SCC Court File No.: 34240

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

A.B. BY HER LITIGATION GUARDIAN, C.D.

APPELLANT
(APPELLANT)

- and -

BRAGG COMMUNICATIONS INCORPORATED, A BODY CORPORATE and HALIFAX HERALD LIMITED, A BODY CORPORATE

RESPONDENTS
(RESPONDENTS)

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.

2. This appeal will address issues of great importance relating to the need to balance important values such as freedom of expression and the open court principle, on the one hand, and privacy and access to justice on the other. The historical balance struck between these competing values and currently embodied in the *Dagenais/Mentuck* test, needs to be applied in a

more nuanced manner if it is to remain sufficient to meeting the realities of a technologically interconnected world. The permanence, wide distribution and easy searchability of information has removed practical barriers historically relied upon to ensure the proper balance between privacy, freedom of expression and the open court principle. An overly narrow and formalistic application of the test for anonymization will have far reaching implications for participants in the judicial process.

3. If successful in its motion for leave to intervene, CIPPIC will assist the Court in its consideration of the important issues before it by offering useful submissions different from those of the other parties and proposed interveners.

4. In providing its useful and different submissions, CIPPIC will draw on the unique knowledge and expertise it has developed through its specialized activities in this area of law and policy. CIPPIC's experience in Internet privacy policy in general has included participation in legislative, academic, judicial, quasi-judicial, and client-centered processes. It has also been an active participant in international policy-making processes relating to privacy and technology, as well as a number of processes where the question of privacy's evolving role within judicial procedures has been directly at issue.

B. CIPPIC

5. 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 new technologies in ways that may detrimentally impact on the public. CIPPIC is Canada's sole legal clinic dedicated entirely to internet policy and public interest law. Internet policy issues impact on most aspects of CIPPIC's advocacy and public outreach activities. CIPPIC has intervened in the courts, testified before Committees of the House of Commons and Senate, participated in numerous quasi-judicial fora, helped shape Internet policy at the International level through participation in various Internet governance processes and produced numerous publications and public outreach documents on law and technology issues.

Affidavit of David Fewer, sworn on March 9, 2012, Motion Record, Tab 2, at paras. 3, 7-15

6. This Hounourable Court has previously recognized CIPPIC's capacity to assist the Court on questions relating to the balance of competing values in an online environment by granting CIPPIC leave to intervene in a number of internet policy-related cases. In 2006, this Honourable Court granted CIPPIC leave to intervene in a case concerning computer sales over the internet, *Dell Computer Corporation.* v. *Union des consommateurs*, 2007 SCC 34. In 2010, this Honourable Court granted CIPPIC leave to intervene in a defamation case with the potential to expand Canadians' liability for posting content on the internet, *Crooks* v. *Newton*, 33412 (SCC). In 2011, this Honourable Court granted CIPPIC leave to intervene in five copyright cases: (*Re:Sound v. Motion Picture Theatre Associations of Canada, et al.*, 34210 (SCC); P*rovince of Alberta as represented by the Minister of Education et al. v. Canadian Copyright Licensing Agency Operating as "Access Copyright"*, 33888 (SCC); E*ntertainment Software Association et al.* v. *Society of Composers, Authors and Music Publishers of Canada, 33921 (SCC);Rogers Communications Inc., et al.* v. *Society of Composers, Authors and Music Publishers of Canada, 33922 (SCC);* and *Society of Composers, Authors and Music Publishers of Canada* v. *Bell Canada et al.*, 33800 (SCC)).

Affidavit of David Fewer, sworn on March 9, 2012, Motion Record, Tab 2

7. In addition to this generalized privacy experience, CIPPIC has participated in numerous processes where the proper scope of privacy protections within judicial processes was directly at issue. These include, for example, its interventions in *BMG Canada Inc. v. Doe*, 2004 FC 488 and 2005 FCA 193, and *Warman v. Wilkins-Fournier*, 2010 ONSC 2126 (Ont. Div. Ct.), privacy complaints filed with the Privacy Commissioner of Canada regarding the failure of federal tribunals to put in place an anonymization process for online publication of judicial decisions, the privacy implications of this failure and the resulting compliance of tribunal publication processes with the *Privacy Act*, R.S.C., 1985, c. P-21 (see Office of the Privacy Commissioner of Canada, Anonymization practices of the Pension Appeals Board, File No.: 7100-03809, October

15, 2008), and, finally, CIPPIC's direct participation in court anonymization processes such as *A.B. v. Canada (Minister of Citizenship and Immigration)*, Fed. Ct. No. IMM-3522.05, (F.C. 2010).

8. CIPPIC aims to leverage this institutional experience in matters of privacy and Internet governance in crafting submissions that are both useful and different from those of other parties and proposed interveners.

PART II – STATEMENT OF QUESTIONS AT ISSUE

9. 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

10. An applicant seeking leave to intervene before this Court under section 55 of the *Rules of the Supreme Court of Canada* must address two issues, as established in case law and codified in section 57(2):

(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 S.C.R. 335 (SCC) at para. 8**
***R.* v. *Finta*, [1993] 1 S.C.R. 1138 (SCC) at para. 5**
***Rules of the Supreme Court of Canada*, SOR/2006-203, ss. 55, 57(2)**

A. CIPPIC's Interest in this Appeal

11. CIPPIC's interest in this appeal flows directly from its mandate to participate in internet policy debates and to advocate for the public interest in where new technologies intersect with legal/policy development. Central to this mandate is advocacy on public interest issues that impact the legal framework governing online privacy content, including the online dissemination of news related to court cases and reasons for decisions of court cases. The issues in this appeal will impact directly on the online privacy rights afforded to litigants, who face a host of privacy

concerns that were never at issue before.

12. The permanence and accessibility of online information ensure that information disclosed through judicial processes, once traceable back to an individual, can and will be used for a range of secondary purposes well beyond discussion of the issues at stake in the case before the Courts. These varied secondary purposes may include, for example, employment applications, targeting of commercial advertisements, satisfying the curious aspirations of a future neighbour, identity thieves and, as in this case, harassment by peers. As it is now common practice for judicial rulings to be placed online, many potential litigants will face the prospect of having the often private activities necessarily revealed in such proceedings as the first piece of confronting anyone who searches their name on the Internet.

> **L. Austin & F. Pelletier, *Synthesis of the Comments on JTAC's Discussion Paper on Open Courts, Electronic Access to Court Records, and Privacy*, Prepared on Behalf of the Judges Technology Advisory Committee for the Canadian Judicial Council, January 2005, <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_Synthesis_2005_en.pdf>**

13. At the same time, the public interest in knowing the identity of random members of the community will be, in many cases, of less pressing importance. Of primary interest to the general public in many cases such as that before the Court now are the facts and issues at stake, as well as the legal rules that result from these. Given the heightened countervailing privacy concerns, an overly restrictive application of the existing rule for publication bans to the question of anonymity will not result in the proper balance being struck between the competing values at issue.

> **Office of the Information & Privacy Commissioner for British Columbia, "Privacy and Openness in Tribunal Decisions", presented at Canadian Bar Association, *National Administrative Law & Labour and Employment CLE Conference*, Ottawa, November 22, 2008, <http://www.oipc.bc.ca/publications/speeches_presentations/CBA-CLE_Conf_AdminTribunalsPrivacy%284Nov08%29.pdf>**

B. Useful and Different Submissions

14. The "useful and different submission" criteria is satisfied by an applicant who has a history of involvement in the issue, 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 S.C.R. 335 (SCC), at para. 12**

15. CIPPIC's submissions will be useful because CIPPIC brings to these proceedings the experience of a legal clinic that has worked with various stakeholders on all sides of competing interests in privacy and freedom of expression online. CIPPIC can offer the Court a useful and balanced perspective on the wider issues raised in this Appeal.

Fewer Affidavit at paras. 7 - 15, Motion Record, Tab 2

16. CIPPIC's submissions will be different from those of the current parties, as they will be informed by its rich experience across the broad spectrum of law and policy related to online privacy as well as by its specific expertise on the need to adjust privacy protections within judicial and quasi-judicial processes.

17. Additionally, CIPPIC's proposed submissions do not raise any concerns that have traditionally led this Honourable Court to refuse intervention. CIPPIC does not intend to expand the issues under appeal beyond those raised by the existing parties.

***Reference re Workers' Compensation Act,* 1983 (Nfld.), [1989] 2 S.C.R. 335 (SCC), at para. 12**

C. CIPPIC's Proposed Submissions

18. If granted intervener's status, CIPPIC proposes to argue that the Court below misapplied the *Dagenais/Mentuck* test in a manner that is overly rigid and fails to properly take into account the context to which it was being applied, specifically, an application for an order for pseudonymity as opposed to a full publication ban. Under the current test, 'harm' is visualized through too narrow a lens that does not adequately account for evolving harms to privacy and particularly for the need to protect the privacy of children. This is particularly an issue in light of the fact that most judicial decisions now become available online and searchable. As the Sedona Conference Working Group tasked with examining the shifting role of privacy within the discovery process recently concluded:

> Courts have begun to address privacy and confidentiality issues that arise as court files are made accessible on the Internet. The federal courts and a growing number of state court systems have developed policies or court rules to balance the competing interests of public access and personal privacy. These policies and rules recognize that case files may contain sensitive personal, confidential or proprietary information that may require special protection in the context of Internet access. Through changes in rules, court policies - and likely also in case law - it is clear that the law in this area will continue to develop to respond to the fundamentally changed context of public access to court records in the Internet era.
>
> It is also clear that the era of "practical obscurity" has past. Litigants and attorneys must be aware of the possible consequences of filing any private or confidential information.

Courts can no longer apply legal test in a manner that ignores the environment in which civil litigation now occurs – an environment where historical practical barriers can no longer be relied upon to provide sufficient protection for the privacy of litigants.

> **The Sedona Conference Working Group on Protective Orders, Confidentiality & Public Access (WG2), "The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases", The Sedona Conference Working Group Series, March 2007, p. 61**

19. The *Dagenais/Mentuck* test itself has adopted an overly narrow conception of 'administration of justice'. While historically there may have been good reason to give minimal regard to a potential plaintiff's sensitivities with respect to the publicity attached to attending a court process, this factor can no longer be completely discounted in an interconnected world. Participation in justice may require an individual to reveal sensitive medical, financial, marital or other information, and many reasonable individuals may now be discouraged from seeking justice by the fact that this information will become a permanent feature of their online profile forever more.

20. In addition, a proper assessment of the competing values at issue in this case must include a direct assessment of the harm to privacy that may result if an individual is forced to navigate judicial processes stripped of anonymity. As Justice Iacobucci noted in *Mentuck*: "[t]he approach adopted was intended to reflect the substance of the *Oakes* test and its valuable function in determining what reasonable limits on the rights to be balanced might be." Justice Iacobucci elaborated on the breadth of factors to be balanced in applying the *Mentuck* test:

> It also bears repeating that the relevant rights and interests will be aligned differently in different cases, and the

> purposes and effects invoked by the parties must be taken into account in a case-specific manner. Where the accused is seeking the publication ban on the basis that his trial will be compromised, a judge would improperly apply the test if he relied on the right to a public trial to the disadvantage of the accused. This test exists to ground the exercise of discretion in a constitutionally sound manner, not to command the same result in every case. Trial judges must, at the outset, use their best judgment to determine which rights and interests are in conflict. In most cases this will not be overly onerous. The parties will frame their arguments in terms that make clear the interests they feel are threatened by the issuance or refusal of a publication ban and those they are ready to sacrifice in the face of the threat.

As privacy is a fundamental and increasingly important right, protected by our *Charter of Rights and Freedoms*, a proper application of the test would have balanced the impact of anonymization on freedom of expression and the open court principle, on the one hand, and the harm to privacy and the administration of justice on the other.

> ***A.M. v. Ryan,*** **[1997] 1 S.C.R. 157**
> ***R. v. Mentuck,*** **2001 SCC 76, at para. 37**

21. Harms to privacy, and particularly the potential for humiliation that can result from violations thereof, are difficult to quantify and even more difficult to prove conclusively. They are nonetheless real, and Courts have recognized the need to protect these rights many times. Most recently, this was noted by the Ontario Court of Appeal in its recognition of a new tort of invasion of seclusion aimed at protecting privacy. In articulating the elements of the new tort, the Court held that:

> and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum... several cases award damages for invasion of privacy in conjunction with, or under the head of, a traditional tort such as nuisance or trespass. These claims typically involve intangible harm such as hurt feelings, embarrassment or mental distress, rather than damages for pecuniary losses...

The Court continued to survey a number of cases where privacy had been invaded, yet direct evidence of harm could not be adduced. In all these cases, judicial notice was taken of the harm to privacy that had resulted from the invasion in question.

> ***Jones v. Tsige,*** **2012 ONCA 32, at paras. 72. 77, 83 – 86 and 87**

22. Other common law jurisdictions have similarly developed tests for the assessment of

anonymity in judicial processes. These tests recognize the need for balancing the *privacy* interests at stake against the degree of impact on free expression and open justice that may result from anonymization. Many of these jurisdictions have recognized the importance of protecting anonymity in the judicial context. In the U.S., for example, a survey of federal and state practices concluded in 2007 that "certain types of information (e.g., the "personal identifiers" specified in proposed Fed. R. Civ. P. 5. 2…including Social Security numbers, dates of birth, financial account numbers and names of minor children) to be presumptively eligible for exclusion from part or all of the court record available to the public." Notably, names of minors are included in this list of identifiers that are redacted unless a court orders otherwise.

> **The Sedona Conference Working Group on Protective Orders, Confidentiality & Public Access (WG2), "The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases", The Sedona Conference Working Group Series, March 2007, pp. 2,**

23. If granted leave to intervene, CIPPIC will present a framework for the assessment of anonymity requests that will permit this Honourable Court and future courts to better balance the competing values at stake. In scenarios where the impact on open justice is minimal, yet the information that will be disclosed is of a nature that will sensitive information of a highly personal nature, for example, discretion should favour anonymization. Where, on the other hand, the applicant is an important public figure (and, hence, her specific identity becomes a matter of importance) and the issues in question are unlikely to reveal highly sensitive information, or where identity is inextricably linked with the facts of a particular case, an order should be refused.

24. In articulating its proposed framework, CIPPIC will draw on existing jurisprudence from Canadian and international courts and other judicial processes, as well as its knowledge and expertise with such issues. In this manner, CIPPIC proposes to offer useful submissions that are different from those of other parties.

PART IV PART IV – COSTS

25. 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 PART V – ORDER SOUGHT

26. CIPPIC respectfully requests an Order from this Honourable Court:

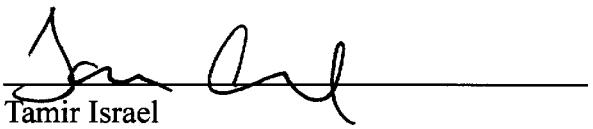
(i) granting CIPPIC leave to intervene in this appeal;

(ii) permitting CIPPIC to file a factum of no greater length than 15 pages;

(iii) permitting CIPPIC to present 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 11th day of March, 2012.



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PART VI – TABLE OF AUTHORITIES

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3	*Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335 (S.C.C.)	10, 14, 17
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7	Office of the Information & Privacy Commissioner for British Columbia, "Privacy and Openness in Tribunal Decisions", presented at Canadian Bar Association, *National Administrative Law & Labour and Employment CLE Conference*, Ottawa, November 22, 2008, <http://www.oipc.bc.ca/publications/speeches_presentations/CBA-CLE_Conf_AdminTribunalsPrivacy%284Nov08%29.pdf>	12
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