SCC Court File No.: **34397**

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SASKATCHEWAN COURT OF APPEAL)

BETWEEN:

BENJAMIN CAIN MACKENZIE

APPELLANT
(Respondent)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

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 – OVERVIEW

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. The determination of this issue will have broad impact for the important balance between the state's legitimate investigative interests and the rights of its citizens to be left alone. Absent clear guidance and objective criteria of what might constitute a 'reasonable suspicion' and on when that standard might be more or less appropriate, the potential for unreasonable intrusion on the informational privacy of individuals is high.

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.

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 state's legitimate surveillance capacity was 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 somewhat unique in Canada, given its academic clinical setting and its dedication 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 Kent Mewhort, sworn on October 2, 2012, Motion Record, Tab 2

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 which had the potential to expand Canadians' liability for linking to content on the Internet, *Crooks* v. *Newton*, 2011 SCC 47.

7. 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.*, 2012 SCC38; P*rovince of Alberta as represented by the Minister of Education et al. v. Canadian Copyright Licensing Agency Operating as "Access Copyright"*, 2012 SCC37; E*ntertainment Software Association et al.* v. *Society of Composers, Authors and Music Publishers of Canada,* 2012 SCC 34*; Rogers Communications Inc., et al.* v. *Society of Composers, Authors and Music Publishers of Canada,* 2012 SCC 35; and *Society of Composers, Authors and Music Publishers of Canada* v. *Bell Canada et al.*, 2012 SCC 36).

8. Recently, this Honourable Court granted CIPPIC leave to intervene in two recent informational privacy-related cases. In *A.B.* v. *Bragg Communications Inc.*, 2012 SCC 46, where the proper balance between privacy rights and the open court principle was at issue and in *Telus Communications Company* v. *Her Majesty the Queen*, S.C.C. File. No. 34252, which will examine the application of surveillance protections found in Part VI of the *Criminal Code* to advanced communications delivery mechanisms.

Mewhort Affidavit, sworn on October 2, 2012, Motion Record, Tab 2

9. In addition to this generalized privacy experience, CIPPIC has participated in numerous processes where the proper scope of privacy protections and reasonable expectations of privacy were at issue. These include, for example, its interventions in *BMG Canada Inc.* v. *Doe*, 2004 FC 488 and 2005 FCA 193, and in *Warman* v. *Wilkins-Fournier*, 2010 ONSC 2126 (Ont. Div. Ct.).

CIPPIC is additionally in the process of completing a research project funded by the Privacy Commissioner of Canada and aimed at examining the evolving public sector surveillance landscape within the broader context of electronic state surveillance capacities.

PART II – STATEMENT OF ISSUES

10. 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

11. 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/2002-156, ss. 55, 57(2)

A. CIPPIC's Interest in this Appeal

12. CIPPIC's interest in this appeal flows directly from its mandate to participate in Internet policy debates and to advocate for the public interest. Privacy has long been a core pillar of that mandate as evolving technologies have stressed the ability of individuals to assert or maintain a comparable level of privacy in society. The state's ability to aggregate information on its citizens has reached new zeniths as a result of general technological changes, and this raises concerns for the balance between the state's legitimate investigative interests and the right of individuals to a zone of privacy. The case at bar calls on this Honourable Court to determine the parameters of an emergent standard that will be used to justify state intrusions into individual's informational

privacy and, hence, implicates several aspects of CIPPIC's work and public interest mandate.

B. Useful and Different Submissions

13. 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

14. 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 state surveillance. CIPPIC can offer the Court a useful and balanced perspective on the wider issues raised in this Appeal.

> Mewhort Affidavit, Motion Record, Tab 2

15. 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 informational privacy and state surveillance.

16. 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

17. If granted intervener's status, CIPPIC will argue that the constitutional underpinnings of the reasonable suspicion test demand clear articulation, so as to guide the decisions of lower

courts and law enforcement alike. The right to be free from unreasonable search and seizure is meaningless unless such searches and seizures are premised on objective criteria:

> Such an amorphous standard cannot provide a meaningful criterion for securing the right guaranteed by s. 8. The location of the constitutional balance between a justifiable expectation of privacy and the legitimate needs of the state cannot depend on the subjective appreciation of individual adjudicators. Some objective standard must be established...The purpose of an objective criterion for granting prior authorization to conduct a search or seizure is to provide a consistent standard for identifying the point at which the interests of the state in such intrusions come to prevail over the interests of the individual in resisting them.
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> ***Hunter v. Southam Inc.***, [1984] 2 S.C.R. 145, pp. 166-167

18. Without clear guidance on what factors to consider when deciding whether to invade the privacy of individuals in a consistent, objective manner, reasonable suspicion will fail in its objective – to provide a clear standard to justify state intrusions on individual privacy. In doing so, it is important to account for the totality of relevant circumstances and to provide flexibility capable of accounting for a variety of investigative contexts. However, it is equally important to adopt a principled approach capable of providing sufficient basis for objective and consistent decision-making and appellate review. If granted leave, CIPPIC will urge the Court to adopt helpful 'markers' to guide such decision-making.

> ***R. v. Tessling***, 2004 SCC 67, paras. 19, 31, 43; ***R. v. Edwards***, [1996] 1 S.C.R. 128, para. 45

19. When assessing what might constitute a 'reasonable suspicion', it is additionally important to adopt the normative analytical stance that has animated this Court's section 8 jurisprudence. Certain factors should not be permitted to contribute to invasion of individual privacy. For example, statistically valid factors should not be permitted to form a basis for 'reasonable' suspicion. For example, mere presence in a designated "high crime area", if permitted to contribute to reasonable suspicion, could lead to excessive searches of individuals in such areas. It could also lead law enforcement agents to place undue weight on other factors and to mis-

assess the ‘totality’ of the circumstances merely on the basis of location. Indeed, if the balance between individual privacy and the state’s legitimate investigative needs is to be maintained, some factors should signal an overabundance of *caution* as they are more likely to lead to false positives and as such their prejudicial value outweighs their probative potential.

R. v. Byfield, 2012 ONSC 2781, para. 14; ***R. v. Clayton***, 2007 SCC 32, paras. 2-4, 44; ***R. v. Duarte***, [1990] 1 S.C.R. 30, paras. 15, 17; ***R. v. Grant***, 2009 SCC 32, paras. 5, 53-57

20. The context in which the reasonable suspicion standard is applied should guide the stringency of its application. If it is to be permitted in general investigative scenarios as opposed to investigations of specific offences, a more rigorous assessment of the reasonableness of a given suspicion should be applied. For example, where no specific crime is being investigated, individualized factors should be a necessary precondition to an invasion of a reasonable expectation of privacy. Otherwise the risk of fishing expeditions or mass surveillance becomes a reality.

R. v. Byfield, 2012 ONSC 2781, para. 14; ***R. v. Clayton***, 2007 SCC 32, paras. 2-4, 44

21. The use of ‘risk profiles’ as a proxy for case by case decision-making, whether by law enforcement or by the Courts, is a concern. It automates and generalizes the assessment process for suspicion. This in itself lends itself too easily to mass processing, and heightens the risk of false positives. This risk is heightened by investigative techniques and tools that are gaining rapid currency, and which seek to leverage online and technological environments in order to data mine individual attributes to identify ‘risk behaviour’. Given the susceptibility of automated environments to data mining techniques of this nature, the ease by which a reasonable suspicion could be gained by such techniques on a wide range of individuals is concerning.

22. In addition, in developing its standard for reasonable suspicion, this Honourable Court should keep in mind Bill C-30, which aims to enact a number of new ‘reasonable suspicion’

based powers aimed at leveraging online and data-based data from various third party service providers. An overly permissive reasonable suspicion standard set by this Honourable Court that fails to impose the proper rigour in generalized investigative settings would permit law enforcement to leverage these new powers in broad ranging ways. CIPPIC notes that these new reasonable suspicion powers may not ultimately be upheld as constitutional, but regardless, as this case contemplates a comprehensive approach to 'reasonable suspicion', these powers should be taken into account.

> **Bill C-30**, *An Act to enact the Investigating and Preventing Criminal Electronic Communications Act and to amend the Criminal Code and other Acts*, First Session, Forty-first Parliament, 60-61 Elizabeth II, 2011-2012, 1st Reading, February 14, 2012; **P. Lawson**, "Moving Toward a Surveillance Society: Proposals to Expand 'Lawful Access' in Canada", BCCLA

PART IV – COSTS

23. 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

24. 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 10 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 2nd day of October, 2012.

Tamir Israel

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PART VI – TABLE OF AUTHORITIES

	Authority	Reference in Argument
	Cases	
1	*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145	17
2	*Reference re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335 (SCC)	11, 13, 16
3	*R. v. Byfield*, 2012 ONSC 2781	19-20
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12	*Rules of the Supreme Court of Canada*, SOR/2002-156, ss. 55, 57(2)	11