

**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

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**MEMORANDUM OF FACTY AND LAW OF CANADIAN  
BROADCASTING CORPORATION/SOCIÉTÉ RADIO-CANADA**

**PUBLIC VERSION**

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## INTRODUCTION

1. The scope of the journalistic purpose exclusion contained in the *Personal Information and Protection of Electronic Documents Act* (“**PIPEDA**”) remains undetermined, as it has yet to be fully established by the courts in this country. However, various access to information and privacy statutes across Canada contain exclusions for certain classes of information. In establishing the scope of these exclusions, administrative bodies and courts appear to agree that they must be read in the larger context of the purpose of the statute in which they are contained.<sup>1</sup>

2. The purpose of PIPEDA is clearly set out in section 3:

The purpose of this Part is to establish [...] rules to govern the collection, use and disclosure of personal information [...] that a reasonable person would consider appropriate in the circumstances [emphasis added].<sup>2</sup>

3. As a starting point to determining what a reasonable person would find an appropriate level of disclosure of journalistic material, it is essential first to understand the nature of the information in issue, the nature of the underlying complaint, and the impact of subjecting it to PIPEDA in the hands of Google.

4. The complaint underlying the present reference concerns links returned by Google when one searches for the name of the Complainant. These links are to articles (the “**Impugned Articles**”) published by [REDACTED] [REDACTED] [REDACTED] (collectively, the “**Implicated Media**”). Google was not involved in the research, writing or initial publication of the Impugned Articles.

5. Both of the Implicated Media are recognized as enterprises engaged in journalistic activities. The status of the Impugned Articles as products of

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<sup>1</sup> See generally *Alberta Environmental Protection (Re)*, 1997 CanLII 15918, para 17; *Carleton University (Re)*, 2011 CanLII 3432, p 8; *Canadian Broadcasting Corporation v Canada (Information Commissioner)*, 2010 FC 954, para 25.

<sup>2</sup> *Personal Information and Protection of Electronic Documents Act*, SC 2000, c 5 [PIPEDA], s 3.

“journalism” has not changed simply because the articles are available online: “a newspaper is no less a newspaper because it appears in an online version”.<sup>3</sup>

6. The Complainant does not argue the Impugned Articles are incorrect or incomplete. His complaint is limited to the fact the links contain information about

7. So far, the Implicated Media have not been, and are not likely to be, invited by the Office of the Privacy Commissioner (“OPC”), to participate in the underlying complaint process. In fact, on this reference, both OPC and the Complainant opposed their participation as parties, alleging that they had no role to play.

#### **JOURNALISTIC MATERIAL IS EXCLUDED FROM PIPEDA**

8. It is our view that the journalistic exclusion in PIPEDA exists precisely because Parliament has recognized it is not the role of the OPC or of the Federal Court to be making editorial decisions about what should be in the news, when and for how long. In fact, the existence of other checks on journalistic activities was cited by Anne McLellan, the Minister of Justice responsible for the introduction of PIPEDA, when she was asked about the purpose and scope of the journalistic exclusion:

We have attempted to strike the balance between privacy and freedom of expression, but nobody should think the normal laws do not apply in this case [...]. There’s nothing here that in any way changes either common law or statute laws that may exist in terms of our basic protections in relation to issues such as defamation or whatever the case may be.<sup>4</sup>

9. The very purpose justifying the exclusion is that an affected party already has recourse against the content creator, who can defend its content. In particular, the courts can issue public judgments, and order damages and other equitable relief when published information is found to be off-side.

10. Furthermore, in the context of journalistic material, there are additional mechanisms beyond the courts through which an individual can challenge the

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<sup>3</sup> *Weiss v Sawyer*, 61 OR (3d) 526, 2002 CanLII 45064 (ON CA), para 25.

<sup>4</sup> *House of Commons Debates*, No. 83 (36-1) February 3, 1999, p 1620, Exhibit D6, Affidavit of Sandy Ballott, sworn August 10, 2020, p 539.

accuracy, completeness or currency of information that has been published. In particular, broadcast media are subject to ultimate review by the Canada Radio-Television Telecommunications Commission (with a preliminary review by the Canadian Broadcast Standards Commission (“**CBSC**”), or in the case of CBC/Radio-Canada, the offices of its French and English Ombudsman); and the various press councils across the country regulate recognized print and other media.

11. All of these processes allow for the publisher or content creator to justify the content in question on questions of accuracy, completeness and bias. If infringements are found to have occurred, they are publicly noted; in the case of adverse CBSC findings, the broadcaster must announce the finding<sup>5</sup>; every report from the CBC/Radio-Canada Ombudsman is published on its website<sup>6</sup>; and the National NewsMedia Council requires any adverse findings to be published<sup>7</sup>.

12. Despite the stated rationale for the exclusion, and the existence of these other appropriate mechanisms that are available to affected persons, OPC and the Complainant are trying through this reference to create a one-sided remedy for a complainant without any input from the content creator, which is virtually impossible for Google to defend against.

13. It is clear that the interpretation of the journalistic purpose exclusion proposed by OPC will expose journalistic material to the provisions of PIPEDA in a manner that would allow OPC to assess only the evidence tendered by a Complainant about the completeness, accuracy or currency of the information, without the input of the original content provider. Furthermore, even if Google decides it is in its interest to defend the content (which is by no means a guarantee), it would be required to do so without any formalized involvement of the Implicated Media. CBC/Radio-Canada submits that is an unreasonable result, given that Google would be placed in an

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<sup>5</sup> Canadian Broadcasting Standards Council (CBSC), *Frequently Asked Questions*, URL: <https://www.cbsc.ca/faqs/>.

<sup>6</sup> Ombudsman of the Canadian Broadcasting Corporation, *Frequently Asked Questions*, URL: <https://cbc.radio-canada.ca/en/ombudsman/faq-ombuds>.

<sup>7</sup> National NewsMedia Council, *Frequently Asked Questions*, URL: <https://www.mediacouncil.ca/frequently-asked-questions/>.

impossible position as it would not ever be able to defend the accuracy, completeness or timeliness of the underlying information, since it had no hand in researching it or in creating the news item at issue.

14. As a result, in keeping with the purpose of PIPEDA as outlined in section 3, CBC/Radio-Canada submits that the scope of the journalistic exclusion contained in PIPEDA is governed by what a reasonable person would find appropriate in the circumstances. To that end, CBC/Radio-Canada proposes a two-part analysis:

a) First, the Court should determine if the material to be disclosed by Google is the work-product of recognized news media. If it is, the exclusion should apply without further analysis.

b) Second, if it is alleged that the material is journalistic in nature despite not being created by recognized media, the finder of fact should ask whether it is the product of “journalism”. If so, the exclusion should apply.

15. Such an approach properly weighs the interests at play.

#### **COMMERCIAL PURPOSE IRRELEVANT TO THE EXCLUSION**

16. OPC and the Complainant have both expressed the view that Google is subject to the provisions of PIPEDA since it is engaged in commercial activity.<sup>8</sup>

17. We note PIPEDA does not apply to any organization that is not “commercial” in nature. As a result, simply having a “commercial purpose” generally must be insufficient to displace the journalistic purpose exclusion. To find otherwise would render the exclusion meaningless since the very parties it is meant to protect (both news broadcasters and newspapers with an online presence) are at least in part commercial in nature, and in particular monetize their news services through the sale of advertising. As a result, CBC/Radio-Canada submits the “no other purpose” element contained in the journalistic purpose exclusion must mean something more.

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<sup>8</sup> Office of the Privacy Commissioner of Canada, *Draft OPC Position on Online Reputation* (2018), URL: [https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/pos\\_or\\_201801/](https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/pos_or_201801/), Exhibit G of the Affidavit of Nathalie Lachance sworn May 14, 2019, pp 123-146 [**Position Paper**]; Complainant Factum, paras 10 and ff; OPC Factum, paras 5, 70 and ff.

### OVERALL ACTIVITIES OF GOOGLE IRRELEVANT TO THE EXCLUSION

18. In asserting that Google does not have recourse to the journalistic exclusion under PIPEDA, OPC and the Complainant have both misconstrued its actual text. Both attach the application of the exclusion to the operations of Google generally, instead of analyzing Google's purpose in disclosing the information in issue, as the exclusion requires. They suggest that the exclusion applies only to entities that are involved exclusively in journalistic activities.

19. OPC's position on this point is spelled out at Part 6 of its factum, titled "Google's search engine does not satisfy the journalistic purposes exemption" [emphasis added].<sup>9</sup> And the Complainant states this position even more plainly:

In order to fall within this exception (and in order for the second Reference question to be answered in the affirmative), all of the personal information involved in operating Google's search engine must be collected, used or disclosed for journalistic, artistic or literary purposes and for no other purpose [emphasis added].<sup>10</sup>

20. This interpretation is not supported by the plain and ordinary language used in section 4(2)(c) of PIPEDA. The wording of the exclusion reads:

This Part does not apply to [...]

(c) any organization in respect of personal information that the organization collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose.<sup>11</sup>

21. What is clear from this section is that it allows for *any organization* to engage in multiple activities that involve the collection, use or disclosure of personal information. And "in respect of" disclosure of any personal information made for a journalistic purpose, the entity may seek recourse in the exclusion. In other words, on the question of whether Google may seek refuge in the journalistic exclusion, it matters not if Google is engaged in some form of other activities as it relates to the disclosure of other information, or in its operations generally. As long as the personal

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<sup>9</sup> OPC Factum, paras 82, 90.

<sup>10</sup> Complainant Factum, para 49.

<sup>11</sup> PIPEDA, s 4(2)(c).

information contained in any given link returned in a Google search is journalistic in nature, and is being disclosed solely to inform a segment of the public who seeks it out, the exclusion can properly apply to that information.

22. As a result, it is not appropriate to look at the activities of Google in a global sense to determine if it is disclosing information for a journalistic purpose. Rather, one must look at whether Google is engaging in a journalistic purpose “in respect of personal information” it returns in links to journalism in response to a search request.

23. Given the nature and purpose of journalism, the dissemination of journalism by Google, even if done for profit, constitutes a “journalistic purpose”. Such a finding is entirely appropriate given Google’s limited role in how and why the information in question is prepared by the media, and then sought out by the public.

#### **JOURNALISTIC PURPOSE DEFINED**

24. The purpose of the journalistic exclusion flows from the values which animate the special role of the media in Canadian society. In particular, it aims to allow Canadians to make informed decisions by having access to information on matters of public interest that affect them. A similar purpose to protecting the right of the public to receive information is entrenched in the European model of the so-called “Right to be Forgotten”, through the carve-out for “journalistic purposes”:

[The exclusion] is necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [emphasis added].<sup>12</sup>

25. This idea that the rights arising from journalistic communications belong to both the media and the public at large is central to the purpose of journalism:

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<sup>12</sup> European Parliament and Council, Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 24 October 1995, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=EN>, recital (37). See also article 9.

“The purpose of journalism is thus to provide citizens with information they need to make the best possible decisions about their lives, their communities, their societies and their governments”.<sup>13</sup>

26. This purpose extends beyond the initial publication of the item in question. “Old news” still serves a journalistic purpose even when it is accessed through archival sources. This principle is expressly acknowledged in Europe:

[The exclusion] should apply in particular to the processing of personal data in the audiovisual field and in news archives and press libraries [emphasis added].<sup>14</sup>

27. OPC is encouraging this Court to take a narrow view of the journalistic exclusion, stating that the rights of the media are adequately addressed by permitting the material to remain accessible on the originating site.<sup>15</sup>

28. However, CBC/Radio-Canada submits this argument demonstrates a fundamental lack of understanding of how users interact with the internet. The Supreme Court of Canada has recognized the vital role that search engines play in the proper functioning of the internet:

There are hundreds of millions of active websites over the internet and trillions of webpages. Search engines make the internet a viable and effective information and communication resource. The internet cannot be successfully navigated without search services such as those Google provides [emphasis added].<sup>16</sup>

29. Furthermore, the Supreme Court has also recognized that speech without an audience is meaningless:

Accordingly, it must be understood that the individual has an interest in communicating his ideas in a place which, because of the presence of

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<sup>13</sup> American Press Institute, *What is the purpose of journalism?*, URL: <https://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/purpose-journalism/> [American Press Institute].

<sup>14</sup> General Data Protection Regulation (GDPR), (EU) 2016/679, Recital 153, URL: <https://gdpr-text.com/read/recital-153/>.

<sup>15</sup> Position Paper, *supra* note 4, section “Notification to Publishers”.

<sup>16</sup> *Equustek Solutions Inc v Jack*, 2014 BCSC 1063, para 32 (aff’d 2017 SCC 34).

listeners, will favour the effective dissemination of what he has to say [emphasis added].<sup>17</sup>

30. Effective communication includes the ability to use existing channels without government interference:

[A]ccording to Van Hoboken, “[t]he protected interests of information providers under the right to freedom of expression can be best understood as the freedom to be included in the search engine’s index and to find their way to an audience”.<sup>18</sup>

31. Any rule that serves to remove information from search engine results effectively relegates that information to the far reaches of the internet where it will never be discovered. In short, removing the information from search engines like Google removes the information entirely from the public realm, even if *technically* it still available somewhere.

32. As a result, CBC/Radio-Canada submits that Google can and should be seen to be engaging in a journalistic purpose when it discloses personal information that is contained in links to “journalism”, as those links “provide citizens with information they need to make the best possible decisions about their lives, their communities, their societies and their governments.”<sup>19</sup>

33. Given that the purpose of the exclusion is to enshrine the right of the public to receive information that affects their lives, communities, societies, governments and institutions, and the fact that the nature of public interest in these matters may evolve over time, CBC/Radio-Canada submits that the exclusion contained in 4(2)(c) of PIPEDA applies to all links returned in a Google search that are the product of journalism.

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<sup>17</sup> *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, p 154.

<sup>18</sup> Ryan Belbin, *When Google Becomes the Norm: The Case for Privacy and the Right to be Forgotten*, (2018) 26 Dalhousie Journal of Legal Studies 17, 2018 CanLIIDocs 301 [**Belbin**], at 29.

<sup>19</sup> American Press Institute, *supra* note 10.

34. Such a finding assigns the proper weight to the *Charter* rights of the public to receive information against the purely personal statutory interests that are meant to be balanced under the exclusion.

**“JOURNALISM” DEFINED**

35. As per CBC/Radio-Canada’s proposed two-part analysis, set out at paragraph 14, links returned by Google to recognized news media will always serve a “journalistic purpose” and the exclusion shall apply without further review of OPC or the Court (part (a) of the test). However, CBC/Radio-Canada proposes a three-part test that may be applied to links to other material to see whether the exclusion should also apply in those instances (part (b) of the test).

36. The question of what constitutes “journalism” under part (b) of the proposed test appears only to have been considered by two cases that have broached the issue, but neither has fully resolved it. In *Globe24h*,<sup>20</sup> this Court found that reproducing court decisions on a website, and requiring payment for their removal was not an excluded activity under PIPEDA. The Alberta Court of Appeal has found that simply broadcasting video of individuals crossing a picket line over the web was not captured by a similarly worded exclusion under the *Alberta Personal Information Protection Act*.<sup>21</sup> Both of those cases turned on whether the underlying material was “journalistic”, and found that it was not.

37. In evaluating the initial complaint in *Globe24h*, OPC relied on a definition of journalism contained in a report by the Canadian Association of Journalists:

...[T]he report describes three functional criteria by which ‘journalism’ can be recognized:

1. **Purpose:** An act of journalism sets out to combine evidence-based research and verification with the creative act of storytelling. Its central purpose is to inform communities about topics or issues that they value.

2. **Creation:** All journalistic work – whether words, photography or graphics – contains an element of original production.

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<sup>20</sup> *AT v Globe24h.com*, 2017 FC 114.

<sup>21</sup> *United Food and Commercial Workers, Local 401 v Alberta (Attorney General)*, 2012 ABCA 130.

3. **Methods:** Journalistic work provides clear evidence of a self-conscious discipline calculated to provide an accurate and fair description of facts, opinion and debate at play within a situation.

The report further proposes that, for most purposes, the above criteria be considered a “three-way veto” – that is, the failure to meet any of the criteria implies a failure to meet the definition of journalism.<sup>22</sup>

38. This definition of journalism was then accepted by this Court.<sup>23</sup> CBC/Radio-Canada agrees this is an adequate definition with which to begin the analysis.

39. Recalling that in a case of a complaint arising from a Google search, the content creators are likely not to be invited to participate in the complaint process, and that Google is not in a position to justify the content in any way, the question of whether the underlying material constitutes “journalism” will have to be assessed on the face of the record itself.

### ***1. Purpose***

40. Under the first step, one must take the viewpoint of the content creator: was the *intention* to inform the target audience on a matter of public interest? The Supreme Court of Canada has established a test to determine whether a publication relates to a matter of public interest:

The expression should be assessed “as a whole”, and it must be asked whether “some segment of the community would have a genuine interest in receiving information on the subject”. While there is “no single ‘test’”, “[t]he public has a genuine stake in knowing about many matters” ranging across a variety of topics.<sup>24</sup>

41. The Court made it clear that “public interest” must be given a broad scope: “[t]he democratic interest in such wide-ranging public debate must be reflected in the jurisprudence”.<sup>25</sup>

42. Importantly, CBC/Radio-Canada submits the wording of the definition of journalism requires only an analysis of what the journalist intended at the time the

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<sup>22</sup> *Complaints against Globe24h.com*, 2015 CanLII 33260, paras 51 and ff.

<sup>23</sup> *AT v Globe24h.com*, 2017 FC 114, para 68.

<sup>24</sup> *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22, para 27.

<sup>25</sup> *Ibid.*

story was published; it is the “purpose” of the publication, not the result, that matters at this stage of the analysis. Even if the material does not succeed in that aim, or if circumstances in the underlying material change over time, the material could still qualify as “journalism” if that was its original intention:

Finally, since the promotion of the open exchange of information and opinions on matters of public interest is one of the overarching purposes animating s. 137.1, the characterization of the expression as a matter of public interest will usually be made by reference to the circumstances as they existed when the expression was made [emphasis added].<sup>26</sup>

43. Provided the face of the record in question reveals that it sought to inform a segment of the population on a matter of public interest at the time the information was first published, the finder of fact should proceed to the next element of the analysis.

## **2. Creation**

44. CBC/Radio-Canada submits this element of the definition looks at whether the material was “original” when it was initially published. A finding that material is not “original” simply because it is being accessed at a later date and/or through a different medium of communication would distort a reasonable person’s understanding of the word.

45. For example, a reasonable person would deem the content of a newspaper to be “journalism” even if that newspaper was accessed years later in a library’s archives. It is unreasonable to think that material is no longer the product of journalism simply because it is dated, or because it was accessed through a source other than the original publisher. CBC/Radio-Canada submits that finding also holds for archival journalistic content that is made available online through Google.

46. Furthermore, CBC/Radio-Canada submits that trying to impose some sort of stale-date on the originality of journalism based solely on the passage of time would be completely arbitrary and impossible to assess. In other words, journalistic material

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<sup>26</sup> *1704604 Ontario Ltd v Pointes Protection Association*, 2018 ONCA 685, para 64; see also para 55 (rev’d on other grounds 2020 SCC 22).

does not lose its quality or status as the product of journalism simply because it accessed by a reader through Google, even if long after the original date of publication. Provided the material contained the necessary elements of originality at the time it was initially published, the finder of fact should move on to the final stage of the analysis.

### **3. Methods**

47. Once again, CBC/Radio-Canada submits the language contained in this element of the test is essential in framing what is to be considered by the finder of fact: the words “*calculated to achieve and accurate and fair description*” mean the finder of fact should ask itself whether it appears on the face of the information in question that an honest attempt was made to be both fair and accurate, even if in the result that is not the case, or if new information has come to light after the initial publication. This approach is consistent with what a reasonable person should expect from the law:

The requirement that the publisher of defamatory material act responsibly provides accountability and comports with the reasonable expectations of those whose conduct brings them within the sphere of public interest. People in public life are entitled to expect that the media and other reporters will act responsibly in protecting them from false accusations and innuendo. They are not, however, entitled to demand perfection and the inevitable silencing of critical comment that a standard of perfection would impose.<sup>27</sup>

48. In other words, even if the information at issue contains material errors or inaccuracies, if there appears to have been an honest attempt to report the matter accurately, the information should be found to be “journalistic” in nature for the purpose of the exclusion.

### **SUMMARY OF “JOURNALISM”**

49. In short, work product of recognized news media is always “journalism”, irrespective of its age and the means through which it is accessed. However, where the underlying material is not the product of recognized news media, the finder of

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<sup>27</sup> *Grant v Torstar Corp*, 2009 SCC 61, para 62.

fact may determine if the record in question is the product of journalism by asking: 1) did the author *intend* to communicate on a matter of public interest; 2) *at the time of initial publication*, did the material contain the necessary elements of originality; and 3) even if there are factual errors or other deficiencies in the reporting, does it appear there was an honest *attempt* at presenting a fair and accurate depiction of the facts in issue?

50. If the answer to all three of the questions is “yes”, the finder of fact should apply the exclusion. A finding that Google is engaged in a journalistic purpose when it disseminates “journalism”, under either branch of the proposed test set out at paragraph 14, is in keeping with the purposes of PIPEDA.

**“BALANCING” REQUIRED UNDER THE EXCLUSION**

51. As noted above, the purpose of PIPEDA is to limit disclosure of personal information to the extent that would be acceptable to reasonable people. In the European model, the purpose of the Right to be Forgotten is to weigh the right of the public to receive information against the interest individuals have in maintaining their privacy. Unlike in Europe where privacy is considered a stand-alone right, the Canadian model does not seek to “balance” two equal rights; it must only give the appropriate weight to the competing interests at play.

52. In Canada, the right to receive information on matters of public importance has been recognized by the Supreme Court of Canada as an essential element of freedom of the press.<sup>28</sup> But while the *Charter* incorporates territorial, bodily and decisional privacy into the rights against unreasonable search and seizure<sup>29</sup>, there is no stand-alone *right* to privacy in information in general terms. While important, informational privacy interests such as those on this reference have not been elevated to *Charter* status: “[A]n individual upset over a personal listing on an online search engine has not been deprived of any defined Charter right, and faces a lack of standing to assert any such claim in court.”<sup>30</sup>

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<sup>28</sup> *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326.

<sup>29</sup> *R v Dymont*, [1988] 2 SCR 417.

<sup>30</sup> Belbin, *supra* note 5, p 29.

53. CBC/Radio-Canada submits it is entirely appropriate to find the exclusion applies to journalistic material accessed through search engines such as Google, as it strikes the proper balance of the privacy interest and *Charter* rights at play. The public interest in the information does not necessarily erode over time; the public to whom it relates may evolve; or the information itself may take on new meaning. As a result, accessing archived journalistic material always serves a “journalistic purpose” since it serves to inform a segment of the population on matters of public importance even after the passage of time, no matter the means through which it is accessed.

54. On the other hand, the alternative of exposing this same material to review under PIPEDA at the request of an individual simply because they no longer wish to have personal information accessible to the public because it is embarrassing, or for some other personal reason, serves only a private interest. When weighing personal privacy interests against the *Charter* guarantee of freedom of expression, courts in Canada have consistently sided with advancing the public interest, rather than giving in to the purely personal interest of one individual:

Purely personal interests cannot justify non-publication or sealing orders. Thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test [citations omitted].<sup>31</sup>

55. CBC/Radio-Canada submits a similar analysis should guide the interpretation of the journalistic material exclusion in the same way, as it weighs identical rights and interests: freedom of the press on the one hand, and privacy interests of an individual on the other.

56. The facts of the underlying complaint are demonstrative of this argument. The Complainant has positioned the issue to be decided by OPC as to whether the public has a right to be able to find intimate personal details about him. However, that position fails to take into account the larger public interest in the question of [REDACTED] [REDACTED] generally, which continues to be a matter of significant public controversy.

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<sup>31</sup> *MEH v Williams*, 2012 ONCA 35, para 25.

**SUMMARY**

57. By exposing the Impugned Articles to scrutiny under PIPEDA while simultaneously excluding the Implicated Media from providing input on the analysis creates a lopsided argument that deprives OPC of a full understanding of why the Impugned Articles continue to serve a journalistic purpose by informing members of the public on the larger public controversy. As a result, material that should properly remain searchable may be wrongly removed from the public domain.

58. There is no question OPC lacks jurisdiction over journalistic material in the hands of the original content creator. Granting OPC jurisdiction over journalistic material accessed through a search engine such as Google as it is trying to do in this case is to grant permission for it to do indirectly what it cannot do directly. Such a result undermines the outcome the journalistic purpose exclusion is precisely designed to prevent.

Montreal, November 24, 2020

*Fasken Martineau DuMoulin*

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