testimony before legislative committees. CIPPIC has additionally participated in relevant regulatory proceedings, including quasi-judicial complaints regarding the obligations of global social media sites under Canadian law, and on the implications of outsourcing email storage in foreign states under foreign laws. CIPPIC has also participated in relevant law reform venues such as the Law Commission of Ontario, where CIPPIC Director David Fewer currently sits on the Advisory Group of a multi-year project on "Defamation in the Age of the Internet."

II. INSTITUTIONAL EXPERTISE

(a) Judicial

7. CIPPIC has been granted leave to intervene by this Court on previous occasions, including:

(i) *Haaretz.com, et al v Mitchell Goldhar*, 2017 SCC File No 37202, on access to justice considerations arising in jurisdiction analysis;

(ii) *R v Jones*, 2017 SCC File No. 37194, on whether the *Charter* and Part VI of the *Criminal Code* apply to text messages sought from their recipient's service provider by law enforcement;

(iii) *R v Marakah*, 2017 SCC File No. 37118, on the reasonable expectation of privacy in the text messages sent from the defendant's cell phone to another recipient;

(iv) *Douez v Facebook, Inc*., 2017 SCC 33, on protecting privacy rights implicit in the *Charter* from being overridden by non-negotiable forum selection clauses;

(v) *Canadian Broadcasting Corporation v SODRAC 2003 Inc*, 2015 SCC 57, on the application of the technical neutrality principle where efficiencies gained from technological advancements impact on copyright laws;

(vi) *R v Fearon*, 2014 SCC 77, on the expectations of privacy attracted by mobile devices such as cell phones, and the resulting need to include safeguards in the historical doctrine that permits law enforcement to search incident to arrest;

(vii) *R v Chehil*, 2013 SCC 49 and *R v MacKenzie*, 2013 SCC 50, addressing the parameters of the reasonable suspicion standard in the context of the common law power to conduct a privacy-invasive search through the deployment of a drug detection dog;

(viii) *R v TELUS Communications Co*, 2013 SCC 16, on the need to adopt a flexible, purposive approach when applying Criminal Code protections intended to safeguard against the interception of private communications to technologically advanced communications delivery methods in the

context of SMS text messaging;

(ix) *AB v Bragg Communications Inc*, 2012 SCC 46, on the need to ensure privacy rights are protected in the context of the open court principle, particularly in light of the greater risk to privacy posed by the online publication of judicial decisions;

(x) *Crookes v Newton*, 2011 SCC 47: wherein CIPPIC intervened to argue that more robust action than the mere posting of a hyperlink must occur before a hyperlinker can be held to have published defamatory statements in the linked content; and

(xi) *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34: wherein CIPPIC intervened to address the appropriate adaptation of consumer contract law principles to an online environment so as to take into account unique internet issues, such as whether additional terms referenced through a hyperlink were 'external' to the contract.

8. CIPPIC has also been active in the courts as counsel to primary parties in proceedings implicating law and technology, e-commerce and online jurisdiction more broadly, including:

(i) *Bell Canada v Amtelecom*, 2015 FCA 126: on the retrospective application of elements of the CRTC's Wireless Consumer Protection Code to pre-existing contractual relationships, in the context of a consumer protection regime imposed onto Wireless Service Provider contracts;

(ii) *Authors Guild v Google, Inc*, No. 05-Civ-8136 (DC)(S.D.N.Y. March 22, 2011): CIPPIC acted on behalf of a group of independent Canadian authors and for the Canadian Association of University Teachers (CAUT) in opposing the proposed US-based class action settlement agreement that would have established an intermediary, Google, as a centralized hub for digital books, affecting the rights of international copyright holders, including Canadian authors, as well as the privacy rights of Canadians; and

(iii) *Lawson v Accusearch*, 2007 FC 125, CIPPIC sought judicial review of the Office of the Privacy Commissioner's decision to refuse, on jurisdictional grounds, to exercise its investigatory

mandate against a United States-based company collecting, using and disclosing the personal information of Canadians. CIPPIC argued that in an online world, territorial location cannot immunize an organization from the privacy protections guaranteed to Canadians by PIPEDA.

(b) Parliamentary Committees and Governmental Consultations

9. CIPPIC has had many opportunities to provide expert testimony and submissions to Parliamentary Committees and other governmental processes regarding the challenges posed by online environments and e-commerce for Canadians, a sampling of which includes:

(i) testimony before the House of Commons Standing Committee on Access to Information, Privacy & Ethics (ETHI), "Study: Personal Information Protection and Electronic Documents Act", March 23, 2017;

(ii) testimony before the House of Commons Standing Committee on Access to Information, Privacy & Ethics (ETHI), "Bill C-51*: Security of Canada Information Sharing Act* (SCISA)", November 22, 2016;

(iii) testimony before the House of Commons Standing Committee on Access to Information, Privacy & Ethics (ETHI), "Canada's Ageing *Privacy Act*: The Need for Modernization", September 20, 2016; Report of the Standing Committee on Access to Information, Privacy & Ethics, "Protecting the Privacy of Canadians: Review of the *Privacy Act*", December 2016, Fourth Report, 42nd Parliament, 1st Session;

(iv) testimony before the Legislative Assembly of British Columbia Special Committee to Review the *Freedom of Information and Protection of Privacy Act*, on the implications of recent trade agreements for legislative provisions aimed at protecting the privacy of government-held Canadian data in cross-border contexts (November 18, 2015);

(v) testimony before the House of Commons Standing Committee on Industry, Science and Technology (INDU), on Bill S-4: the Digital Privacy Act, addressing the need for strong and enforceable privacy rights and on the dangers of an overly permissive cyber security information-

sharing regime (February 19, 2015);

(vi) testimony before the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) on the evolving privacy implications of social media (Study: Privacy and Social Media, June 19, 2012); and

(vii) testimony before the House of Commons Standing Committee on Industry, Science and Technology (INDU), on Bill C-27: Electronic Commerce Protection Act, addressing the regulation of unsolicited electronic messages and the unauthorized installation of computer programs (Monday, September 28, 2009).

(c) Quasi-Judicial Tribunals

10. CIPPIC has participated in various activities before quasi-judicial administrative tribunals in pursuit of its objectives. A representative sample of CIPPIC's advocacy in this field includes:

(i) representation of the Open Media Engagement Network in *In re: An Applicant and the Vancouver Police Department*, BC OIPC File No: F15-63155, a written inquiry before the Information & Privacy Commissioner of British Columbia examining the refusal of the Vancouver Police Department to respond to an access to information demand requesting records relating to a surreptitious surveillance tool;

(ii) an intervention in *Application Regarding Vidéotron's Unlimited Music Zero Rating Service*, CRTC File Nos: 8661-P8-201510199 & 8622-V42-20150735, September 1, 2015, regarding the potential impact on online innovation that would arise from a digital music platform operated by a mobile service provider;

(iii) Telecom Notice of Consultation CRTC 2012-557, *proceeding to establish a mandatory code for mobile wireless services*, October 11, 2012, CRTC Reference No.: 8665-C12-201212448: a regulatory proceeding which examined challenges arising from managing jurisdiction conflicts and in consumer protections regimes within Canada and at the federal level, as applied to wireless service provider contracts;

(iv) a complaint and ongoing intervention in *CIPPIC v Facebook*, PIPEDA Case Summary #2009-008, applying Canadian privacy laws, norms and principles to a new and emerging medium of online social networking.

11. In addition to its parliamentary, quasi-judicial and judicial activities, CIPPIC routinely advises and represents both individuals and organizations on a range of issues related to privacy rights. CIPPIC has also participated in international policy making processes on matters relating to privacy issues including participation, by its membership in the Civil Society Information Society Advisory Council to the OECD, in the 30 year review of the OECD Guidelines Governing the Protection of Privacy and Transborder Data Flows of Personal Data.

12. CIPPIC staff have also written extensively on data issues, including reports on *The Open Data Ottawa License: A Review and Recommendations* (2010), *Report on Open Licensing and Risk Management: A Comparison of the City of Ottawa Open License, the ODC-BY license and the ODC-PDDL license* (2011), *Analysis of Share-alike Obligations in Municipal Open Data Licenses* (2011), *Creative Commons Licenses: Options for Canadian Open Data Providers* (2012), *Report: How to Redistribute Open Data* (2012), and *Open Data, Open Citizens? Open Data and Privacy* (2015).

13. Through these activities, CIPPIC has had substantial impact to date on the development of privacy and data management law and policy in Canada. CIPPIC expertise is further supplemented by its Faculty advisors and, more generally, its access to the University of Ottawa's Faculty of Law and Centre for Law, Technology and Society.

III. CIPPIC'S INTEREST IN THIS APPEAL

14. CIPPIC's historical concern regarding public policy issues arising at the intersection of law and technology places this appeal squarely within its mandate. Its enduring interest in maintaining the balance between protecting individuals' privacy rights and the transparency and accountability of administrative decisions is perhaps best reflected in CIPPIC's extensive contributions to policy and legal discussions around such matters. Balancing the administrative transparency concomitant with a

modern democracy against privacy interests in sensitive information raises broad implications for the general public, extending beyond those of parties to this appeal.

IV. POSITION AND PROPOSED SUBMISSIONS

15. If granted leave, CIPPIC proposes to offer three related submissions.

16. First, CIPPIC proposes to place this case into the context of this Court's rapidly evolving jurisprudence addressing the privacy rights of Canadians. This case involves health data, some of the most private of personal information Canadians possess. The statute at issue includes privacy enhancing provisions, and the orders of the courts below include some privacy-respecting measures. CIPPIC proposes to offer this Court submissions on privacy, anonymity, and how to address the risk of re-identification inherent in efforts to protect privacy in large datasets that include personal information.

17. Second, CIPPIC will offer submissions on whether the analysis of data is neutral. CIPPIC will argue that where government actors base decisions on large data sets, there will be a need to disclose the underlying data in order to test and contest those analyses. This must include an ability to challenge the data itself and to test (and contest) the algorithms used to arrive at its analyses. CIPPIC's submissions will suggest how a Court may order disclosure of both datasets and algorithms while respecting personal information that may be embedded in those datasets.

18. Third, CIPPIC will offer the Court submissions on how to "future-proof" this test in the face of new technologies for algorithmic decision making such as artificial intelligence. While access and transparency lie at the heart of the issues in this case, future cases will also raise issues of explicability and scrutability. CIPPIC will argue that in many cases governments will have to be able to explain how they arrive at decisions that affect Canadians, and this is so regardless of the technology employed in reaching those decisions.

19. The case raises important issues about the right to challenge the outcomes of analytics

performed on large data sets, and what that right should entail. These issues will be of fundamental importance as governments increase their reliance on big data analytics and on artificial intelligence technologies. Governments and courts assessing privacy and accountability rights in future cases involving large datasets, complicated algorithmic decision making and artificial intelligence will inevitably look to the outcome of this Appeal for guidance.

20. CIPPIC will not seek costs and asks that it not have costs awarded against it in the event that leave to intervene is granted.

21. I make this Affidavit in support of CIPPIC's Motion for Leave to Intervene in this appeal and for no improper purpose.

SWORN before me at the City of)
Ottawa in the Province of Ontario)
this 13th day of November, 2017)

[original signed]

Tamir Israel

[original signed]

David A. Fewer, Commissioner for Taking Oaths

TAB 3

SCC Court File No: 37524

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA
APPELLANT
(Appellant)

- and -

PHILIP MORRIS INTERNATIONAL, INC.
RESPONDENT
(Respondent)

MEMORANDUM OF ARGUMENT
OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC
(Motion for leave to intervene)

Pursuant to Rules 47 and 55 of the Rules of the Supreme Court of Canada

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Part I – FACTS

A. OVERVIEW

1. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC") seeks an Order granting it leave to intervene in this appeal. This appeal will address issues with broad public policy implications for digital platforms, privacy, data analytics, and decision-making supported by algorithms and Artificial Intelligence (AI). Its determination will affect the ability of Canadians to benefit from both predictability and fairness concerning government decision-making using aggregate data, and the expectation of privacy in anonymized data. As government decisions are increasingly supported or supplanted by algorithms, the outcome of this appeal will have farther-reaching impact.

2. By means of its proposed intervention, CIPPIC offers to assist the Court in its consideration of the internet policy and public interest issues before it by offering useful submissions different from

those of other parties. In formulating these submissions, CIPPIC will draw on the unique and multi-faceted knowledge and expertise it has developed through its specialized activities in this area of law.

B. THE PROPOSED INTERVENER – CIPPIC

3. CIPPIC is a legal clinic based at the University of Ottawa's Centre for Law, Technology and Society. Its core mandate is to advocate in the public interest where the law intersects with technology in ways that may detrimentally impact on individuals. CIPPIC's advocacy and public outreach activities have extensively engaged matters relating to digital platforms, privacy rights, consumer protection, and online jurisdiction such as those at issue in this appeal.

Affidavit of Tamir Israel, "Israel Affidavit", sworn on November 13th, 2017, Motion Record, Tab 2

4. Courts have regularly recognized CIPPIC's capacity to assist on questions relating to privacy rights and the public interest. In particular, CIPPIC has participated in a number of judicial proceedings that implicate many of the same issues raised by this appeal. These include: *Douez v Facebook Inc*, 2017 SCC 33, which similarly addressed privacy concerns in a claim with respect to digital content, and *R v Marakah*, 2017 SCC File No. 37118, on the reasonable expectation of privacy in text messages.

Israel Affidavit, Motion Record, Tab 2, para 1(v)

5. Some of CIPPIC's general expertise in privacy issues is described below, with particular emphasis on activities relating to online platforms and consumer protection in digital settings. Specific CIPPIC experience on these issues includes interventions before courts on the reasonable expectation of privacy afforded to Canadians' personal and sensitive information. It has also included testimony before legislative committees on the transparency and accountability of administrative decision-makers. CIPPIC has additionally participated in salient regulatory proceedings, including quasi-judicial complaints regarding the obligations of global social media sites under Canadian law and on the implications of outsourcing email storage in foreign states under foreign laws. CIPPIC has also participated in relevant law reform venues such as the Law Commission of Ontario, where CIPPIC Director David Fewer currently sits on the Advisory Group of a multi-year project on

"Defamation in the Age of the Internet." CIPPIC has also provided Parliamentary testimony on matters relating to the protection of privacy on global social networking sites (ETHI Parliamentary Study on Privacy and Social Media) and currently participates in global policy-making on cross-border privacy protection (30 year review of the OECD Guidelines on Privacy and Transborder Data Flows). CIPPIC's regulatory experience includes its filing of a regulatory complaint applying Canadian privacy standards to a global social media site (*CIPPIC v Facebook*, OPC File No 2009-008); its participation in a regulatory proceeding establishing extensive consumer protections in wireless telephone and internet service provider contracts (Telecom Notice of Consultation CRTC 2012-557); and its participation to the Law Commission of Ontario within the Advisory Group of the "Defamation in the Age of the Internet" project.

Israel Affidavit, Motion Record, Tab 2, paras 6 and 10-12

Part II – STATEMENT OF QUESTIONS AT ISSUE

6. The only issue before the Court in this motion is whether CIPPIC should be granted leave to intervene in this matter of important public interest.

Part III – ARGUMENT

7. An applicant seeking leave to intervene before this Court must address two issues:

(a) whether the applicant has an interest in the issues raised by the parties to the appeal; and

(b) whether the applicant's submissions will be useful to the Court and different from those of the other parties.

***Reference re Workers' Compensation Act, 1983 (Nfld),* [1989] 2 SCR 335, para 8; *R v Finta*, [1993] 1 SCR 1138, para 5; *Rules of the Supreme Court of Canada*, SOR/2002-156, ss 55, 57(2)**

A. CIPPIC'S INTEREST IN THIS APPEAL

8. The matters raised by this appeal engage the privacy rights of Canadians and the need for transparency in administrative decision-making supported by or reliant on algorithms and Artificial Intelligence (AI). These matters are all of central importance to CIPPIC's mandate, which is to advance technology law in the public interest. The resolution of this Appeal directly and seriously implicates this aspect of CIPPIC's work and mandate.

Israel Affidavit, Motion Record, Tab 2, paras 3-12

B. USEFUL AND DIFFERENT SUBMISSIONS

9. An applicant seeking leave to intervene before this Court must demonstrate that its proposed intervention will provide "useful and different submissions". The "useful and different submission" criterion is satisfied by an applicant who has a history of involvement in the issues raised by an appeal, giving the applicant expertise that can shed fresh light or provide new information on the matter.

***Reference re Workers' Compensation Act, 1983 (Nfld),* [1989] 2 SCR 335, at para 12**

10. CIPPIC's submissions will be useful because CIPPIC brings to these proceedings the experience of a legal clinic that has worked with various stakeholders and in multi-faceted policy and law-making processes on matters concerning privacy, digital platforms, consumer protection, and the transparency of administrative decisions. CIPPIC can therefore offer the Court a useful, public interest-oriented perspective on the issues raised in this Appeal.

Israel Affidavit, Motion Record, Tab 2

11. CIPPIC's submissions will be different from those of the other parties. Its submissions will be informed by its extensive experience in law and policy relating to digital platforms, consumer protection, privacy rights and online jurisdiction. CIPPIC is eminently capable of assisting the Court by providing thoughtful submissions on the considerations that should guide the enforcement of forum selection clauses in this context.

12. Additionally, CIPPIC's proposed intervention does not raise any concerns that have traditionally led this Court to refuse intervention. CIPPIC does not intend to expand the issues under appeal beyond those raised by the existing parties. We outline our proposed intervention in the following paragraphs.

***Reference re Workers' Compensation Act, 1983 (Nfld),* [1989] 2 SCR 335, at para 12**

C. CIPPIC'S PROPOSED SUBMISSIONS

13. If granted leave, CIPPIC proposes to offer three related submissions.

14. First, CIPPIC proposes to place this case into the context of this Court's rapidly evolving jurisprudence addressing the privacy rights of Canadians. This case involves health data, some of the

most private of personal information Canadians possess. The statute at issue includes privacy enhancing provisions, and the orders of the courts below include some privacy-respecting measures. CIPPIC proposes to offer this Court submissions on privacy, anonymity, and how to address the risk of re-identification inherent in efforts to protect privacy in large datasets that include personal information.

15. Second, CIPPIC will offer submissions on whether the analysis of data is neutral. CIPPIC will argue that where government actors base decisions on large data sets, there will be a need to disclose the underlying data in order to test and contest those analyses. This must include an ability to challenge the data itself and to test (and contest) the algorithms used to arrive at its analyses. CIPPIC's submissions will suggest how a Court may order disclosure of both datasets and algorithms while respecting personal information that may be embedded in those datasets.

16. Third, CIPPIC will offer the Court submissions on how to "future-proof" this test in the face of new technologies for algorithmic decision making such as artificial intelligence. While access and transparency lie at the heart of the issues in this case, future cases will also raise issues of explicability and scrutability. CIPPIC will argue that in many cases governments will have to be able to explain how they arrive at decisions that affect Canadians, and this is so regardless of the technology employed in reaching those decisions.

17. This case raises important issues about the right to challenge the outcomes of analytics performed on large data sets, and what that right should entail. These issues will be of fundamental importance as governments increase their reliance on big data analytics and on artificial intelligence technologies. Governments and courts assessing privacy and accountability rights in future cases involving large datasets, complicated algorithmic decision making and artificial intelligence will inevitably look to the outcome of this Appeal for guidance.

Part IV – COSTS

18. CIPPIC will not seek costs in this matter and asks that costs not be awarded against it in this motion or in the appeal if leave to intervene is granted.

Part V – ORDER SOUGHT

19. CIPPIC respectfully requests an Order from this Court:

(i) granting CIPPIC leave to intervene in this appeal;

(ii) permitting CIPPIC to file a factum of no greater length than 10 pages;

(iii) permitting CIPPIC to present 10 minutes of oral argument at the hearing of this appeal; and

(iv) such further or other Order as deemed appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of November, 2017.

[original signed]

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Counsel for the Proposed Intervener

Part VI – TABLE OF AUTHORITIES

	Authority	***Reference in Argument***
	Cases	
1	*Reference re Workers' Compensation Act*, 1983 (Nfld), [1989] 2 SCR 335	7, 9, 12
2	*R v Finta*, [1993] 1 SCR 1138	7
	Legislation	
3	*Rules of the Supreme Court of Canada*, SOR/2002-156, ss 55, 57(2)	22

TAB 4

CANADA

CONSOLIDATION

CODIFICATION

Rules of the Supreme Court of Canada

Règles de la Cour suprême du Canada

SOR/2002-156

DORS/2002-156

Current to June 18, 2017

Last amended on January 1, 2017

À jour au 18 juin 2017

Dernière modification le 1 janvier 2017

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (3) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence
31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

...

Inconsistencies in regulations
(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to June 18, 2017. The last amendments came into force on January 1, 2017. Any amendments that were not in force as of June 18, 2017 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve
31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

[...]

Incompatibilité — règlements
(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 18 juin 2017. Les dernières modifications sont entrées en vigueur le 1 janvier 2017. Toutes modifications qui n'étaient pas en vigueur au 18 juin 2017 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Registration
SOR/2002-156 April 15, 2002

SUPREME COURT ACT

Rules of the Supreme Court of Canada

Pursuant to subsection 97(1)[a] of the *Supreme Court Act*, the undersigned judges of the Supreme Court of Canada hereby make the annexed *Rules of the Supreme Court of Canada*.

Ottawa, April 15, 2002

The Right Honourable Beverley McLachlin
The Honourable Mr. Justice John C. Major
The Honourable Mr. Justice Michel Bastarache
The Honourable Mr. Justice William Ian Corneil Binnie
The Honourable Mr. Justice Louis LeBel
Judges of the Supreme Court of Canada

Enregistrement
DORS/2002-156 Le 15 avril 2002

LOI SUR LA COUR SUPRÊME

Règles de la Cour suprême du Canada

En vertu du paragraphe 97(1)[a] de la *Loi sur la Cour suprême*, les juges soussignés de la Cour suprême du Canada prennent les *Règles de la Cour suprême du Canada*, ci-après.

Ottawa, le 15 avril 2002

Juges de la Cour suprême du Canada
La très honorable Beverley McLachlin
L'honorable Juge John C. Major
L'honorable Juge Michel Bastarache
L'honorable Juge William Ian Corneil Binnie
L'honorable Juge Louis LeBel

[a] R.S., c. 34 (3rd Supp.), s. 7

[a] L.R., ch. 34 (3e suppl.), art. 7

PART 11

Particular Motions

Motion for Intervention

55 Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge.

56 A motion for intervention shall be made

(a) in the case of an application for leave to appeal, within 30 days after the filing of the application for leave to appeal;

(b) in the case of an appeal, within four weeks after the filing of the appellant's factum; and

(c) in the case of a reference, within four weeks after the filing of the Governor in Council's factum.

SOR/2006-203, s. 29; SOR/2013-175, s. 37(E).

57 (1) The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person's interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.

(2) A motion for intervention shall

(a) identify the position the person interested in the proceeding intends to take with respect to the questions on which they propose to intervene; and

(b) set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

SOR/2013-175, s. 38.

58 At the end of the applicable time referred to in Rule 51, the Registrar shall submit to a judge all motions for intervention that have been made within the time required by Rule 56.

SOR/2006-203, s. 30.

59 (1) In an order granting an intervention, the judge may

(a) make provisions as to additional disbursements incurred by the appellant or respondent as a result of the intervention; and

PARTIE 11

Requêtes spéciales

Requête en intervention

55 Toute personne ayant un intérêt dans une demande d'autorisation d'appel, un appel ou un renvoi peut, par requête à un juge, demander l'autorisation d'intervenir.

56 La requête en intervention est présentée dans les délais suivants :

a) dans le cas de la demande d'autorisation d'appel, dans les trente jours suivant son dépôt;

b) dans le cas d'un appel, dans les quatre semaines suivant le dépôt du mémoire de l'appelant;

c) dans le cas d'un renvoi, dans les quatre semaines suivant le dépôt du mémoire du gouverneur en conseil.

DORS/2006-203, art. 29; DORS/2013-175, art. 37(A).

57 (1) L'affidavit à l'appui de la requête en intervention doit préciser l'identité de la personne ayant un intérêt dans la procédure et cet intérêt, y compris tout préjudice que subirait cette personne en cas de refus de l'autorisation d'intervenir.

(2) La requête expose ce qui suit :

a) la position que cette personne compte prendre relativement aux questions visées par son intervention;

b) ses arguments relativement aux questions visées par son intervention, leur pertinence par rapport à la procédure et les raisons qu'elle a de croire qu'ils seront utiles à la Cour et différents de ceux des autres parties.

DORS/2013-175, art. 38.

58 À l'expiration du délai applicable selon la règle 51, le registraire présente au juge toutes les requêtes en intervention présentées dans les délais prévus à la règle 56.

DORS/2006-203, art. 30.

59 (1) Dans l'ordonnance octroyant l'autorisation d'intervenir, le juge peut :

a) prévoir comment seront supportés les dépens supplémentaires de l'appelant ou de l'intimé résultant de l'intervention;

(b) impose any terms and conditions and grant any rights and privileges that the judge may determine, including whether the intervener is entitled to adduce further evidence or otherwise to supplement the record.

(2) In an order granting an intervention or after the time for serving and filing all of the memoranda of argument on an application for leave to appeal or the facta on an appeal or reference has expired, a judge may authorize the intervener to present oral argument at the hearing of the application for leave to appeal, if any, the appeal or the reference, and determine the time to be allotted for oral argument.

(3) An intervener is not permitted to raise new issues unless otherwise ordered by a judge.

SOR/2006-203, s. 31; SOR/2016-271, s. 34.

60 [Repealed, SOR/2016-271, s. 35]

61 [Repealed, SOR/2016-271, s. 35]

Motion to Stay

[SOR/2011-74, s. 30(F)]

62 Any party against whom a judgment has been given, or an order made, by the Court or any other court, may make a motion to the Court for a stay of execution or other relief against such judgment or order, and the Court may give such relief on the terms that may be appropriate.

Motion to Quash

63 (1) Within 30 days after the filing of a proceeding referred to in section 44 of the Act, a respondent may make a motion to the Court to quash the proceeding.

(2) Upon service of the motion to quash, the proceeding shall be stayed until the motion has been disposed of unless the Court or a judge otherwise orders.

(3) If the proceeding is quashed, the party bringing the proceeding may, in the discretion of the Court, be ordered to pay the whole or any part of the costs of the proceeding.

Assignment of Counsel by the Court to Act on Behalf of Accused

63.1 (1) For the purposes of section 694.1 of the *Criminal Code*, the accused who is the appellant, applicant or

b) imposer des conditions et octroyer les droits et privilèges qu'il détermine, notamment le droit d'apporter d'autres éléments de preuve ou de compléter autrement le dossier.

(2) Dans l'ordonnance octroyant l'autorisation d'intervenir ou après l'expiration du délai de signification et de dépôt des mémoires de demande d'autorisation d'appel, d'appel ou de renvoi, le juge peut, à sa discrétion, autoriser l'intervenant à présenter une plaidoirie orale à l'audition de la demande d'autorisation d'appel, de l'appel ou du renvoi, selon le cas, et déterminer le temps alloué pour la plaidoirie orale.

(3) Sauf ordonnance contraire d'un juge, l'intervenant n'est pas autorisé à soulever de nouvelles questions.

DORS/2006-203, art. 31; DORS/2016-271, art. 34.

60 [Abrogé, DORS/2016-271, art. 35]

61 [Abrogé, DORS/2016-271, art. 35]

Requête en sursis d'exécution

[DORS/2011-74, art. 30(F)]

62 La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accéder à cette demande aux conditions qu'elle estime indiquées.

Requête en cassation

63 (1) L'intimé peut présenter à la Cour, dans les trente jours suivant l'engagement d'une procédure visée à l'article 44 de la Loi, une requête pour casser la procédure.

(2) Sauf ordonnance contraire de la Cour ou d'un juge, la signification de la requête en cassation emporte suspension de la procédure jusqu'à ce qu'il soit statué sur la requête.

(3) Si elle fait droit à la requête, la Cour peut, à sa discrétion, ordonner à la partie instituant la procédure de payer tout ou partie des dépens de la procédure.

Désignation par la Cour d'un procureur pour agir au nom d'un accusé

63.1 (1) Pour l'application de l'article 694.1 du *Code criminel*, l'accusé, qui est appelant, demandeur ou intimé