

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

BETWEEN:

THE PRIVACY COMMISSIONER OF CANADA

Applicant

**PUBLIC MEMORANDUM OF FACT AND LAW OF
GOOGLE LLC**

NOVEMBER 9, 2020

**James D. Bunting
Anisah Hassan
Adam Soliman**

TYR LLP
160 John Street, Suite 500
Toronto, ON M5V 2E5

Tel: 647.519.6607
Fax: 416.987.2370
Email: jbunting@tyrllp.com
ahassan@tyrllp.com
asoliman@tyrllp.com

David TS Fraser

MCINNES COOPER
1969 Upper Water St., Suite 1300
Purdy's Wharf Tower II
Halifax, NS B3J 3R7

Tel: 902.444.8535
Fax: 902.425.6350
Email: david.fraser@mcinnescooper.com

Legal Counsel for the Respondent, Google LLC

TO: Federal Court Registry
180 Queen Street West
Suite 200
Toronto ON M5V 3L6

AND TO: Goldblatt Partners
500 - 30 rue Metcalfe St.
Ottawa, Ontario K1P 5L4

Office of the Privacy Commissioner of Canada
30 Victoria Street
Gatineau, Quebec K1A 1H3

Peter Engelmann
Colleen Bauman
Tel: (613) 482-2452
(613) 482-2463
Fax: (613) 235-3041
Email: pengelmann@goldblattpartners.com
cbauman@goldblattpartners.com

Regan Morris
Kelly Stephens
Tel.: (613) 219-9016
(613) 818-2238
Fax: (819) 994-5424
Email: Regan.Morris@priv.gc.ca
Kelly.Stephens@priv.gc.ca

Counsel for the Privacy Commissioner of Canada

AND TO: Mark Phillips
4104 rue Saint-Denis,
Montréal, QC H2W 2M5

Tel: (514) 441-5054
Fax: (438) 801-0347
Email: avocat@markphillips.ca

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Michael Fenrick
Charlotte Calon
Tel: (416) 646-7481
Fax: (416) 646-4301
Email: Michael.fenrick@paliareroland.com
Charlotte.Calon@paliareroland.com

Counsel for the Complainant

AND TO: Attorney General of Canada
Department of Justice
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

Christopher M. Rupar
Kirk G. Shannon
Fraser Harland
Tel.: (613) 670-6290
(613) 670-8515
Fax: (613) 954-1920
Email: Christopher.rupar@justice.gc.ca
Kirk.Shannon@justice.gc.ca
Fraser.harland@justice.gc.ca

Counsel for the Attorney General of Canada

AND
TO: **Canadian Broadcasting Corporation/
Société Radio Canada**
250 Front Street West
Toronto, ON M5V 3G7

Sean Moreman
Tel.: (416) 205-6494
Email: sean.moreman@cbc.ca

Fasken Martineau Dumoulin, SRL
800 Place Victoria, Suite 3700, CP 242
Montréal, QC H4Z 1E9

Christian Leblanc
Patricia Hénault
Tel.: (514) 397-7545
Fax: (514) 397-7600
Email: cleblanc@fasken.com
phenault@fasken.com

Counsel for the Intervener, Canadian Broadcasting Corporation/Société Radio Canada

AND
TO: **Samuelson-Glushko Canadian Internet
Policy and Public Interest
Clinic (CIPPIC)**
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

Tamir Israel
Tel.: (613) 562-5800 ext 2914
Fax: (613) 562-5417
Email: tisrael@cippic.ca

Trudel Johnston & Lespérance
750 Cote de la Place d'Armes, Bureau 90
Montréal, QC H2Y 2X8

Alexandra (Lex) Gill
Tel.: (514) 871-8385 ext 219
Fax: (514) 871-8800
Email: lex@tjl.quebec

**Counsel for the Intervener, Samuelson-Glushko Canadian Internet Policy and Public
Interest Clinic (CIPPIC)**

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OVERVIEW

1. In contrast to the broad and sweeping submissions set out in the facts of the Privacy Commissioner of Canada (the “**OPC**”) and the Complainant, this reference application (the “**Reference**”) is not about online privacy generally, nor all of Google’s activities, nor even all of the activities of Google’s search engine (“**Google Search**”). The *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 (“**PIPEDA**”) applies to specific activities, not to all of the activities of an organization, and the questions framed by the OPC in this Reference are focused on the indexing and presentation of Google Search results “in response to searches of an individual’s name”.

2. That activity of searching for an individual’s name arises in the context of an underlying complaint to the OPC. That complaint concerns news articles that refer to the Complainant that were written and published by news organizations, who decided what information to include in those articles and invited Google to include the articles in Google Search results. The OPC has introduced no evidence that advertisements were shown in response to searches for the Complainant’s name.

3. *PIPEDA* does not apply to the specific activity raised in this Reference. Google acts as an intermediary. It references the content of news organizations, like a digital library index. This activity is very different from the collection, use and disclosure of personal information in the course of commercial activities in respect of which *PIPEDA* applies. Moreover, even if this Court finds that *PIPEDA* applies to search results displayed in response to searches of an individual’s name, activity of this nature falls outside the constitutional purpose and mandate of *PIPEDA* and is exempt from the application of *PIPEDA* under s. 4(2)(c).

4. Parliament did not include a “right to be forgotten” in *PIPEDA*, nor did it endow the OPC with the power to regulate either the public’s right to seek and access lawfully existing information that was published on the internet or the right of the media to publish and to reach audiences for their lawful publications. In the absence of that authority, the OPC commenced this Reference seeking jurisdiction over Google Search so that it can instruct Google to delist news articles from Google Search results, thereby allowing the OPC to do indirectly what it cannot do directly.

5. While the Reference is framed as a simple question of jurisdiction, it necessarily engages with the purpose and scheme of *PIPEDA* and the delicate balance that must be struck between privacy and freedom of expression. The OPC argues to the contrary, asserting issues relating to the constitutionality of applying *PIPEDA* to Google Search can be addressed later because they are not engaged until it directs Google to delist content. The OPC’s position is incorrect.

6. It is well recognized that the raw power to regulate speech infringes s. 2(b) of the *Charter* even if that power is not exercised. Critically important *Charter* issues arise even before the OPC directs Google to delist a search result.

7. As a direct result of the limited scope and evidence that the OPC has put before the Court, the ability of this Court to address and decide the questions before it in this Reference is significantly constrained. This Court should not, on the basis of the issues and evidence before it, determine that *PIPEDA* applies to Google Search. The consequences that follow from such a decision are too important, too cumbersome and too far-reaching to be compartmentalized and decided in the narrow manner set out in this Reference. It should be left to Parliament to make this determination in light of its policy objectives and taking all the consequences (intended or not) into account. The only outcomes that can fairly be achieved within the narrow scope of this Reference are to (i) find that *PIPEDA* does not apply to Google Search; or (ii) decline to answer

the Reference questions. Any other outcome would have significant ramifications that, based on the evidentiary record and issues presented to it, this Court has not been equipped to address.

PART I – FACTS

8. Google was in its infancy and technology was very different when *PIPEDA* received royal assent in April 2000.¹ Indeed, neither Google Search nor any other search engines are discussed in over 1,500 pages of Parliamentary debates and reports on the enactment of *PIPEDA*.

9. In the 20 years since the enactment of *PIPEDA*, the world has changed – driven in many ways by technological advances. The technology at issue in this Reference is Google Search, a free search engine that allows the public to conduct searches of content created and posted by others on the internet.² Google Search provides links or references to webpages published by third parties. A webpage is an online document located at a unique address, called a “**uniform resource locator**” or “**URL**”.³

A. THE COMPLAINT GIVING RISE TO THE REFERENCE

10. On June 16, 2017, the Complainant submitted a complaint to the OPC requesting that certain URLs containing news stories about him be delisted from Google Search (the “**Complaint**”).⁴ Those articles from local news sources report on criminal charges laid against the Complainant and, among other things, state that police are disclosing this information to warn the public about risks of certain interactions with him.⁵

¹ *House of Commons Debates*, Vol. 136, No. 85 (36-2) April 13, 2000, pp. 6126-6127, Exhibit D.3, Affidavit of Sandy Ballott, sworn August 10, 2020 (“**Ballott Affidavit**”), pp. 381-382.

² Preliminary Findings of Fact (“**Preliminary Findings**”), paras. 3, 16, 47, Exhibit R, Affidavit of Nathalie Lachance sworn May 14, 2019 (“**Lachance Affidavit**”), pp. 216, 219, 226..

³ As the distinction between a webpage and its URL is not relevant here, those terms are used interchangeably in this Factum.

⁴ Online Complaint Form dated June 16, 2017, Exhibit A, Lachance Affidavit, pp. 11-36.

⁵ Online News Articles referred to in Complaint, Exhibit B, Lachance Affidavit, pp. 54-95.

11. The Complainant contacted Google on July 7, 2017, requesting that the same news articles be delisted from Google Search.⁶ After reviewing the request and following its policies and practices, Google declined to remove the search results and encouraged the Complainant to resolve the matter directly with the publishers of the articles. Google also informed the Complainant that “[i]f you pursue legal action against this site [that published the articles] that results in the removal of the material, our search results will display this change after we next crawl the site.”⁷ There is no evidence in the record that the Complainant or the OPC asked the publishers of the articles to remove or update them.

12. On November 16, 2017, the OPC contacted Google and asked Google to justify linking to the articles in question.⁸ Google responded that the OPC did not have jurisdiction in this matter as *PIPEDA* was not applicable, the matter was exempt by the journalistic exemption, and the OPC’s interpretation of *PIPEDA* was contrary to the *Charter*.⁹

13. This Reference was commenced on October 10, 2018 raising two questions (the “**Reference Questions**”) focused on Google “index[ing] web pages and present[ing] search results in response to searches of an individual’s name”.¹⁰ Notably, the OPC already addressed and provided its opinion on the Reference Questions in its “Draft OPC Position on Online Reputation” (the “**OPC Position**”) published January 21, 2018.¹¹ The OPC Position expresses the OPC’s opinion that (i) internet search engines collect and disclose personal information for a commercial purpose; (ii) internet search engines are subject to *PIPEDA* when they display search results in

⁶ Email dated July 19, 2017 from Mark Phillips, Exhibit D, Lachance Affidavit, p. 109.

⁷ Email dated July 19, 2017 from Mark Phillips, Exhibit D, Lachance Affidavit, p. 108.

⁸ Letter from OPC to Google dated November 16, 2017, Exhibit E, Lachance Affidavit, pp. 113-114.

⁹ Letter dated March 2, 2018 from D. Fraser to OPC, Exhibit F, Lachance Affidavit, pp. 117-120.

¹⁰ *Reference*, [2019 FC 957](#) at para. 11 (Google BOA, Tab 18)

¹¹ OPC Position Paper on Online Reputation, January 26, 2018, Exhibit G, Lachance Affidavit, pp. 123-146.

response to a search user's query; and (iii) the OPC has the jurisdiction under *PIPEDA* to effectively compel internet search engines to delist and censor search results.¹²

B. HOW GOOGLE SEARCH WORKS

14. Google Search operates through three basic functions: crawling, indexing, and displaying search results. Crawling is an automated process that involves the use of software, called a “crawler”, that continuously accesses publicly available webpages¹³ and transmits information from those webpages to be indexed or referenced.¹⁴ As pages are updated over time, Google's crawlers access the updated version of the pages.¹⁵

15. Information identified by the crawler is then linked to an index where Google organizes the information. This index is like the index in the back of a book, with an entry for each word on each webpage indexed.¹⁶ The index is updated if a new webpage appears or an existing webpage is altered or removed.¹⁷

16. When an individual enters a search query, Google Search uses algorithms to display search results linking to the relevant web pages in the index, ranked from most to least relevant. Google Search displays the title of the webpages, links to the webpages, and automatically-generated short textual “snippets” from the webpages.¹⁸ The information displayed is content from the webpage itself and (as explained below) is subject to the instructions of website operators.¹⁹

¹² OPC Position, pp. 7-8, 11 and 13, Exhibit G, Lachance Affidavit, pp. 129-130, 133, 135.

¹³ Preliminary Findings, para. 28, Exhibit R, Lachance Affidavit, p. 221.

¹⁴ Preliminary Findings, para. 28, Exhibit R, Lachance Affidavit, p. 221.

¹⁵ Preliminary Findings, paras. 30-33, Exhibit R, Lachance Affidavit, pp. 221-222.

¹⁶ Preliminary Findings, para. 30, Exhibit R, Lachance Affidavit, p. 221.

¹⁷ Preliminary Findings, paras. 30-33, Exhibit R, Lachance Affidavit, pp. 221-222.

¹⁸ Preliminary Findings, para. 35, Exhibit R, Lachance Affidavit, p. 222

¹⁹ Preliminary Findings, paras. 3, 40, Exhibit R, Lachance Affidavit, p. 217, 222

17. Google displays responses to a user search query in the order that Google considers of likely interest to the user²⁰ as determined by algorithms maintained by Google, which analyze many different factors, including how recent the content is and the number of times it has been linked to by prominent websites.²¹

18. Importantly, website operators have control over whether their content is displayed by Google Search. Website operators may configure their servers to refuse to respond to requests for access from one of Google’s crawlers, preventing the contents of that URL from being indexed and displayed by Google Search.²² Operators can also provide more detailed instructions to Google on whether and how to capture particular content through files titled “robots.txt”.²³ In this manner, website operators control the content on their website that is available to be indexed and, therefore, displayed by Google Search. Website operators can also opt out entirely from Google Search.²⁴

19. For news articles, like the content at issue here, news organizations control what stories appear in Google Search as part of their overall journalistic mission: first, by deciding what to publish on their website; then, by deciding whether to remove or change any information on their website (such as making references to an individual anonymous or by updating stories with later-arising information); and finally, they can use robots.txt files to direct Google on which stories from their websites to include in Google Search.²⁵ Here, all of the news organizations at issue invited Google to include their webpages in Google Search²⁶ and, as noted, it was entirely within

²⁰ Preliminary Findings, para. 35 Exhibit R to Lachance Affidavit, p. 222

²¹ Preliminary Findings, para. 38, Exhibit R to Lachance Affidavit, p. 223

²² Preliminary Findings, para. 33, Exhibit R, Lachance Affidavit, p. 222; “How Search organizes information”, Exhibit S-7, Lachance Affidavit, p. 73.

²³ Preliminary Findings, para. 33, Exhibit R, Lachance Affidavit, p. 222.

²⁴ “How Search organizes information”, p. 1, Exhibit S-7, Lachance Affidavit, p. 73.

²⁵ Preliminary Findings, paras. 32-34, Exhibit R, Lachance Affidavit, p. 222; “How Search organizes information”, p. 1, Exhibit S-7, Lachance Affidavit, p. 73.

²⁶ Preliminary Findings, para. 34, Exhibit R, Lachance Affidavit, p. 222.

the control of these news organizations to prevent the articles from being indexed by the crawler and, therefore, from being displayed by Google Search.

C. GOOGLE DOES NOT GENERATE REVENUE FROM SEARCHES FOR THE COMPLAINANT

20. Google does not accept money for displaying web pages in Google Search nor to alter the order of its search results or prioritizing the ranking of a web page.²⁷ Google generates revenue when users click on advertisements that are displayed.²⁸ Ads are displayed in response to some, but not all, search queries.²⁹ Advertisements are generated through a process that is entirely separate from how Google returns search results. An advertiser creates the text of the advertisement and selects keywords in respect of which it wants its advertisement to be displayed.³⁰ That advertisement may then be displayed in response to a query for those keywords. For example, if a user searches for “bikes”, they may see advertisements for bicycles for sale near them from advertisers who selected “bikes” as a keyword.³¹

21. On a search where advertisements are displayed, advertisements are labelled and displayed separately from search results returned by a query. This is illustrated in the examples in the OPC’s Record, which show the “Ad” label beside displayed advertisements.³²

22. This Reference only concerns “search results in response to searches of an individual’s name”.³³ It is highly unlikely that advertisers would select the name of a private individual like the Complainant as keywords for their advertisements. The only search results before this Court are searches for the Complainant’s name and, unsurprisingly, there is no evidence before this Court

²⁷ Preliminary Findings, paras. 16, 47, Exhibit R, Lachance Affidavit, pp. 219, 226; Letter dated September 10, 2018 from D. Fraser, para. 43, Exhibit N, Lachance Affidavit, p. 198.

²⁸ Preliminary Findings, para. 50, Exhibit R, Lachance Affidavit, pp. 226-227.

²⁹ For example, Google did not display advertisements in responses to searches for the Complainant’s name.

³⁰ Google, “Search Ads”, pp. 1-2, Exhibit S-21, Lachance Affidavit, pp. 168 -169.

³¹ Google, “How Search Ads Work”, p. 1, Exhibit S-17, Lachance Affidavit, p. 146.

³² Google, “Where your ads will appear on Google”, p. 1, Exhibit S-22, Lachance Affidavit, p. 173.

³³ Reference, [2019 FC 957](#) at [para. 11](#) (Google BOA, Tab 18).

that advertisements of any kind appeared in searches for the Complainant's name.³⁴ In contrast, while there is no evidence that Google generated revenue from searches for the Complainant's name, the newspaper publishers' webpages displaying articles about the Complainant include advertisements alongside the articles to generate revenue for the newspaper publishers.³⁵

PART II – POINTS IN ISSUE

23. On a reference under s. 18.3(1) of the *Federal Courts Act*, this Court undertakes an analysis of the questions referred to it. The issues before the Court in connection with this Reference are as follows:

- (a) **Issue 1** - First Reference question: Does Google collect, use or disclose personal information in the course of commercial activities within the meaning of s. 4(1)(a) of *PIPEDA* when it indexes webpages and presents search results in response to searches of an individual's name?
- (b) **Issue 2** - Second Reference question: If Google Search results for an individual's name do fall within s. 4(1)(a) of *PIPEDA*, is the application of *PIPEDA* excluded under s. 4(2)(c) of *PIPEDA*?
- (c) **Issue 3** - Should the Reference be dismissed and/or should this Court decline to answer the questions before it because the questions cannot or should not be determined without also addressing the constitutional issues and/or there is an inadequate evidentiary record before this Court?

PART III – SUBMISSIONS

24. Contrary to the Complainant's submissions, no deference is shown to the OPC's position on a reference.³⁶ The principle incorrectly relied on by the Complainant, from a statement in *Nowegijick v. The Queen*, is a narrow one and has no application here.³⁷ *Nowegijick* was not a reference proceeding, it was a tax dispute where the taxpayer relied on interpretive bulletins

³⁴ Preliminary Findings, para. 55, Exhibit R, Lachance Affidavit, p. 228.

³⁵ Preliminary Findings, para. 55, Exhibit R, Lachance Affidavit, p. 228; Articles about Complainant, Exhibit A, Ballott Affidavit, pp. 6-15.

³⁶ Not only is there no decision here to which to defer, but even if there were, this court has consistently not deferred to the OPC: *State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada*, [2010 FC 736](#) at paras. [88-90](#) [*State Farm*] (OPC BOA, Tab 33).

³⁷ *Nowegijick v. The Queen*, [\[1983\] 1 S.C.R. 29](#) at p. 37 (Complainant BOA, Tab 1).

published by the CRA. Courts have explicitly rejected the Complainant's argument, holding that a regulatory agency's own publications do not grant its arguments additional authority,³⁸ and the Supreme Court has confirmed the narrow application of the statement quoted by the Claimant.³⁹ Notably, the OPC does not join the Complainant in asserting that deference should be shown to it on this Reference, presumably recognizing that the Complainant's position is incorrect.

A. THE PURPOSE, OBJECT AND SCHEME OF *PIPEDA*

25. The Reference Questions involve the interpretation of *PIPEDA*. It is well-established that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”.⁴⁰ As well, the *Interpretation Act* states that every federal statute is deemed to be remedial and shall be interpreted to account for the statute's objectives.⁴¹

26. *PIPEDA* was designed to foster electronic commerce by regulating the commercial use of personal information.⁴² The objectives and purposes of *PIPEDA* were reviewed by this Court in both the *Englander*⁴³ and *State Farm*⁴⁴ decisions. Justice Mainville in *State Farm* adopted the position of the Attorney General that the purpose of *PIPEDA* is as follows:

In the *PIPEDA*, personal information is regulated only insofar as it relates to how the Canadian economy functions and operates. The scheme promotes consumer confidence by protecting personal information when it is collected, used or disclosed in the course of commercial activity in the Canadian market.

³⁸ *Laidlaw Waste Systems Ltd. v. Minister of National Revenue*, 1989 CarswellNat 265 at paras. 17-19 (Google BOA, Tab 8); *Jagenberg of Canada Ltd. v. Deputy Minister of National Revenue (Customs & Excise)* (1983), 17 CER 296 at 308 (Google BOA, Tab 7).

³⁹ *Mattabi Mines Ltd. v. Ontario*, [1988] 2 S.C.R. 175 at para. 28 (Google BOA, Tab 9); *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494 at para. 17 (Google BOA, Tab 10).

⁴⁰ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21 (OPC BOA, Tab 31).

⁴¹ *Interpretation Act*, RSC 1985, c I-21, s. 12 (OPC BOA, Tab 1).

⁴² *House of Commons Debates*, vol. 136, No. 9 (36-2), Oct. 22, 1999, p. 539 (Manley), Exhibit D.3, and *House of Commons Debates*, vol. 136, No. 7 (36-2), Oct. 20, 1999, p. 539 (Whelan), Exhibit D.3, Ballott Affidavit, at pp. 245 and 293; See also: Report of the Industry Canada Task Force on Electronic Commerce, (January 1998), Exhibit A, Ballott Affidavit, pp. 20-36.

⁴³ *Englander v Telus Communications Inc.*, 2004 FCA 387 (OPC BOA, Tab 12).

⁴⁴ *State Farm*, 2010 FC 736 (OPC BOA, Tab 33).

The significant relationship between personal information use and economic activity has developed with advances in information and communication technologies and the extensive adoption of such technologies by businesses.⁴⁵

27. Significantly, *PIPEDA*'s privacy protections were created within a regulatory scheme relying on the federal "general trade and commerce" power. As provincial legislatures "may exclusively make laws in relation to... property and civil rights"⁴⁶, the requirement that *PIPEDA* only apply to commercial activity is a critical constitutional guardrail.⁴⁷ Parliament, therefore, expressly limited the application of *PIPEDA* to "commercial activity". Indeed, s. 4(1) specifically excludes non-commercial activities, provincially regulated workplaces and other entities beyond the reach of federal regulation. As held in *State Farm*, under *PIPEDA*, "personal information is regulated only insofar as it relates to how the Canadian economy functions and operates."⁴⁸

28. The OPC and the Complainant make sweeping statements about the purpose of *PIPEDA* that fall outside the commercial grounding of the statute. For example, the Complainant submits that "in addition to the values of autonomy, dignity and privacy, *PIPEDA* is specifically concerned with regulating 'electronic commerce'"⁴⁹ This states the purpose of *PIPEDA* in reverse. *PIPEDA* is designed to address electronic commerce and – in the context of commerce, and only commerce – *PIPEDA* protects personal information. If personal information is collected, used or disclosed other than for a commercial purpose it falls outside the ambit of *PIPEDA*.

29. Similarly, the OPC asserts that *PIPEDA* was enacted to protect privacy and provide "individuals with control over their personal information".⁵⁰ However, the purpose and scheme of

⁴⁵ *State Farm*, [2010 FC 736](#), [para. 103](#) (OPC BOA, Tab 33).

⁴⁶ *Constitution Act, 1867*, [30 & 31 Victoria, c. 3 \(U.K.\)](#), s. 92(13).

⁴⁷ S. Perrin, H. Black, D. Flaherty, M. Rankin, *The Personal Information Protection and Electronic Documents Act: An Annotated Guide* (Toronto: Irwin Law, 2001), p. 56 (Google BOA, Tab 26).

⁴⁸ *State Farm*, [2010 FC 736](#) at [para. 40](#) (OPC BOA, Tab 33).

⁴⁹ Complainant Factum, para 16.

⁵⁰ OPC Factum, para. 38.

PIPEDA is more nuanced. *PIPEDA* does not have the *sole* object of protecting privacy and was, in fact, designed to strike a *balance* between different – and at times conflicting – goals of (i) individuals having “*some control* over their personal information”,⁵¹ (ii) “the need of industry to collect and use personal information as a vital component of success in the information economy”⁵² and (iii) protecting “open and free discussion”, “free speech” and “freedom of the press”.⁵³

B. ISSUE 1: GOOGLE IS NOT COLLECTING, USING OR DISCLOSING PERSONAL INFORMATION IN THE COURSE OF COMMERCIAL ACTIVITIES WHEN RETURNING SEARCH RESULTS FOR AN INDIVIDUAL'S NAME

30. The OPC seeks to apply *PIPEDA* to activity that is not commercial, transactional or part of the commercial marketplace,⁵⁴ but is at its core, about disseminating and accessing information, particularly journalistic publications. Activity of this nature falls outside the constitutional mandate and commercial purpose of *PIPEDA*.

31. The first Reference Question asks: “Does Google, in the operation of its search engine service, collect, use or disclose personal information in the course of commercial activities when it indexes webpages and presents search results in response to searches of an individual’s name?”

⁵¹ *House of Commons Debates*, vol. 135, No. 137 (36-1), Oct. 19, 1998, pp. 9076 (Manley), Exhibit D.2, Ballott Affidavit, p. 43.

⁵² *House of Commons Debates*, vol. 135, No. 137 (36-1), Oct. 19, 1998, at pp. 9076 (Manley), Exhibit D.2, Ballott Affidavit, p. 43.

⁵³ *House of Commons Debates*, vol. 136, No. 7 (36-2), Oct. 20, 1999, at p. 415 (Penson), Exhibit D.3, Ballott Affidavit, p. 241; House Committee Testimony, INDY 36-1, No. 077 at 1555 (d’Auray), 1645, 1730 (Phillips), Exhibit D.5, Ballott Affidavit, pp. 442, 454-455, 465; House Committee Testimony, INDY 36-1, No. 083 at 1615 (McLellan), No. 089 at 1640 (Cavoukian), Exhibit D.6, Ballott Affidavit, p. 538 and 656.

⁵⁴ The OPC’s statement at para. 72 of its factum that “Google has previously accepted that its sale of online ad space is subject to *PIPEDA*” is not accurate and is of no bearing on this case or the Court’s analysis. The OPC conflates two different kinds of advertisements offered by Google: (i) Google’s AdSense program, which the OPC considered in its non-binding report of findings, involves advertisements on third party websites; and (ii) advertisements that are labelled as “Ads” and displayed separately from search results returned by a query on Google Search. These are two distinct advertising offerings.

32. It is critical that the first Reference Question be answered within the context in which it was framed. This Reference only concerns Google Search in respect of searches for “an individual’s name,” and relates only to Google’s indexing of speech about individuals placed publicly on the internet by journalists, and displaying references to that speech to Google’s users when relevant. This Reference does not address whether *PIPEDA* applies to other activities of Google or, contrary to the OPC’s submissions, Google Search in general.

33. Google accepts that the plain and ordinary meaning of the words “collect, use and disclose” could capture indexing and displaying of search results. However, these words must be considered in light of the purpose and objects of *PIPEDA* and it is not clear that “collect, use and disclose” was ever intended to apply to online intermediaries conveying the speech of third parties to users.

34. If Google in its role as an intermediary is collecting, using or disclosing personal information then so too is virtually every online intermediary that plays a part in a user accessing content over the internet. Google no more collects, uses or discloses information than a library that creates a user-friendly index of works published by others.

35. It is the publishers who use, collect and disclose personal information as contemplated by *PIPEDA*. Making intermediaries like Google or internet service providers (or “ISPs”) such as Bell or Rogers,⁵⁵ which play a supportive role necessary for all online content to operate, subject to *PIPEDA* would treat online content differently from its analog counterpart, contrary to the intention of our legislature.⁵⁶

⁵⁵ ISPs often copy and store information on websites, either through server hosting services, or because ISPs save copies of webpages onto their servers through a process called “caching”. With cached copies, when another user requests the same data as a previous user, the ISP can provide access to its copy rather than retrieving a new copy from the host server, speeding up the process: see *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004 SCC 45](#) at [paras. 8, 17-25](#) (Google BOA, Tab 19).

⁵⁶ See e.g. “[*PIPEDA*] is in fact—and we have attempted to draft it that way—technology-neutral” and “Bill C-54 covers all manner of information-gathering, and not just electronic”; INDY 36-1, No. 076 at 1545 (Manley) and No. 83 at 1630 and 1655 (Power), Exhibit D.5, Ballott Affidavit, pp. 410, 542 and 548.

36. Leaving aside the question of whether Google collects, uses or discloses personal information within the meaning of s. 4(1) when it displays search results for an individual's name, to ensure the constitutionality of the statute, Parliament restricted the application of *PIPEDA* to “personal information that [an] organization collects, uses or discloses *in the course of commercial activities*”.⁵⁷ This was a deliberate choice following testimony before the House Standing Committee on Industry considering *PIPEDA* (the “**House Committee**”). As the House Committee chair reported to the House of Commons: “commercial activity is now defined in terms of the nature of the transaction itself *rather than the activity of the organization per se*”.⁵⁸ This means non-profits can be engaged in commercial activity and commercial organizations can be engaged in activities that are non-commercial.

37. “Commercial” means commerce in the usual and traditional sense of buying and selling of goods and services. This is supported by the decision in *3510395 Canada*, in which this Court held that the average person would understand “commerce” to mean “exchange, trade, buying and selling”.⁵⁹

38. Google and the OPC agree that advertisements appear on the news publisher pages displaying the news articles about the Complainant, but the OPC has not proffered any evidence that – in displaying Google Search results for the Complainant's name – Google displayed advertisements on Google Search,⁶⁰ and therefore was “selling, bartering or leasing” anything. Indeed, the OPC's Preliminary Findings of Fact found “there is no evidence that advertisements appear alongside the search results generated by a search of the complainant's name”.⁶¹

⁵⁷ *PIPEDA*, s. 4(1) (emphasis added).

⁵⁸ *House of Commons Debates*, vol. 136, No. 7 (36-2), Oct. 20, 1999, at p. 420 (Whelan), Exhibit D.3, Ballott Affidavit, p. 246 (emphasis added).

⁵⁹ *3510395 Canada v Canada (Attorney General)*, [2020 FCA 103](#) at [140-141](#) (Google BOA, Tab 1).

⁶⁰ Google Search Results, Exhibit C, Lachance Affidavit, pp. 98-103.

⁶¹ Preliminary Findings, para. 55, Exhibit R, Lachance Affidavit, p. 228.

39. In the absence of any evidence that Google displays advertisements in connection with a search for an individual's name, the OPC incorrectly uses the fact that Google is generally a for-profit enterprise to argue that Google's operation as a whole is a "commercial activity" and the entire operation of Google Search is, therefore, subject to *PIPEDA*. Such an interpretation overrides Parliament's deliberate choice to define commercial activity "in terms of the nature of the transaction itself *rather than the activity of the organization per se*".⁶²

40. This argument also misconstrues the nature of the Reference Questions, which identify the specific activity at issue as the indexing of the internet and delivery of search results "*in response to a search for an individual's name*", not in respect of all of Google Search and certainly not in respect of all of Google's business.

41. This Court, the Federal Court of Appeal and the Ontario Superior Court of Justice have all held that when evaluating if personal information has been collected, used or disclosed for a "commercial activity", a court must assess the character of the activity in question, rather than simply looking at the general nature of the party collecting, using or disclosing the personal information.⁶³ For example, in *State Farm*, the Federal Court found that an insurance company that collected personal information on behalf of an individual it was representing in a lawsuit was not collecting that information in the course of commercial activity. The Court focused on the purpose for which the information was collected by the insurance company (i.e. on behalf of a private person to defend a legal action) and concluded that this was not a commercial activity.

⁶² *House of Commons Debates*, vol. 136, No. 7 (36-2), Oct. 20, 1999, at p. 420 (Whelan), Exhibit D.3, Ballott Affidavit, p. 246 (emphasis added).

⁶³ *State Farm*, [2010 FC 736](#) at paras. [97-100](#), [106](#) (OPC BOA, Tab 33); *Wyndowe v Rousseau*, [2008 FCA 39](#) at paras. [35-39](#) (Google BOA, Tab 20), and *Ferenczy v MCI Medical Clinics* (2004), [70 OR \(3d\) 277 \(Ont. S.C.\)](#) at [paras. 30-31](#) (Google BOA, Tab 5).

42. Considering this jurisprudence in the context of Google Search, Professor Scassa, the Canada Research Chair in Information Law and Policy at the University of Ottawa Faculty of Law summarized “commercial activity” and Google Search as follows:

The same reasoning applies to search engines. Yes, Google makes a lot of money, some of which comes from its search engine functions. However, the search engines are there for anyone to use, and *the relevant activities, for the purposes of the application of PIPEDA, are those of the users*. If a private individual carries out a Google search for his or her own purposes, that activity does not amount to the collection of personal information in the course of commercial activity. If a company does so for its commercial purposes, then that company – and not Google – will have to answer under PIPEDA for the collection, use or disclosure of that personal information. *The view that Google is on the hook for all searches is not tenable.*⁶⁴

43. Following this reasoning, Google is the intermediary between the searcher and the publisher. Google is an intermediary similar to the role of the insurance company or the law firm in *State Farm*.⁶⁵ As such, even if Google is a commercial enterprise, it is outside of the ambit of *PIPEDA* when it displays search results “*in response to a search for an individual’s name*”.

C. ISSUE 2: GOOGLE SEARCH IS EXEMPT FROM *PIPEDA* UNDER S. 4(2)(C)

44. If s. 4(1)(a) applies, which is disputed, Google Search is exempt from Part I of *PIPEDA* under s. 4(2)(c) when Google indexes webpages and presents search results in response to searches of an individual’s name:

(2) 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.

(2) La présente partie ne s’applique pas:[...] c) à une organisation à l’égard des renseignements personnels qu’elle recueille, utilise ou communique à des fins journalistiques, artistiques ou littéraires et à aucune autre fin.

⁶⁴ T. Scassa, “OPC Report on Online Reputation Misses the Mark on the Application of PIPEDA to Search Engines” [Teresa Scassa Blog](#) (31 January 2018), (emphasis added) (Google BOA, Tab 27)

⁶⁵ See also *Crookes v. Newton*, 2011 SCC 47 at paras. 26 and 30 (OPC BOA, Tab 10) re hyperlinks.

45. In creating an exemption for journalistic, artistic and literary content under s. 4(2)(c), Parliament recognized that boundless regulation in the name of privacy protection threatens free speech under the *Charter*. S. 4(2)(c) was, therefore, one measure specifically enacted to protect free speech. The importance of this section to the protection of *Charter* rights was emphasized before the House Committee by the departments who co-authored the bill (specifically, the Minister of Justice and the head of the Ministry of Industry's E-Commerce Task Force), the Privacy Commissioner of Canada and the Information and Privacy Commissioner of Ontario.⁶⁶

The Minister of Justice specifically stated:

This clause acknowledges the fact that, under the Charter of Rights and Freedoms, there is the protection of freedom of expression. Freedom of expression is one of the fundamental liberties that all Canadians hold sacred. It's important to strike a balance between the privacy rights of individuals, which are also sacred, and freedom of expression. Therefore, in legislative regimes like this, what you will find is government acknowledging both rights while attempting to strike a balance that we think is appropriate.⁶⁷

46. There is no dispute that news articles, such as those that contain the personal information complained about, are exempt from Part I of *PIPEDA* pursuant to s. 4(2)(c). By inviting Google to index these clearly exempt news articles, the publishers are advancing their journalistic purpose and Google indexes and displays this content for similar journalistic purposes: to aid the process of distributing journalistic content to an interested public. Google is not the author or editor of the material in question; the journalists who wrote the articles and news organisations who published them are. But “journalistic purpose” is a broader concept than simply the reporting and publishing of news stories. Distributing, or making accessible, journalistic content to the public must itself

⁶⁶ House Committee Testimony, INDY 36-1, No. 077 at 1555 (d'Auray), 1645, 1730 (Phillips), Exhibit D.5, Ballott Affidavit, pp. 442, 454-455, 465; House Committee Testimony, INDY 36-1, No. 083 at 1615 (McLellan), No. 089 at 1640 (Cavoukian), Exhibit D.6, Ballott Affidavit, p. 538, 656.

⁶⁷ House Committee Testimony, INDY 36-1, No. 083 at 1615 (McLellan), Exhibit D.6, Ballott Affidavit, p. 538; House Committee Testimony, INDY 36-1, No. 077 at 1645 (Phillips), Exhibit D.5, Ballott Affidavit, p. 454.

constitute a “journalistic purpose”. This is consistent with common definitions of journalism: the Encyclopedia Britannica defines journalism to include “the *collection, preparation and distribution* of news and related commentary”⁶⁸ and s. 39.1 of the *Canada Evidence Act*, which defines a journalist as “a person whose main occupation is to contribute directly... to the *collection*, writing or production of information *for dissemination* by the media, *or anyone who assists such a person*.”⁶⁹

47. Focusing on the words in s. 4(2)(c): “does not collect, use or disclose for any other purpose”, the OPC argues that s. 4(2)(c) does not apply to links to media articles displayed by Google. Specifically, the OPC asserts that “this reference is concerned with how Google’s search engine operates and what its purposes for collecting, using and disclosing personal information are.”⁷⁰ Based on this position the OPC argues: “Google’s purpose for operating its search engine service extends far beyond journalism,”⁷¹ its distribution of journalistic content “is purely accidental, and incidental” and, therefore, s. 4(2)(c) does not apply to Google’s search activities.

48. The OPC’s position narrowly and incorrectly interprets and applies the words “not... for any other purpose” and misconstrues the nature and scope of the second reference question that it has put before the Court.

49. First, reading s. 4(2)(c) contextually and within PIPEDA as a whole, it is clear that the application of s. 4(2)(c) is not limited to activities that are exclusively “journalistic, artistic or literary” as the OPC argues. For example, s. 4(2)(c) applies to activities that are also commercial in nature as *PIPEDA* only applies to the collection, use or disclosure of personal information “in

⁶⁸ “Journalism”, [Encyclopædia Britannica, Inc.](#), online: published May 6, 2020, (Google BOA, Tab 28).

⁶⁹ *Canada Evidence Act*, [R.S.C. 1985, c. C-5, s. 39.1](#) (emphasis added).

⁷⁰ OPC Factum, para. 89.

⁷¹ OPC Factum, para. 90.

the course of commercial activities”.⁷² As such, if an activity is not commercial in nature that activity is already exempt from *PIPEDA* and s. 4(2)(c) would have no application. S. 4(2)(c) must, therefore, apply to commercial or for-profit activities or the section would be rendered redundant because it would not apply to any activity.⁷³ As such, the exemption clearly applies to journalistic, literary or artistic activities that are also commercial or for-profit.

50. Second, this Reference is not concerned with how Google Search operates in general. The s. 4(2)(c) exemption is considered in respect of *specific* personal information, and the organization’s purpose in collecting using or disclosing *that specific information* – not the organization’s operation as a whole. This is apparent both from the text of the clause and the objectives it serves. Section 4(2)(c) does not – as the OPC argues – assess whether the actions of an organization writ large are for a journalistic purpose “and for no other purpose.” Indeed, if the relevant scope of activity were cast so broadly, no organization would ever be acting “for journalistic, artistic or literary purposes and... not... for any other purpose.” News media organizations, for example, advertise on their websites directly beside the articles that they publish. This is a commercial activity that is linked to the publication of articles and if generating revenue were to exclude an activity from being journalistic then even articles published in newspapers would not be considered journalistic under s. 4(2)(c) of *PIPEDA*.

51. Here, the Reference asks for a determination of whether the s. 4(2)(c) exemption applies to “personal information” collected, used or disclosed by Google when indexing and presenting webpages in response to “searches of an *individual’s name*”. The specific “personal information” at issue is the information that the Complainant seeks to have delisted.

⁷² *PIPEDA* also applies to information about federal employees as per s. 4(1)(b), but that is not at issue here.

⁷³ Interpretations that would make language redundant should be avoided: *R. v. Proulx*, [2000 SCC 5](#) at para. 28 (Google BOA, Tab 15); Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Irwin Law, 2016), p. 43 (Google BOA, Tab 25).

52. The inquiry before the Court, therefore, is whether – in indexing and linking to *personal information* contained in news articles in response to a search for an individual’s name – Google is acting with a journalistic purpose and no other purpose. Google submits that – in this context – its activities in indexing and displaying those results fall within s. 4(2)(c). The publishers published those articles, and instructed Google to include them in Google Search. Google fulfills a journalistic purpose by serving as a conduit connecting news organizations to readers and also furthers the journalistic purpose of the news organizations by returning links to their articles, and readers by connecting them to these articles.

53. Interpreting s. 4(2)(c) as the OPC asks would grant the OPC the power to do indirectly what it cannot do directly: regulating how individuals access the press. Articles from organizations like the CBC, the Globe and Mail, the Halifax Chronicle Herald, the Hamilton Spectator and the Toronto Star would still exist, but the OPC would restrict who reads them by regulating search engines that are significant channels connecting readers to journalistic content.

54. Parliament denied the OPC this power, leaving it in the hands of journalists. In this regard, this issue was raised by the House Committee who asked whether journalists should be granted the broad exemption in s. 4(2)(c), expressing concern that it allows journalists to use outdated personal information.⁷⁴ Privacy Commissioner Phillips responded that “an exemption for the press is an essential precondition for maintaining its ability to do its job in a free environment” and “[t]he issue of the ethics of modern journalism, and whether it does or does not go too far, is perhaps one of the things that lies at the root of questions such as the one you have raised.” On how to answer such ethical questions, Commissioner Phillips testified that:

I do not think the solution for that is to impose impossible restrictions on the ability of journalists to do their job.... We ought to be arguing not for less

⁷⁴ House Committee Testimony, INDY 36-1, No. 077 at 1650 (Phillips), Exhibit D.5, Ballott Affidavit, p. 455.

journalistic freedom but for more freedom; for better training of journalists; for better resources for journalists... and above all, for better education, particularly in the ethics of good journalism and what is and what is not permissible.⁷⁵

55. The House and the Senate passed *PIPEDA* without narrowing the journalistic exemption in s. 4(2)(c) and the privacy impact of journalistic reporting was properly left to journalists. Put simply, Parliament decided that the OPC would not have the power to decide the reach of journalistic content – regardless of its privacy implications. *PIPEDA* should not, therefore, be interpreted to do indirectly what Parliament confirmed should not be done directly.

(i) A CHARTER COMPLIANT INTERPRETATION SHOULD BE APPLIED

56. In addition to the submissions above, Google submits that the respective positions of the OPC and Google reflect ambiguity within s. 4(2)(c). The OPC acknowledges in its factum that if a provision is ambiguous this Court should adopt the interpretation that complies with the *Charter*.⁷⁶ As then Chief Justice McLachlin wrote in *R. v Sharpe*: “[i]f a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted.”⁷⁷

57. The OPC argues that “journalistic purposes” be interpreted narrowly, such that only writing and publishing news articles falls under clause 4(2)(c). The OPC’s interpretation *prima facie* infringes s. 2(b) of the *Charter*. In this regard, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*⁷⁸ (or “*UFCW*”) the Supreme Court considered substantially similar language in Alberta’s *Personal Information Protection Act* (“*PIPA*”):

⁷⁵ House Committee Testimony, INDY 36-1, No. 077 at 1650 (Phillips), Exhibit D.5, Ballott Affidavit, p. 455

⁷⁶ OPC Factum, para. 39; *Bell ExpressVu Limited Partnership v. Rex*, [2002 SCC 42](#), para. 62 (Google BOA, Tab 2); *R v. Sharpe*, [2001 SCC 2](#), para. 33 (Google BOA, Tab 16); *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, [2015 SCC 47](#), [para. 25](#) (OPC BOA, Tab 38).

⁷⁷ *R v. Sharpe*, [2001 SCC 2](#), para. 33 (Google BOA, Tab 16).

⁷⁸ *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013 SCC 62](#) [*UFCW*] (OPC BOA, Tab 7).

4(3) This Act does not apply to the following:

(c) the collection, use or disclosure of personal information, other than personal employee information that is collected, used or disclosed pursuant to section 15, 18 or 21, if the collection, use or disclosure, as the case may be, is for journalistic purposes and for no other purpose.⁷⁹

58. The Supreme Court held that interpreting this section such that an activity has to be 100% journalistic to fall within the exemption was a violation of s. 2(b) of the *Charter*. In that case the Charter issues were fully engaged, and the Supreme Court went on to find that the infringement was not justified under section 1 of the Charter and struck down the statute.⁸⁰

59. The OPC is asking this Court to adopt an interpretation that was expressly found by the Supreme Court to infringe s. 2(b). This makes little sense when an interpretation that is consistent with *Charter* values is available: disseminating news articles is itself protected by the *Charter*, and the Supreme Court has held that “[t]here can be no doubt, of course, that [s. 2(b) of the *Charter*] comprises the right to disseminate news, information and beliefs” and where *Charter*-protected expression is disseminated it is also protected by the *Charter*.⁸¹ The Supreme Court of Canada has expressly held that hyperlinks like those displayed in Google Search are an important means of communicating expressive content.⁸²

60. As such, any ambiguity in the meaning of “journalistic purposes” should be resolved by rejecting the OPC’s interpretation and adopting a purposeful, contextual and *Charter*-compliant interpretation that captures the displaying of links to news articles in response to a search for an individual’s name.

⁷⁹ *Personal Information Protection Act*, [SA 2003, c P-6.5, s. 4\(3\)\(c\)](#) [*PIPA*] (emphasis added).

⁸⁰ *UFCW*, [2013 SCC 62](#), [paras. 25-37](#) (OPC BOA, Tab 7).

⁸¹ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [\[1996\] 3 S.C.R. 480](#), [para. 24](#) (Google BOA, Tab 3).

⁸² *Crookes v. Newton*, [2011 SCC 47](#) at para. 25 (OPC BOA, Tab 10).

(ii) THE OPC’S RESTRICTIVE DEFINITION OF “JOURNALISTIC PURPOSE” SHOULD NOT BE ADOPTED

61. The OPC relies on this Court’s analysis of “journalistic purpose” in *Globe24h.com* to suggest a restrictive definition of “journalistic purpose” under s.4(2)(c).⁸³ That case is distinguishable and should not be applied in the manner suggested by the OPC. *Globe24h.com* concerned a publisher of content. The decision is simply not helpful or instructive here when the Court is tasked with assessing the meaning of “journalistic purpose” in the context of an intermediary like Google that connects readers to content.

62. *Globe24h.com* concerned a respondent that was a website publisher that hosted its own content.⁸⁴ More specifically, *Globe24h.com* was running a profit-making scheme to exploit online publications of Canadian court and tribunal decisions containing personal information (for example criminal and family law decisions). Online court and tribunal decisions are not indexed or searchable by search engines (i.e. the content is configured by the websites that publish this content, such as CanLII, so that Google and other search engines will not display links to these judgements in search results).⁸⁵ *Globe24h.com* was scraping content from websites that publish court and tribunal decisions, publishing them on its own website and configuring its website so that its webpages (containing these court decisions) would be displayed in search results. This resulted in court decisions that contained personal information of individuals being displayed in response to searches for an individual’s name.⁸⁶ When *Globe24h.com* was contacted by an individual about a decision being on its website, it would offer to take it down for a fee.⁸⁷ *Globe24h.com* also sold and displayed advertising on its webpage.

⁸³ OPC Factum, para. 86.

⁸⁴ *A.T. v. Globe24h.com*, [2017 FC 114](#) [*Globe24h.com*] (OPC BOA, Tab 6)

⁸⁵ *Globe24h.com*, [2017 FC 114](#), [paras. 11-12](#) (OPC BOA, Tab 6).

⁸⁶ *Globe24h.com*, [2017 FC 114](#), [para. 14](#) (OPC BOA, Tab 6).

⁸⁷ *Globe24h.com*, [2017 FC 114](#), [para. 15](#) (OPC BOA, Tab 6).

63. *Globe24h.com* concerned whether *Globe24h.com* was fulfilling a “journalistic purpose” in reproducing court and tribunal decisions and charging a fee for them to be removed. In that context, the Court established a three part test for determining whether a publisher of content is carrying on a journalistic purpose and held that the journalistic purpose exception did not apply to *Globe24h.com* because its “primary purpose is to incentivize individuals to pay to have their personal information removed from the website”.⁸⁸ In other words, there was *no* party that was serving any journalistic purpose; the court decisions were not themselves journalism, nor was the act of compiling them for the purpose of extracting money in exchange for removal.

64. In contrast, here, the Court is considering whether an intermediary is carrying on a journalistic purpose, considering the clear journalistic purpose of the upstream authors. As detailed above, Google fulfills a journalistic purpose by serving as a conduit connecting news organizations to readers and also furthers the journalistic purpose of the news organizations by returning links to their articles, and readers by connecting them to these articles. Applying s. 4(2)(c) to Google avoids the absurd result where the exemption does not practically exist since, in virtually every distribution chain, there is at least one intermediary between author and reader.

65. The *Globe24h.com* definition of “journalistic purpose” that was applied to a content publisher should not and cannot reasonably apply to an intermediary. Indeed, the OPC submits that Google’s purpose in operating Search is to “organize the world’s information and make it universally accessible and useful”.⁸⁹ The analogous party to *Globe24h.com* is not Google, but the newspapers who published the articles on their websites. There is no dispute that those organizations, unlike *Globe24h.com*, meet the journalistic purpose test in s.4(2)(c).

⁸⁸ *Globe24h.com*, [2017 FC 114](#), [para. 15](#) and [71](#) (OPC BOA, Tab 6).

⁸⁹ Preliminary Findings, para. 23, Exhibit R, Lachance Affidavit, p. 220.

66. Alternatively, even on the narrow approach to journalistic purpose espoused by the OPC, Google’s purpose to “organize the world’s information and make it universally accessible and useful”⁹⁰ is journalistic and serves similar goals to those set out in *Globe24h.com*:

- (a) Search is designed with users in mind, prioritizing information that users value, including that “[i]n order to assess trustworthiness and authority on its subject matter, [Google] look[s] for sites that many users seem to value for similar queries”;⁹¹
- (b) Search does not mechanically return results containing a user’s keywords, but includes analysis from its algorithms to “look for clues to measure how well potential search results give users what they are looking for”⁹² and “analyze hundreds of different factors to try to surface the best information the web can offer, from the freshness of the content, to the number of times your search terms appear and whether the page has a good user experience”;⁹³ and
- (c) Google’s algorithms consider Search results as a whole and “evaluate how all the relevant information fits together” considering questions like “is there only one topic among the search results, or many?” and “[a]re there too many pages focusing on one narrow interpretation?”⁹⁴

D. ISSUE 3: THE REFERENCE SHOULD BE STRUCK

67. In correspondence to the OPC and in motions before this Court, Google sought to have the *Charter* issues that are embedded within the Complaint considered fully and fairly, in the interests of all parties and the Canadian public.

68. This Court confirmed the OPC has the sole right and the sole responsibility to set the Reference Questions and shape the record upon which they are decided.⁹⁵ The OPC has, over Google's express objections, insisted on a record that denies this Court the ability to properly assess the *Charter* issues or to interpret s. 4(2)(c) in light of relevant facts.

⁹⁰ Preliminary Findings, para. 23, Exhibit R, Lachance Affidavit, p. 220.

⁹¹ Google, “How Search algorithms work”, Exhibit S-9, Lachance Affidavit, p. 87.

⁹² Google, “How Search algorithms work”, Exhibit S-9, Lachance Affidavit, p. 84.

⁹³ Google, “How Search algorithms work”, Exhibit S-9, Lachance Affidavit, p. 87.

⁹⁴ Google, “How Search algorithms work”, Exhibit S-9, Lachance Affidavit, p. 93.

⁹⁵ If that record is inadequate, the appropriate remedy is to strike the reference and/or decline to answer the questions raised in the Reference: Order of Case Management Judge Steele, July 24, 2020, paras. 18-19 (Google BOA, Tab 11).

69. After maintaining a narrow scope to both the record and the Reference Questions, the OPC’s submissions now take a decidedly different turn. The OPC now presents this case as dealing with sweeping societal issues including that “[o]nline identity...has increasingly become a central component of our social and professional lives”,⁹⁶ that “[t]he information that is collated and disclosed about an individual in search results can be used to make decisions about employment, accommodations, volunteer opportunities and personal relationships”⁹⁷ and arguing that “Google can magnify the harms associated with the wide exposure of personal information online.”⁹⁸ The OPC also relies heavily upon European cases that turned on the application of the *Charter of Fundamental Rights of the European Union*⁹⁹ (the “**European Charter**”),¹⁰⁰ ignoring that (i) unlike *PIPEDA*, the underlying privacy laws applicable in those European cases are not limited in their application to commercial activities, but rather apply to almost all data processing with only much narrower, specific exceptions; and (ii) subsequent European legislation, including both the European Charter and the *General Data Protection Directive*,¹⁰¹ unlike *PIPEDA*, specifically enshrined a “right to be forgotten” under European Union law. The OPC fails to mention not only that the vast majority of nations do not recognize a “right to be forgotten” like that found in the European Union, but that many nations have expressly held that a “right to be forgotten” of the kind recognized in the European Union does not exist in their respective countries.¹⁰²

96 OPC Factum, para. 65.

97 OPC Factum, para. 65.

98 OPC Factum, para. 3.

99 [2000/C 364/01](#).

100 Notably, the OPC opposed the application of the Canadian *Charter* and now relies on cases that turn on the application of the European Charter, which did not exist at the time *PIPEDA* was enacted, and contains explicit rights not found in the Canadian Charter. These decisions have no bearing on the interpretation of *PIPEDA*: see *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González*, Case C-131/12 [*Costeja*] (OPC BOA, Tab 17) and *NTI & NT2 v Google LLC*, [\[2018\] 3 All ER 581](#) (OPC BOA, Tab 25).

101 [Regulation \(EU\) 2016/679](#), OJ L 119, art. 17.

102 *Garcia v. Google, Inc.*, 786 F (3d) 733 (9th Cir. 2015) (Google BOA, Tab 21), p. 26: “such a “right to be forgotten”... is not recognized in the United States”; *Google Inc. vs. Mr. M.*, Decision No. 192 (Tokyo High

70. The OPC’s factum also shows how the statutory interpretation and *Charter* analysis are inextricably intertwined. For example, the OPC cites select fragments of the Supreme Court’s s. 1 analysis in *UFCW* as support for its argument on the purpose of *PIPEDA*,¹⁰³ yet asks that this Court ignore the paragraphs immediately following, where the Supreme Court concludes that “[t]he price *PIPA* exacts, however, is disproportionate to the benefits it promotes”, that it infringes freedom of expression under s. 2(b) of the *Charter*, and that “this infringement of the right to freedom of expression is disproportionate to the government’s objective of providing individuals with control over personal information.”¹⁰⁴

71. The OPC’s sweeping submissions and reference to *Charter* analysis illustrate exactly why Google argued earlier for a full evidentiary record and the ability to address the embedded *Charter* questions. Significantly, Madam Justice Gagne held in her Reasons dated July 22, 2019 that “Google will have another opportunity to argue, at the merits stage, that the reference questions are improper and that they should not be answered” and that it is “open to the judge hearing the application to decide, after having considered the evidence that will be filed that he or she should decline to answer the reference questions.”¹⁰⁵

72. Google does so now.

73. Google submits that the manner in which the OPC has framed this Reference significantly restrains how the Court can address the Reference Questions before it. The Reference Questions cannot be answered other than in Google’s favour without resorting to evidence and *Charter* issues that are not before this Court. In this respect, to the extent this Court does not accept Google’s

Ct, 12th Div.) (Google BOA, Tab 23); *Millalongo Diaz, Re*, Case no. 87-756-2016 (Chilean Supreme Court) (Google BOA, Tab 24); *Gloria v. Casa Editorial El Tiempo*, Judgment No. T277 (Colombian Constitutional Court), p. 45 (Google BOA, Tab 22).

¹⁰³ OPC Factum, paras. 44, 63.

¹⁰⁴ *UFCW*, [2013 SCC 62](#) at [para. 25](#) (OPC BOA, Tab 7).

¹⁰⁵ *Reference*, [2019 FC 957](#) at [paras. 76](#) and [79](#) (Google BOA, Tab 18).

position that *PIPEDA* does not apply to the displaying of results for searches for an individual's name, it is being asked to grant the OPC powers without being permitted to assess whether the granting of those powers is constitutional.

74. The two questions raised by the OPC in the Reference by their nature seek an answer to the central question of whether the Privacy Commissioner has the jurisdiction or power to apply *PIPEDA* to the expressive content of Google Search. The OPC argues that “whether *PIPEDA* requires Google to delist the articles in question from searches of the Complainant's name and whether such a requirement would violate s. 2(b) of the Charter in a manner that could not be saved by section 1 are important issues that remain to be considered.”¹⁰⁶

75. This misunderstands how section 2(b) of the *Charter* operates.¹⁰⁷ It is not only if the OPC finds that Google must delist articles that section 2(b) is engaged. The very act of finding that *PIPEDA* applies to Google searches for an individual's name infringes section 2(b), as it purports to regulate expressive activity.

76. If the Reference Questions can be answered as the OPC submits, then this Court is opining that the return of results for searches for individuals' names on Google Search is subject to Part I of *PIPEDA*. This has immediate consequences – whether or not the OPC ever makes a specific recommendation that delisting the URLs at issue in the Complaint is appropriate.

77. Finding that Part I of *PIPEDA* applies to Google Search – among other things – immediately grants the Commissioner the power to: (i) investigate whether the list of obligations in Schedule 1 is met, (ii) use its investigative powers in connection with the backlog of complaints that it says it has held in abeyance, and (iii) assess whether it believes information on Google Search is accurate and whether Google has complied with its consent obligations. Indeed, here the

¹⁰⁶ OPC Factum, para. 91.

¹⁰⁷ *Grant v. Torstar Corp.*, [2009 SCC 61](#), paras. 48-49 (Google BOA, Tab 6).

OPC has already commenced an investigation and began its communication with Google with a letter requiring Google to explain how its actions are compliant with *PIPEDA*.¹⁰⁸

78. *PIPEDA* also requires consent for all collection, use and disclosure of personal information unless an exception applies. It would never be feasible for internet intermediaries to track down and obtain consent from every person named in every news article, every blog post, every social media post, every publication. There is no further exception to the consent requirement based on newsworthiness or public interest, other than s. 4(2)(c). Would this mean that search engines could never provide results in response to inquiries about people, whether government officials, public figures or private individuals?

79. The above illustrates that the mere grant of jurisdiction or power to the OPC without determining the constitutional issues is highly problematic. Moreover, the OPC's position that there are no *Charter* issues until it actually seeks to delist content and that it will only reasonably seek to delist content is wrong and does not reflect *Charter* values. An unconstitutional grant of power to a government agency cannot be saved by that agency promising to behave constitutionally or arguing that it may never use that power. As held by the Supreme Court considering a similar argument about a provision of the *Criminal Code*, “[t]he protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control.”¹⁰⁹

80. The Supreme Court has recognized the threat of overbroad laws that, depending on prosecutorial discretion, have the potential to impose sanctions on protected speech. Even if such

¹⁰⁸ Letter from the OPC to Google dated November 16, 2017, Exhibit D, Lachance Affidavit, pp. 113-114.

¹⁰⁹ *R v. Bain*, [1992] 1 S.C.R. 91, para. 8 (Google BOA, Tab 12); *R v. Nur*, 2015 SCC 15, para. 95 (Google BOA, Tab 14); *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 per L'Heureux-Dubé J, para. 69 (Google BOA, Tab 4); *R. v. Zundel*, [1992] 2 S.C.R. 731, paras. 53, 71 (Google BOA, Tab 17); *R v. Keegstra*, [1990] 3 S.C.R. 697 per McLachlin J. (dissenting, not on this point), para. 191 (Google BOA, Tab 13).

laws are never applied to censor legitimate speech, the threat of them may chill legitimate expression by encouraging people to censor themselves to avoid the threat of legal action. As Justice McLachlin (as she then was) noted in *R v. Keegstra*, “[p]rotection of free speech is regarded as such a strong value that legislation aimed at legitimate ends and *in practice used only to achieve those legitimate ends* may be struck down, if it also tends to inhibit protected speech”.¹¹⁰

81. Put differently, the raw power to regulate speech infringes s. 2(b) of the *Charter* even if that power is never exercised. The OPC is here asking for that power.

82. The chilling effect on freedom of expression that would result from finding that *PIPEDA* applies here is very real. Google and other internet intermediaries would be pressured to censor the internet regardless of whether the OPC ever makes any specific recommendation regarding the Complaint. This would have a detrimental effect on freedom of speech and Canadian society. The OPC flags this as an issue in the OPC Position, but does not offer any solution under the current legislation. Instead, the OPC proposes that Parliament should amend *PIPEDA*:

Some have also pointed out that it is unclear how certain requirements in *PIPEDA* can sensibly be applied to a search engine. For instance, as we noted in the OPC's Consent Report, it may not be practicable for an intermediary such as a search engine to obtain consent to index all webpages on the Internet that contain personal information. In our Consent Report, *we recommend that Parliament consider new, properly framed exceptions* to consent to deal with situations, such as the indexing activities of search engines, where consent may be impracticable, or where implied consent would be stretched to absurdity. We continue to believe that such clarification would be desirable.¹¹¹

83. The fact that the OPC is recommending legislative change to address search engines further illustrates that Parliament never intended *PIPEDA* to apply here.

84. Before Parliament, the OPC advocates for revisions to *PIPEDA* to implement what it sees as a workable vision of the “right to be forgotten”. Before this Court, the OPC seeks an interim,

¹¹⁰ *R v. Keegstra*, [1990] 3 S.C.R. 697 per McLachlin J. (dissenting, not on this point) (Google BOA, Tab 13).

¹¹¹ OPC Position, p. 9, Exhibit G, Lachance Affidavit, p. 131 (emphasis added).

unfair and unworkable outcome. Indeed, in the intervening period of time between this Court's decision and a *de novo* hearing, Google may be faced with a litany of requests to delist by complainants who will allege if it fails to do so it is acting unlawfully. Google should not be put in a position to have to act on these requests before the constitutional issues have been judicially determined.

85. For these reasons Google submits that it is not open to this Court to determine that *PIPEDA* applies to Google Search without also engaging and addressing the *Charter* questions that Google raised in its Notice of Constitutional Question filed at the outset of this Reference. Finally, it is important to bear in mind that the constrained outcomes available are not of Google's making or in Google's interest. Google would have welcomed a broader reference that included these issues, but that is not the reference the OPC placed before this Court.

PART IV – ORDER SOUGHT

86. Google asks this Court to make one of the following three determinations:
- (a) Find that *PIPEDA* does not apply to Google Search because Google does not collect, use or disclose personal information in the course of commercial activities when it indexes webpages and presents search results in response to searches of an individual's name.
 - (b) Find that even if *PIPEDA* applies, Google is exempted under s. 4(2)(c) when it collects, uses or discloses personal information in the course of indexing webpages and presenting search results in response to searches of an individual's name.
 - (c) If the Court is not able to make either finding (a) or (b), then this Court should dismiss the reference on the basis that the questions cannot or should not be determined based on the scope of the issues and evidentiary record before it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of November, 2020.



James D. Bunting
David TS Fraser
Anisah Hassan
Adam Soliman

Legal Counsel for the Respondent, Google LLC

PART V – LIST OF AUTHORITIES CITED

	Authority	BOA Reference
1.	<i>Reference re Subsection 18.3(1) of the Federal Courts Act</i> , 2019 FC 957	Google, Tab 18
2.	<i>State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada</i> , 2010 FC 736	OPC, Tab 33
3.	<i>Nowegijick v. The Queen</i> , [1983] 1 S.C.R 29	Complainant, Tab 1
4.	<i>Laidlaw Waste Systems Ltd. v. Minister of National Revenue</i> , 1989 CarswellNat 265	Google, Tab 8
5.	<i>Jagenberg of Canada Ltd. v. Deputy Minister of National Revenue (Customs & Excise)</i> (1983), 17 CER 296	Google, Tab 7
6.	<i>Mattabi Mines Ltd. v. Ontario</i> , [1988] 2 S.C.R. 175	Google, Tab 9
7.	<i>North Pender Island Local Trust Committee v. Conconi</i> , 2010 BCCA 494	Google, Tab 10
8.	<i>Rizzo & Rizzo Shoes Ltd. (Re)</i> , [1998] 1 S.C.R. 27	OPC, Tab 31
9.	<i>Englander v Telus Communications Inc.</i> , 2004 FCA 387	OPC, Tab 12
10.	S. Perrin, H. Black, D. Flaherty, M. Rankin, <i>The Personal Information Protection and Electronic Documents Act: An Annotated Guide</i> (Toronto: Irwin Law, 2001)	Google, Tab 26
11.	<i>Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers</i> , 2004 SCC 45	Google, Tab 19
12.	<i>3510395 Canada v Canada (Attorney General)</i> , 2020 FCA 103	Google, Tab 1
13.	<i>Wyndowe v Rousseau</i> , 2008 FCA 39	Google, Tab 20
14.	<i>Ferenczy v MCI Medical Clinics</i> (2004), 70 OR (3d) 277 (Ont. S.C.)	Google, Tab 5
15.	T. Scassa, “OPC Report on Online Reputation Misses the Mark on the Application of PIPEDA to Search Engines” Teresa Scassa Blog (31 January 2018), online: < https://www.teresascassa.ca/ >	Google, Tab 27
16.	<i>Crookes v. Newton</i> , 2011 SCC 47	OPC, Tab 10
17.	“Journalism”, Encyclopædia Britannica, Inc. , published: May 6, 2020, online: < https://www.britannica.com/topic/journalism >	Google, Tab 28

18.	<i>R. v. Proulx</i> , 2000 SCC 5	Google, Tab 15
19.	Ruth Sullivan, <i>Statutory Interpretation</i> , 3rd ed. (Irwin Law, 2016)	Google, Tab 25
20.	<i>Bell ExpressVu Limited Partnership v. Rex</i> , 2002 SCC 42	Google, Tab 2
21.	<i>R v. Sharpe</i> , 2001 SCC 2	Google, Tab 16
22.	<i>Wilson v. British Columbia (Motor Vehicles)</i> , 2015 SCC 47	OPC, Tab 38
23.	<i>Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401</i> , 2013 SCC 62	OPC, Tab 7
24.	<i>Canadian Broadcasting Corp. v. New Brunswick (Attorney General)</i> , [1996] 3 S.C.R. 480	Google, Tab 3
25.	<i>A.T. v. Globe24h.com</i> , 2017 FC 114	OPC, Tab 6
26.	Order of Case Management Judge Steele dated July 24, 2020	Google, Tab 11
27.	<i>Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González</i> , Case C-131/12	OPC, Tab 17
28.	<i>NT1 & NT2 v Google LLC</i> , [2018] 3 All ER 581	OPC, Tab 25
29.	<i>Garcia v. Google, Inc.</i> , 786 F (3d) 733 (9th Cir. 2015)	Google, Tab 21
30.	<i>Google Inc. vs. Mr. M.</i> , Decision No. 192 (Tokyo High Ct, 12th Div.)	Google, Tab 23
31.	<i>Millalonco Diaz, Re</i> , Case no. 87-756-2016 (Chilean Supreme Court)	Google, Tab 24
32.	<i>Gloria v. Casa Editorial El Tiempo</i> , Judgment No. T277 (Colombian Constitutional Court)	Google, Tab 22
33.	<i>Grant v. Torstar Corp.</i> , 2009 SCC 61	Google, Tab 6
34.	<i>R v. Bain</i> , [1992] 1 S.C.R. 91	Google, Tab 12
35.	<i>R v. Nur</i> , 2015 SCC 15	Google, Tab 14
36.	<i>Committee for the Commonwealth of Canada v. Canada</i> , [1991] 1 S.C.R. 139	Google, Tab 4
37.	<i>R. v. Zundel</i> , [1992] 2 S.C.R. 731	Google, Tab 17
38.	<i>R v. Keegstra</i> , [1990] 3 S.C.R. 697	Google, Tab 13

APPENDIX A – STATUTES CITED

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

Loi sur la protection des renseignements personnels et les documents électroniques, L.C. 2000, ch. 5

Definitions

2 (1) The definitions in this subsection apply in this Part.

[...]

commercial activity means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering, or leasing of donor, membership or other fundraising lists. (*activité commerciale*)

Application

4 (1) This Part applies to every organization in respect of personal information that
(a) the organization collects, uses or discloses in the course of commercial activities;

Limit

(2) 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.

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente partie.

[...]

activité commerciale Toute activité régulière ainsi que tout acte isolé qui revêtent un caractère commercial de par leur nature, y compris la vente, le troc ou la location de listes de donateurs, d'adhésion ou de collecte de fonds. (*commercial activity*)

Champ d'application

4 (1) La présente partie s'applique à toute organisation à l'égard des renseignements personnels :

(a) soit qu'elle recueille, utilise ou communique dans le cadre d'activités commerciales;

Limite

(2) La présente partie ne s'applique pas :

[...]

(c) à une organisation à l'égard des renseignements personnels qu'elle recueille, utilise ou communique à des fins journalistiques, artistiques ou littéraires et à aucune autre fin.

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.)

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES

Subjects of exclusive Provincial Legislation

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

[...]

13. Property and Civil Rights in the Province.

Interpretation Act, RSC 1985, c I-21

12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

- a) liberté de conscience et de religion;
- b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
- c) liberté de réunion pacifique;
- d) liberté d'association.

Loi constitutionnelle de 1867, 30 & 31 Victoria, c 3

POUVOIRS EXCLUSIFS DES LÉGISLATURES PROVINCIALES

Sujets soumis au contrôle exclusif de la législation provinciale

92. Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

[...]

13. La propriété et les droits civils dans la province.

Loi d'interprétation, LRC 1985, c I-21

12 Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

Canada Evidence Act, RSC 1985, c C-5

39.1 (1) journalist means a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person. (*journaliste*)

Loi sur la preuve au Canada, LRC 1985, c C-5

39.1 (1) journaliste Personne dont l'occupation principale consiste à contribuer directement et moyennant rétribution, soit régulièrement ou occasionnellement, à la collecte, la rédaction ou la production d'informations en vue de leur diffusion par les médias, ou tout collaborateur de cette personne. (*journalist*)

Personal Information Protection Act, SA 2003, c P-6.5

Application

4(1) Except as provided in this Act and subject to the regulations, this Act applies to every organization and in respect of all personal information.

(3) This Act does not apply to the following:

- (c)** the collection, use or disclosure of personal information, other than personal employee information that is collected, used or disclosed pursuant to section 15, 18 or 21, if the collection, use or disclosure, as the case may be, is for journalistic purposes and for no other purpose

Charter of Fundamental Rights of the European Union, 2012/C 326/02

Article 7

Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

General Data Protection Regulation (GDPR), (EU) 2016/679

Art. 17

Right to erasure ('right to be forgotten')

1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:
 - (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
 - (b) the data subject withdraws consent on which the processing is based according to point (a) of [Article 6\(1\)](#), or point (a) of [Article 9\(2\)](#), and where there is no other legal ground for the processing;
 - (c) the data subject objects to the processing pursuant to [Article 21\(1\)](#) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to [Article 21\(2\)](#);
 - (d) the personal data have been unlawfully processed;
 - (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;
 - (f) the personal data have been collected in relation to the offer of information society services referred to in [Article 8\(1\)](#).
2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.
3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:
 - (a) for exercising the right of freedom of expression and information;
 - (b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
 - (c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of [Article 9\(2\)](#) as well as [Article 9\(3\)](#);
 - (d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with [Article 89\(1\)](#) in so far as the

right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or

(e) for the establishment, exercise or defence of legal claims.