

FEDERAL COURT

IN THE MATTER OF a reference pursuant to subsection 18.3(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of questions or issues of law and jurisdiction concerning the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 that have arisen in the course of an investigation into a complaint before the Privacy Commissioner of Canada

B E T W E E N:

THE PRIVACY COMMISSIONER OF CANADA

APPLICANT

**MOTION RECORD
OF THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY &
PUBLIC INTEREST CLINIC
(Motion for leave to intervene, to be heard in writing)**

Pursuant to Rules 109 and 369 of the Federal Court Rules

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B E T W E E N:

THE PRIVACY COMMISSIONER OF CANADA

APPLICANT

**NOTICE OF MOTION
OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC
INTEREST CLINIC
(Motion for leave to intervene, to be heard in writing)**

Pursuant to Rules 109 and 369 of the Federal Court Rules

TAKE NOTICE THAT the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (“CIPPIC”) will make a motion to the Court in writing under Rule 369 of the *Federal Courts Rules*.

THE MOTION IS FOR an Order, in the form attached as Schedule “A” to this Notice of Motion, granting CIPPIC leave to intervene in this proceeding.

THE GROUNDS FOR THE MOTION ARE:

1. CIPPIC will draw on its institutional mandate and expertise to provide useful submissions that are distinct from those of other parties on the public interest dimensions of this reference.
 - a. This reference raises important matters of public interest. CIPPIC’s public interest perspective differs from those of the parties to this proceeding, and will provide the court with distinct views on the matters raised by this reference. The degree to which the rights protecting provisions of PIPEDA apply to individual-initiated conduct on e-commerce platforms is

central to CIPPIC's mandate, and will have broad impact on the privacy and other rights of many individuals.

- b. CIPPIC's institutional expertise on matters relating to digital privacy and online e-commerce platforms will allow it to provide meaningful and distinct contributions to the resolution of the matters raised by this reference. CIPPIC has participated in numerous parliamentary hearings, regulatory proceedings and judicial proceedings where the impact of online user-generated activities, the regulation of e-commerce platforms, and privacy rights have been at issue. If granted leave, CIPPIC will draw on its extensive and multi-disciplinary expertise to provide useful submissions that are distinct from those of other parties to this reference; and
 - c. CIPPIC's expertise in these matters has been recognized by courts who have granted it intervention status on similar matters. This includes its intervention in *Douez v Facebook Inc*, 2017 SCC 33, where CIPPIC was granted leave to intervene on the need to account for core constitutional privacy values when determining the application of quasi-constitutional statutory protections to a non-negotiable forum selection clause imposed by a global e-commerce platform.
2. CIPPIC's intervention will provide useful and distinct insight on the matters raised by this reference without raising new issues not already before the Court.
 3. If granted leave, CIPPIC will address the following points:
 - a. 'commercial activity' is an open-ended and ambiguous term, that should be given a broad and liberal interpretation, keeping in mind PIPEDA's statutory objectives, its consumer protection nature and status as quasi-constitutional legislation, and consistency with implicated *Charter* principles of privacy, non-discrimination and freedom of expression;
 - b. if the threshold term 'commercial activity' is defined too broadly or

narrowly in this context, it can have far-reaching implications for privacy, information-based discrimination and freedom of expression on a broad range of e-commerce platforms, many of which operate on the basis of facilitating user-generated activity;

- c. ‘commercial activity’ must be defined in a manner that accounts for the integrated manner in which many e-commerce platforms, including search engines, are designed to broadly monetize user activity and Internet content; and
 - d. whether acts of indexing and querying news articles and other online informational content are best addressed through PIPEDA’s journalist exception or through some other vehicle.
4. The proposed intervention will not cause delay or prejudice to the parties;
 5. CIPPIC does not seek costs and asks that costs not be awarded against it as a result of its intervention in this reference;
 6. Rules 109 and 369 of the *Federal Courts Rules*, SOR/98-106 as amended; and
 7. Such further and other grounds as counsel may advise, and which this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be relied upon in support of this motion to intervene:

1. The affidavit of David A Fewer, General Counsel, CIPPIC, sworn on October 3, 2019; and
2. Such further and other material as counsel may advise, and which this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 3rd day of October, 2019.

[original signed]

Tamir Israel

Counsel for the Proposed Intervener

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SCHEDULE "A"

Court File No. T-1779-18

FEDERAL COURT

IN THE MATTER OF a reference pursuant to subsection 18.3(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of questions or issues of law and jurisdiction concerning the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 that have arisen in the course of an investigation into a complaint before the Privacy Commissioner of Canada

B E T W E E N:

THE PRIVACY COMMISSIONER OF CANADA

APPLICANT

ORDER

UPON MOTION by the moving party, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), for an order pursuant to Rule 109 of the *Federal Courts Rules*, 1998, SOR/98-106;

THIS COURT GRANTS LEAVE TO INTERVENE to the moving party in this proceeding on the following terms:

1. CIPPIC shall be added to the style of cause as intervener;
2. CIPPIC shall be permitted to file a factum;
3. CIPPIC shall be permitted to present oral arguments at the hearing of this appeal;
4. CIPPIC shall cooperate with all other parties and interveners to expedite the hearing and avoid duplication;
5. CIPPIC shall not seek or be made subject to any order for costs; and
6. CIPPIC shall be served with all materials filed and to be filed by other parties and interveners.

TO: **THE REGISTRAR**
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B E T W E E N:

THE PRIVACY COMMISSIONER OF CANADA

APPLICANT

AFFIDAVIT OF DAVID A FEWER

I, **DAVID A FEWER**, of the City of Ottawa, in the Province of Ontario, DO SOLEMNLY AFFIRM THAT:

I. INTRODUCTION

1. I am General Counsel at the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) hosted at the Centre for Law, Technology and Society (CLTS) at the University of Ottawa's Faculty of Law. 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 reviewed the relevant files, documentation or submissions and base my account thereof on this knowledge.

3. CIPPIC is a legal clinic founded by 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 currently operates under an Executive Director, a Staff Lawyer, and a General Counsel, presently Vivek Krishnamurthy, Tamir Israel, and myself, respectively. CIPPIC benefits from the expertise of an internal Advisory Committee comprised of faculty members, as well as an external Advisory Board composed of highly respected and accomplished lawyers and academics in the technology law field from across North America.

5. CIPPIC's core mandate is to advocate in the public interest on matters 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 and public outreach component. In pursuit of these mandates, CIPPIC regularly provides expert testimony to parliamentary committees, participates in regulatory and quasi-judicial proceedings and conducts strategic intervention 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. This appeal raises issues relating to the legal impact of user-generated activities, the regulation of e-commerce platforms and the protection of digital privacy. Indicative examples of CIPPIC's institutional expertise on these matters include: testimony before the House ETHI committee in its statutory review of PIPEDA; a regulatory complaint that constituted the first comprehensive application of PIPEDA to a global social media platform (*CIPPIC v Facebook Inc*, PIPEDA Case Summary #2009-008); an intervention before the Supreme Court of Canada (*Douez v Facebook Inc*, 2017 SCC 33) and a joint intervention before the Court of Justice of the European Union (Case C-

507/17, *Google Inc v CNIL*), which both examined the cross-border legal implications of applying privacy rights to global online platforms; and input into reviews of two key international privacy instruments (Council of Europe, Modernization of Convention 108: New Proposals, T-PD-BUR(2012)01Rev and OECD, 30 Year Review of the OECD Privacy Guidelines, DSTI/ICCP/REG(2011)2).

7. Additional details of CIPPIC’s general expertise in Internet law are provided below, with particular emphasis on activities that implicate online user-generated activities, the regulation of e-commerce platforms and privacy. The breadth of this activity has furnished CIPPIC with expansive institutional expertise on Internet law matters including those raised by this reference in relation to digital privacy and e-commerce platforms.

II. INSTITUTIONAL EXPERTISE

(a) **Judicial**

8. This Court has previously granted CIPPIC leave to intervene, including in:

- (i) *Voltage v Doe*, File No T-662-16, on the implications of a novel copyright “reverse” class proceeding for alleged infringers named in the class;
- (ii) *Voltage v Doe*, 2016 FC 881, on the need for privacy safeguards in a third-party discovery order sought in support of a copyright infringement “reverse” class proceeding;
- (iii) *Voltage v Doe*, 2014 FC 161, addressing the balancing of copyright and Internet users’ privacy rights with respect to an ISP’s identification of customers alleged to be associated with copyright infringing activity; and
- (iv) *BMG v Doe*, 2004 FC 488, on the balance between privacy and copyright enforcement in the third party discovery process, taking into account applicable elements of PIPEDA.

9. CIPPIC interventions before other courts on Internet law matters include:

- (i) *R v Jarvis*, 2019 SCC 10, addressing the reasonable expectation of students' privacy in the classroom in the context of the *Criminal Code*'s voyeurism provision in light of digital surveillance techniques;
- (ii) *Cooperstock v United Airlines Inc.*, File No A-262-17 (FCA), regarding the application of the *Trade-marks Act* as online parody in light of implicated consumer protection and freedom of expression values;
- (iii) *R v Reeves*, 2018 SCC 56, addressing whether a reasonable expectation of privacy in a home computing system can persist despite consent obtained by a co-resident;
- (iv) *R v Jones*, 2017 SCC 60, 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;
- (v) *R v Marakah*, 2017 SCC 59, on the reasonable expectation of privacy in the text messages sent from the defendant's cell phone to another recipient;
- (vi) *Doez v Facebook Inc.*, 2017 SCC 33, on consumer access to domestic class proceedings relating to privacy rights implicit in the *Charter* and despite a non-negotiable forum selection imposed by a global e-commerce platform;
- (vii) *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;
- (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;
- (ix) *National Post v Fournier*, File Nos A-394-12 & A-395-12 (FCA), on the obligations imposed by copyright law on online discussion platforms including

with respect to liability for user activity (discontinued following written submissions);

- (x) *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, in light of the greater risk to privacy posed by the online publication of judicial decisions; and
- (xi) *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 hyperlink can be held to have published defamatory statements in the linked content.

10. CIPPIC has also participated in the courts as a primary party, including in:

- (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 applied to wireless service provider contracts; and
- (ii) *Lawson v Accusearch*, 2007 FC 125, a 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.

(b) Parliamentary Committees and Governmental Consultations

11. CIPPIC has had many opportunities to provide expert testimony and submissions to Parliamentary Committees and other governmental processes regarding the legal challenges posed by online environments, 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), “Canada’s Ageing Privacy Act: The Need for Modernization”, September 20, 2016;

- (iii) testimony before the Legislative Assembly of British Columbia Special Committee to Review the Freedom of Information and Protection of Privacy Act, “Trade Agreements: Recent and Upcoming Implications for BC FIPPA section 30.1”, November 18, 2015;
- (iv) testimony before the House of Commons Standing Committee on Industry, Science and Technology (INDU), Bill S-4: the Digital Privacy Act, February 19, 2015;
- (v) testimony before the House of Commons Standing Committee on Access to Information, Privacy & Ethics (ETHI), “Study on the Growing Problem of Identity Theft and its Economic Impact”, June 3, 2014;
- (vi) testimony before the House of Commons Standing Committee on Access to Information, Privacy & Ethics (ETHI), Study on Privacy & Social Media, June 19, 2012; and
- (vii) testimony before the House of Commons Standing Committee on Industry, Science and Technology (INDU), Bill C-27: Electronic Commerce Protection Act, September 28, 2009.

(c) **Quasi-Judicial Tribunals**

12. CIPPIC has participated in various activities before quasi-judicial administrative tribunals in pursuit of its objectives, including:

- (i) representation of the OpenMedia Engagement Network in *In re: An Applicant and the Vancouver Police Department*, BC OIPC File No: F15-63155, a written inquiry 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) a complaint and intervention in *CIPPIC v Facebook*, PIPEDA Case Summary #2009-008, applying Canadian privacy laws, norms and principles to the new and emerging medium of online social networking; and
- (iii) complaints under the *Privacy Act* against the CRTC (letter requesting investigation, June 2005) and the Pension Appeals Board (July 2007) assessing the open court principle in light of the greater impact and risks that emerge from online publication of non-anonymized decisions.

13. Through these and other activities, CIPPIC has had substantial impact on the development of Internet law and policy in Canada, including on the scope of digital privacy protection.

14. Expertise gained from these activities is supplemented by CIPPIC's client-based advisory activities and its participation in international policy-making forums. CIPPIC staff members are frequently called upon to do presentations, media interviews, and sit on panel discussions as experts in law and technology issues.

III. CIPPIC'S INTEREST IN THIS REFERENCE

15. CIPPIC's long-standing public interest advocacy on digital privacy matters as well as its broader historical concern with matters arising at the intersection of law and technology is the basis for its intervention in this reference.

16. This reference will define the extent to which e-commerce platforms are covered by PIPEDA, Canada's primary federal privacy legislation. The ultimate parameters of the threshold questions raised by this reference will have implications far beyond the complainant and the search engine represented in this proceeding. They will impact privacy on other e-commerce platforms such as social media networks, online messaging platforms and cloud services. They could also impact the ability of individuals to locate and impart personal information when carrying out their own interpersonal interactions on digital platforms. CIPPIC is well placed to speak to these perspectives.

IV. POSITION AND PROPOSED SUBMISSIONS

17. If granted leave to intervene, CIPPIC will address the following issues:

- (i) ‘commercial activity’ is an open-ended and ambiguous term, that should be given a broad and liberal interpretation, keeping in mind PIPEDA’s statutory objectives, its consumer protection nature and status as quasi-constitutional legislation, and consistency with implicated *Charter* principles of privacy, non-discrimination and freedom of expression;
- (ii) if the threshold term ‘commercial activity’ is defined too broadly or narrowly in this context, it can have far-reaching implications for privacy, information-based discrimination and freedom of expression on a broad range of e-commerce platforms, many of which operate on the basis of facilitating user-generated activity;
- (iii) ‘commercial activity’ must be defined in a manner that accounts for the integrated manner in which many e-commerce platforms, including search engines, are designed to broadly monetize user activity and Internet content; and
- (iv) whether acts of indexing and querying news articles and other online informational content are best addressed through PIPEDA’s journalistic activities exception or through some other vehicle.

18. I believe that CIPPIC’s submissions will be of assistance to the Court in deciding the important issues in this reference. CIPPIC’s submissions will be distinct in that they will derive from its public interest mandate.

19. I am further informed by Tamir Israel, Staff Lawyer for CIPPIC, that CIPPIC has coordinated with other public interest organizations who are seeking leave to intervene in this matter and, should leave be granted, that CIPPIC is willing to continue to coordinate with any parties in order to minimize duplication. I verily believe this to be true.

20. CIPPIC's proposed intervention will not cause a delay in the hearing of this case nor prejudice the parties.

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

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

SWORN before me at the City of)
Ottawa in the Province of Ontario) *[original signed]*
this 3rd day of October, 2019) **DAVID A FEWER**

[original signed]

Tamir Israel, Commissioner for Taking Oaths, etc

FEDERAL COURT

IN THE MATTER OF a reference pursuant to subsection 18.3(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of questions or issues of law and jurisdiction concerning the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 that have arisen in the course of an investigation into a complaint before the Privacy Commissioner of Canada

B E T W E E N:

THE PRIVACY COMMISSIONER OF CANADA

APPLICANT

WRITTEN REPRESENTATIONS

PART I - THE NATURE OF THIS MOTION

1. By way of this motion, the Moving Party, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), seeks an Order, in the form attached as Schedule "A" to the Notice of Motion, for leave to intervene in this proceeding.

Notice of Motion, Moving Party's Motion Record, Tab 1

PART II - THE FACTS

2. The Moving Party seeks leave to intervene in this reference.
3. CIPPIC is a legal clinic based at the Centre for Law, Technology and Society at the University of Ottawa. CIPPIC's mandate is to research and advocate in the public interest on public policy issues arising at the intersection of law and technology. CIPPIC's activities in support of its mandate include intervening before courts, tribunals, and other decision-making bodies in order to bring forward important public interest points or perspectives that might otherwise not be represented. CIPPIC has a particular interest in the legal issues raised in this proceeding insofar as their determination will impact the scope of privacy protection on e-commerce platforms, particularly with respect to user-generated content.

Affidavit of David A Fewer, Moving Party's Motion Record, Tab 2, paras 3-5

4. CIPPIC has extensive and distinct institutional knowledge of and expertise relating to the legal impact of user-generated activities, the regulation of e-commerce platforms and the protection of digital privacy – all matters that are central to the resolution of this reference. CIPPIC’s expertise this will inform the arguments and submissions we seek leave to present.

Affidavit of David A Fewer, Moving Party's Motion Record, Tab 2, paras 8-17

5. Specifically, this reference calls upon the Court to interpret threshold concepts that will determine the application of PIPEDA to user-generated activity carried out on e-commerce platforms. That determination will have broad implications for individuals’ rights to privacy, non-discriminatory treatment and freedom of expression in their day to day activities on search engines and across a range of e-commerce platforms. CIPPIC is well placed to ensure the Court is informed of these implications.

PART III - SUBMISSIONS

6. Under Rule 109 of the *Federal Court Rules*, 1998, the Court has the power to grant any person leave to person to intervene in a proceeding.

Federal Court Rules, SOR/98-106, Rule 109

7. The central question to be determined on a motion for public interest intervention under Rule 109 is whether the participation of the proposed intervener will assist the Court in determining a factual or legal issue related to the proceeding and whether permitting the intervention would serve the interests of justice. Public interest interventions are assessed on their capacity to assist the Court in addressing any public interest dimensions raised by the matter before it by advancing different and valuable insights on these matters without duplicating submissions already before the Court.

Sport Maska Inc v Bauer Hockey Corp, 2016 FCA 44; *Globalive Wireless Management Corp v Public Mobile Inc*, 2011 FCA 119, para 5 b; *Prophet River First Nation and West Moberly First Nations v Canada (Attorney General)*, 2016 FCA 120; *Rozas del Soal v Canada (Citizenship and Immigration)*, 2018 FC 156; *In Re Reference Questions or Issues of Law and*

Jurisdiction Concerning the Personal Information Protection and Electronic Documents Act, SC 2000, C 5, 2019 FC 957, para 95

8. A public interest organization will be deemed capable of assisting the Court where it can demonstrate its capacity to offer distinct, non-duplicative and useful submissions on the public interest questions before the court. This can be achieved by demonstrating institutional expertise on the matters at issue, and through the organization’s proposed arguments of fact and law, as set out in its motion for leave to intervene in accordance with Rule 109(2)(b) of the *Federal Court Rules*. These proposed submissions need not be set out in granular particularity.

Amnesty International Canada v Canada (Canadian Forces), 2008 FCA 257, para 3; *Globalive Wireless Management Corp v Public Mobile Inc*, 2011 FCA 119, para 5 c; *Rozas del Soal v Canada (Citizenship and Immigration)*, 2018 FC 156, para 17

9. In addition, a proposed Intervener must demonstrate an interest in the proceeding that is genuine, rather than ‘jurisprudential’, in nature. A genuine interest need not be direct in nature, and organization is sufficiently affected to establish its interest as genuine where the anticipated impacts of a given proceeding intersect with its mandate. Similarly, where an organization can advance “a demonstrated commitment to the strict interpretation” of the provisions in question, this will qualify as a genuine interest. By contrast, where the proposed intervener’s interest is premised on advancing its legal practice or attempting to avoid unwanted impacts for its client base, its interest is jurisprudential in nature. Generally, an intervener must be interested with the public interest impacts of the specific proceeding, not with the general state of the law implicated by it.

Globalive Wireless Management Corp v Public Mobile Inc, 2011 FCA 119; *Amnesty International Canada v Canada (Canadian Forces)*, 2008 FCA 257; *Prophet River First Nation and West Moberly First Nations v Canada (Attorney General)*, 2016 FCA 120, paras 19-20

10. CIPPIC has expertise in the legal and factual matters at issue in this motion. CIPPIC’s mandate is to advocate in the public interest on matters arising at the intersection of law and technology. In pursuit of this mandate, it has demonstrated its interest in such matters in numerous interventions before the courts on a broad range of law and technology

matters, in expert testimony on related issues before parliamentary committees and in a range of academic and regulatory activities. This has included parliamentary testimony, regulatory filings, and participation in court proceedings on PIPEDA-related matters and privacy more broadly. Its demonstrated interest in the broader public impacts that would result if PIPEDA were interpreted to exclude user-generated activity on e-commerce platforms is genuine and not merely jurisprudential in nature.

Affidavit of David A Fewer, Moving Party's Motion Record, Tab 2, paras 8(iv); 9(vi) and (x); 10(ii); 11-12

11. This reference raises complex dimensions of broad public importance. The interpretive questions raised by this reference will impact the degree to which individual interaction on a range of e-commerce platforms can continue to benefit from the protections in PIPEDA or not. CIPPIC proposed intervention will address the *Charter* and other public policy dimensions of this Reference.

Affidavit of David A Fewer, Moving Party's Motion Record, Tab 2, para 17; *In Re Reference Questions or Issues of Law and Jurisdiction Concerning the Personal Information Protection and Electronic Documents Act, SC 2000, C 5*, 2019 FC 957, para 29

12. CIPPIC will draw on its institutional expertise and mandate to provide the court with a perspective on the impact of mandating third party disclosure in this particular context. It has taken steps to coordinate with other interveners so that its submissions will not be duplicative of other interveners. Should it be granted leave to intervene, CIPPIC is willing to continue to coordinate with other parties to avoid duplication in its more detailed substantive submissions.

A. INTENDED SUBMISSIONS SHOULD LEAVE BE GRANTED

13. If granted leave to intervene, CIPPIC will address the following points:
 - a. ‘commercial activity’ is an open-ended and ambiguous term, that should be given a broad and liberal interpretation, keeping in mind PIPEDA’s statutory objectives, its consumer protection nature and status as quasi-constitutional

legislation, and consistency with implicated *Charter* principles of privacy, non-discrimination and freedom of expression;

- b. if the threshold term ‘commercial activity’ is defined too broadly or narrowly in this context, it can have far-reaching implications for privacy, information-based discrimination and freedom of expression on a broad range of e-commerce platforms, many of which operate on the basis of facilitating user-generated activity;
 - c. ‘commercial activity’ must be defined in a manner that accounts for the integrated manner in which many e-commerce platforms, including search engines, are designed to broadly monetize user activity and Internet content; and
 - d. whether acts of indexing and querying news articles and other online informational content are best addressed through PIPEDA’s journalist exception or through some other vehicle.
14. Courts have recognized that the term ‘commercial activity’ is ambiguous and PIPEDA defines it in a manner that is circular in nature. While the term itself denotes a profit-making motive and the exchange of consideration, courts have held that these touchstones of commercial character are not determinative. As a result, it is important to adopt a purposive approach to the interpretation of this term, keeping in mind the statutory context of PIPEDA and its animating purposes.
15. The statutory interpretation task must also take into account the rights-conferring nature of PIPEDA. In this respect, PIPEDA has been judicially recognized as quasi-constitutional in nature, a status that arises from its nexus with the constitutionally protected right to privacy. Courts have also characterized PIPEDA as ‘consumer protection’ legislation for the digital age. The term ‘commercial activity’ operates as a definitional gatekeeper to PIPEDA’s substantive protections and, in light of PIPEDA’s rights-conferring nature, should be interpreted restrictively. The term ‘commercial

activity’ should also be informed by any *Charter* principles it implicates, including the right to privacy, to non-discrimination and to freedom of expression.

16. This court’s definition of ‘commercial activity’ should also be cognizant of the implications an overly broad or narrow determination would have on PIPEDA’s application to other e-commerce platforms that operate on similar principles as search engines. PIPEDA and similar privacy laws have been applied to many e-commerce platforms that operate primarily on the basis of user activity that they facilitate.
17. Social media networks, for example, track the content shared by their users, much of which includes user-initiated interactions with content on the open internet. An under-inclusive definition of ‘commercial activity’ in this reference could operate to exclude the systematic collection of such activity by social media networks from PIPEDA’s protective scope. E-commerce platforms that operate on a more transactional basis such as Amazon also leverage user conduct on their platforms as a basis for extensive customer profiling. Defining commercial activity to the exclusion of common individual-initiated conduct that occurs on e-commerce platforms would impact PIPEDA’s application to these and other e-commerce contexts. Such under-inclusivity would be contrary to the objective of PIPEDA and comparable privacy laws.
18. The manner in which commercial activity is interpreted must also take into account the highly integrated monetization approach taken by most e-commerce platforms, which seeks to extract economic value from user activity and content in varied ways. As documented in the Privacy Commissioner’s evidentiary materials, individual actions on e-commerce platforms contribute to rich profiles that are monetized in a wide variety of ways over time, often in a manner that is divorced from the immediate context of a given search query. Yet the individual conduct these platforms collect and retain has commercial value beyond the immediate sale of advertisements.
19. Regulatory determinations have outlined how the collection and analysis of

individual conduct contributes to the development and refinement of various algorithms which have independent commercial value for e-commerce platforms. For example, the broad indexing of public content contributes to the refinement of automated natural language recognition while search algorithms are developed and refined by learning from the search activities of users. Courts and privacy regulators have recognized this holistic monetization model when applying laws to e-commerce platforms, and it must be taken into account when defining ‘commercial activity’ in the context of legislation intended to protect privacy on e-commerce platforms.

20. The acts of indexing and querying that are central to search engines have implications for the dissemination of online information including journalistic content. If granted leave, CIPPIC will provide submissions on the extent to which these activities might be categorized as conducted solely for journalistic purposes and to the extent that they cannot. CIPPIC’s submissions will draw on the perspective of individuals and in particular on their use of search engines to seek and impart information online.
21. CIPPIC therefore requests that its motion for leave to intervene be granted.

PART IV - ORDER

22. CIPPIC seeks an order granting it leave to intervene, with conditions set out in Schedule A to its Notice of Motion.

Notice of Motion, Schedule A, Moving Party’s Motion Record, Tab 1

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of October, 2019

[original signed]

Tamir Israel

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PART V - AUTHORITIES

<u>Statutory Provisions</u>	
1.	<i>Federal Court Rules</i> , SOR/98-106, Rule 109, https://laws-lois.justice.gc.ca/eng/regulations/sor-98-106/page-10.html#h-1013526
<u>Case Law</u>	
2.	<i>Amnesty International Canada v Canada (Canadian Forces)</i> , 2008 FCA 257, https://www.canlii.org/en/ca/fca/doc/2011/2011fca119/2011fca119.html
3.	<i>Globalive Wireless Management Corp v Public Mobile Inc</i> , 2011 FCA 119, https://www.canlii.org/en/ca/fca/doc/2011/2011fca119/2011fca119.html
4.	<i>In Re Reference Questions or Issues of Law and Jurisdiction Concerning the Personal Information Protection and Electronic Documents Act</i> , SC 2000, C 5, 2019 FC 957, https://www.canlii.org/en/ca/fca/doc/2016/2016fca120/2016fca120.html
5.	<i>Prophet River First Nation and West Moberly First Nations v Canada (Attorney General)</i> , 2016 FCA 120, https://www.canlii.org/en/ca/fca/doc/2016/2016fca120/2016fca120.html
6.	<i>Rozas del Soal v Canada (Citizenship and Immigration)</i> , 2018 FC 156, https://www.canlii.org/en/ca/fct/doc/2018/2018fc156/2018fc156.html
7.	<i>Sport Maska Inc v Bauer Hockey Corp</i> , 2016 FCA 44 https://www.canlii.org/en/ca/fca/doc/2016/2016fca44/2016fca44.html