

IN THE SUPREME COURT OF CANADA
[On Appeal from the Ontario Court of Appeal for Ontario]

B E T W E E N:

TELUS COMMUNICATIONS INC.

APPELLANT
(Appellant)

- and -

AVRAHAM WELLMAN

RESPONDENT
(Respondent)

MOTION RECORD
OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC
INTEREST CLINIC
(Motion for leave to intervene)

Pursuant to Rules 47 and 55 of the Rules of the Supreme Court of Canada

**Samuelson-Glushko Canadian Internet
Policy & Public Interest Clinic (CIPPIC)**
University of Ottawa, Faculty of Law
57 Louis Pasteur Street
Ottawa, ON, K1N 6N5

David Fewer
Tel: (613) 562-5800 x 2558
Fax: (613) 562-5417
Email: dfewer@uottawa.ca

Marina Pavlović
Tel: (613) 562-5800 x 2675
Email: Marina.Pavlovic@uOttawa.ca

Counsel for the Proposed Intervener

**Samuelson-Glushko Canadian Internet
Policy & Public Interest Clinic (CIPPIC)**
University of Ottawa, Faculty of Law
57 Louis Pasteur Street
Ottawa, ON, K1N 6N5

David Fewer
Tel: (613) 562-5800 x 2558
Fax: (613) 562-5417
Email: dfewer@uottawa.ca

Agent for the Proposed Intervener

TO: THE REGISTRAR

COPY TO: FASKEN MARTINEAU DUMOULIN LLP FASKEN MARTINEAU DUMOULIN LLP

Barristers and Solicitors
550 Burrard Street, Suite 2900
Vancouver, BC V6C 0A3

Barristers and Solicitors
55 Metcalfe Street, Suite 1300
Ottawa, ON K1P 615

D. Geoffrey Cowper, Q.C.
Gerald L.R. Ranking
Andrew Borrell
Alexandra Mitretodis

Sophie Arseneault

Tel: (604) 631-3131
Email: gcower@fasken.com

Tel: (613) 236-3882
Fax: (613) 230-6423
Email: sarseneault@fasken.com

Counsel for the Appellant,
TELUS Communications Inc.

Agent for the Appellant,
TELUS Communications Inc.

AND TO: ROCHON GENOVA LLP
Barristers & Solicitors
121 Richmond Street West, Suite 900
Toronto, Ontario M5H 2K1

SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Joel P. Rochon
Peter Jervis

Tel: 416 548 9874
Fax: 416 363 0263
Email: jrochon@rochongenova.com

Marie-France Major

Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Counsel for the Respondent,
Avraham Wellman

Agent for the Respondent,
Avraham Wellman

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(Motion for leave to intervene)**

Pursuant to Rules 47 and 55 of the Rules of the Supreme Court of Canada

TAKE NOTICE that the Proposed Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), hereby applies to a Judge of the Court pursuant to Rules 47, 55 and 59(2) of the *Rules of the Supreme Court of Canada*, SOR 2002/156, as amended, for an order:

1. granting CIPPIC leave to intervene in this appeal;
2. permitting CIPPIC to file a factum of no greater length than 10 pages;
3. permitting CIPPIC to present oral arguments for 10 minutes at the hearing of this appeal; and
4. any further or other order as said Judge or this Honourable Court may deem appropriate.

AND FURTHER TAKE NOTICE that the following documentary evidence will be relied upon in support of this motion:

1. the affidavit of Tamir Israel, Staff Lawyer at CIPPIC, sworn 13th of July, 2018; and
2. such further and other material as counsel may advise and this Honourable Court may permit.

AND FURTHER TAKE NOTICE THAT this motion shall be made on the following grounds:

1. CIPPIC has a direct and significant interest in this appeal, and will leverage its expertise to provide useful submissions different from those of other parties to the appeal:

(i) CIPPIC is a legal clinic with a mandate to advocate for the public interest on legal and policy issues arising at the intersection of law and technology. This case raises important policy considerations that should inform any statutory interpretation, and falls within CIPPIC's purview;

(ii) since its founding in 2003, CIPPIC has participated in numerous legal and policy processes relating to the evolution of consumer rights in the context of an increasingly digital society. This has included interventions before the courts, testimony before parliamentary committees, appearances in quasi-judicial processes, as well as participation in various international policy-making fora on related issues;

(iii) this Court has recognized CIPPIC's contributions to and expertise in this field by granting it intervener status on a number of related prior occasions including *Douez v Facebook Inc*, 2017 SCC 33, which addressed access to justice issues related to individual privacy, and *Dell Computer Corp v Union des consommateurs*, [2007] 2 SCR 801, which addressed the ability of e-commerce platforms to evade customers' substantive and procedural rights by means of non-negotiable contract terms;

(iv) the matters raised by this appeal have implications that extend beyond those of the immediate parties. CIPPIC has a special and direct interest in these broader implications,

arising from its mandate; and

(v) if granted leave to intervene, CIPPIC will draw on its extensive and significant institutional expertise on matters related to technology, consumer rights, and the balance of these rights in the Canadian marketplace. With this expertise and multi-dimensional perspective, CIPPIC would provide useful submissions that are distinct and different from the other parties involved in this appeal;

2. if granted leave, CIPPIC proposes to contextualize this case within the rapidly evolving jurisprudence addressing consumer rights afforded to Canadians. CIPPIC will argue:

(i) the digitization of society and increasing reliance on non-negotiated standard-form contracts involving consumers have exacerbated the power imbalance between consumers and large corporations, while an outdated (and inadequate) legislative framework endorses the use of arbitration clauses to block access to justice and effectively extinguish a growing swath of consumer and other substantive rights;

(ii) relative to large corporations, small and medium enterprises (SMEs), including sole proprietors, often experience vulnerability and power and informational imbalance similar to that of individual consumers;

(iii) ignoring the realities of small businesses and the technology-driven shifts in today's consumer marketplace also leaves a new category of "prosumers"—hobbyist or self-employed individuals—in an equally precarious position when it comes to access to justice; and

(iv) the Court's determinations in this case will impact access to justice beyond the consumer context, in other areas where non-negotiated standard-form contracts containing arbitration clauses are prevalent, such as employment law, franchise law, and, increasingly, tort law.

CIPPIC will expand on these submissions if leave to intervene is granted;

3. the proposed intervention will not cause delay or prejudice to the parties;
4. CIPPIC does not seek costs and asks that it not be liable for costs to any other party in the event it is granted leave to intervene in this appeal;
5. Rules 47, 55, 57, 59 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, *as amended*; and
6. such further and other grounds as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th of July, 2018.

[original signed]

David Fewer

[original signed]

Marina Pavlović

Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC)

University of Ottawa, Faculty of Law

57 Louis Pasteur Street

Ottawa, ON K1N 6N5

Tel: (613) 562-5800 x 2558

Fax: (613) 562-5417

Email: dfewer@uottawa.ca

Tel: (613) 562-5800 x 2675

Tel: (613) 562-5124

Email: Marina.Pavlovic@uOttawa.ca

Counsel for the Proposed Intervener

TO: THE REGISTRAR

COPY TO: FASKEN MARTINEAU DUMOULIN LLP FASKEN MARTINEAU DUMOULIN LLP

Barristers and Solicitors
550 Burrard Street, Suite 2900
Vancouver, BC V6C 0A3

Barristers and Solicitors
55 Metcalfe Street, Suite 1300
Ottawa, ON K1P 615

D. Geoffrey Cowper, Q.C.
Gerald L.R. Ranking
Andrew Borrell
Alexandra Mitretodis

Sophie Arseneault

Tel: (604) 631-3131
Email: gcower@fasken.com

Tel: (613) 236-3882
Fax: (613) 230-6423
Email: sarseneault@fasken.com

Counsel for the Appellant,
TELUS Communications Inc.

Agent for the Appellant,
TELUS Communications Inc.

AND TO: ROCHON GENOVA LLP
Barristers & Solicitors
121 Richmond Street West, Suite 900
Toronto, Ontario M5H 2K1

SUPREME ADVOCACY LLP
100 - 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Joel P. Rochon
Peter Jervis

Tel: 416 548 9874
Fax: 416 363 0263
Email: jrochon@rochongenova.com

Marie-France Major

Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Counsel for the Respondent,
Avraham Wellman

Agent for the Respondent,
Avraham Wellman

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.

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Affidavit of TAMIR ISRAEL

I, Tamir Israel, of the City of Ottawa, DO SOLEMNLY AFFIRM THAT:

I. INTRODUCTION

1. I am Staff Lawyer at the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) based at the Centre for Law, Technology and Society (CLTS) at the University of Ottawa's Faculty of Law. This Affidavit is sworn in support of CIPPIC's motion for leave to intervene in this appeal.

2. Except as otherwise indicated, I have personal knowledge of the matters to which I depose in this Affidavit. Where I lack such personal knowledge, I have indicated the source of my information and I verily believe such information to be true. Where specific CIPPIC activities are referred to below in which I have had no personal participation, I have familiarized myself with the relevant files, and base my account thereof on this knowledge.

3. CIPPIC is a legal clinic founded at the University of Ottawa's Faculty of Law. It was established

in September 2003 with funding from the Ontario Research Network on Electronic Commerce and an Amazon.com *Cy Pres* fund. The purpose of CIPPIC's creation was to fill voids in public policy debates on technology law issues, ensuring balance in policy and law-making processes, and providing legal assistance to under-represented organizations and individuals on matters involving the intersection of law and technology. In 2007, CIPPIC received additional funding from the Samuelson-Glushko Foundation, enabling CIPPIC to continue fulfilling its mandate and to join the international network of Samuelson-Glushko technology law clinics.

4. CIPPIC operates under a Staff Lawyer and a Director, presently myself and David Fewer, respectively. Both are called to the bar of Ontario and work for CIPPIC full time. CIPPIC benefits from the expertise of an internal Advisory Committee composed of faculty members of the Centre for Law, Technology and Society, as well as of an external Advisory Board composed of five highly respected lawyers and academics in the technology law field across North America.

5. CIPPIC's core mandate is to advocate in the public interest in debates arising at the intersection of law and technology. CIPPIC has the additional mandate of providing legal assistance to under-represented organizations and individuals on law and technology issues, and a tertiary education-based mandate that includes a teaching and public outreach component. In pursuit of these mandates, CIPPIC's activities regularly extend to provision of expert testimony to parliamentary committees, participation in regulatory and quasi-judicial proceedings and strategic interventions before the courts. CIPPIC is also deeply involved in research and advocacy on the nature and social impact of technological change, and the manner in which the evolving legal landscape interacts with the distinct challenges of a technology-driven world.

6. Some of CIPPIC's general expertise in Internet policy issues is described below, with particular emphasis on activities relating to online platforms, consumer rights in digital settings, privacy, online jurisdiction, and access to justice. Specific CIPPIC experience on these issues includes interventions before courts on issues relating to the need for consumer protection in e-commerce contracts and on matters related to digital privacy and cross-border jurisdiction. It has also included testimony before

legislative committees on the domestic privacy impact, including barriers to access to justice, of global social media sites as well as on the parameters of electronic commerce protection regulations aimed at reducing unsolicited electronic communications to Canadians from domestic and foreign platforms. CIPPIC has additionally participated in salient regulatory proceedings, including quasi-judicial complaints regarding the consumer redress obligations of global social media sites (in the context of privacy) under Canadian law, on the exposure risks to consumers of outsourcing email storage to foreign states under foreign laws, and on the need to integrate comprehensive consumer protection into wireless service contracts. Finally, CIPPIC's related experience includes participation in international policy-making fora such as advocacy on behalf on consumer rights in the context of proposals to include Investor-State Dispute Settlement mechanisms in trade agreements such as the Trans Pacific Partnership and the re-negotiated North American Free Trade Agreement.

7. More of CIPPIC's general expertise in consumer rights, access to justice, and Internet policy issues is described below, with particular emphasis on activities relating to consumer rights and access to justice in digital settings.

II. INSTITUTIONAL EXPERTISE

(a) Judicial

8. CIPPIC has been granted leave to intervene by this Court on previous occasions, including:

(i) *Sean Patrick Mills v Her Majesty the Queen*, SCC File No. 37518, addressing whether Canadians enjoy a reasonable expectation of privacy in emails sent to fictitious on-line personae and surreptitiously captured using a screenshot program by recipient undercover police officers;

(ii) *Thomas Reeves v Her Majesty the Queen*, SCC File No. 37676, addressing whether the state may rely upon the consent of a third-party co-resident to justify a warrantless search of a person's home and seize a computer located therein;

(iii) *Rogers Communications Inc v Voltage Pictures, LLC, et al.*, SCC File No. 37679, addressing the interpretation of the "notice and notice" regime of the *Copyright Act*;

- (iv) *R v Jarvis*, SCC File No 37833, addressing the reasonable expectation of privacy in public places in the context of a voyeurism offence;
- (v) *Her Majesty the Queen in Right of British Columbia v Philip Morris International, Inc.*, SCC 36, on balancing privacy values with rights of discovery in tobacco litigation;
- (vi) *Haaretz.com, et al v Mitchell Goldhar*, 2018 SCC 28, on access to justice considerations arising in jurisdiction analysis in the context of online defamation;
- (vii) *R v Jones*, 2017 SCC 60, on whether the *Charter* and Part VI of the *Criminal Code* apply to text messages sought from their recipient's service provider by law enforcement;
- (viii) *R v Marakah*, 2017 SCC 59, on the reasonable expectation of privacy in the text messages sent from the defendant's cell phone to another recipient;
- (ix) *Douez v Facebook, Inc.*, 2017 SCC 33, on consumer access to domestic class proceedings against a non-negotiable forum selection clause regarding privacy rights implicit in the *Charter*;
- (x) *Canadian Broadcasting Corporation v SODRAC 2003 Inc.*, 2015 SCC 57, on the application of the technological neutrality principle where efficiencies gained from technological advancements impact on copyright laws;
- (xi) *R v Fearon*, 2014 SCC 77, on the expectations of privacy attracted by mobile devices such as cell phones, and the resulting need to include safeguards in the historical doctrine that permits law enforcement to search incident to arrest;
- (xii) *R v Chehil*, 2013 SCC 49 and *R v MacKenzie*, 2013 SCC 50, addressing the parameters of the reasonable suspicion standard in the context of the common law power to conduct a privacy-invasive search through the deployment of a drug detection dog;
- (xiii) *R v TELUS Communications Co.*, 2013 SCC 16, on the need to adopt a flexible, purposive approach when applying *Criminal Code* protections intended to safeguard against the interception

of private communications to technologically advanced communications delivery methods in the context of SMS text messaging;

(xiv) *AB v Bragg Communications Inc*, 2012 SCC 46, on the need to ensure privacy rights are protected in the context of the open court principle, particularly in light of the greater risk to privacy posed by the online publication of judicial decisions and the heightened privacy interests of youth;

(xv) *Crookes v Newton*, 2011 SCC 47, wherein CIPPIC intervened to argue that more robust action than the mere posting of a hyperlink must occur before a hyperlink can be held to have published defamatory statements in the linked content; and

(xvi) *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34, wherein CIPPIC intervened to address the appropriate adaptation of consumer contract law principles to an online environment so as to take into account unique internet issues, such as whether additional terms referenced through a hyperlink were ‘external’ to the contract.

9. CIPPIC has also been granted intervention status by other courts in proceedings implicating the legal obligations and roles of technology and communications companies and the impact of these obligations on their customers, including:

(i) *Cooperstock v United Airlines*, Fed. Court App. No. A-262-17, wherein CIPPIC was granted leave to intervene on the question of a balanced interpretation of the *Trade-marks Act* that is consistent with its trade-related objectives and limited by principles of consumer protection, unfair competition and freedom of expression;

(ii) *Voltage v Doe*, 2016 FC 881, wherein CIPPIC was granted leave to intervene on the need for privacy safeguards in the third-party discovery order sought in respect of a copyright infringement “reverse” class proceeding;

(iii) *Voltage v Doe*, 2014 FC 161, which addressed the balancing of copyright and Internet users’ privacy rights with respect to an ISP’s disclosure of the Internet Protocol addresses associated with

downloading activity to copyright holders;

(iv) *National Post v Fournier*, File Nos A-394-12 & A-395-12 (FCA), on the obligations imposed by copyright law on online discussion forums, touching on issues of substantial reproduction, intermediary liability, and fair dealing (discontinued following written submissions);

(v) *BMG v Doe*, 2004 FC 488, 2005 FCA 193, the seminal case in Canada on the rights of copyright holders to seek the third-party disclosure of the personal information of Canadian Internet subscribers involved in file-sharing; and

(vi) *Warman v Fournier*, 2010 ONSC 2126, (2010) 100 OR (3d) 648 (Ont Div Ct): appeal addressing the proper balance between the need to preserve the privacy and free expression rights of anonymous online speakers with the need to facilitate legitimate allegations of defamation. CIPPIC successfully argued that the proper balance required a protective framework which ensures privacy and free expression are not discarded upon a mere allegation of defamatory speech.

10. CIPPIC has also been active in the courts as counsel to primary parties in proceedings implicating law and technology, consumer rights, and access to justice more broadly, including:

(i) *Bell Canada v Amtelecom*, 2015 FCA 126, on the retrospective application of elements of the CRTC's Wireless Consumer Protection Code to pre-existing contractual relationships, in the context of a consumer protection regime applied to wireless service provider contracts;

(ii) *Authors Guild v Google, Inc*, No. 05-Civ-8136 (DC) (S.D.N.Y. March 22, 2011), wherein CIPPIC acted on behalf of a group of independent Canadian authors and for the Canadian Association of University Teachers (CAUT) in opposing the proposed US-based class action settlement agreement that would have established an intermediary, Google, as a centralized hub for digital books, affecting the rights of international copyright holders, including Canadian authors, as well as the privacy rights of Canadians; and

(iii) *Lawson v Accusearch*, 2007 FC 125, wherein CIPPIC sought judicial review of the Office of

the Privacy Commissioner’s decision to refuse, on jurisdictional grounds, to exercise its investigatory mandate against a United States-based company collecting, using and disclosing the personal information of Canadians. CIPPIC argued that in an online world, territorial location cannot immunize an organization from the privacy protections guaranteed to Canadians by PIPEDA.

(b) Parliamentary Committees and Governmental Consultations

11. CIPPIC has had many opportunities to provide expert testimony to Parliamentary Committees and other governmental processes regarding the challenges posed by online environments, associated threats to consumer rights, and digital technologies’ impact on Canadian society, a sampling of which includes:

(i) testimony before the House of Commons Standing Committee on Access to Information, Privacy & Ethics (ETHI), “Study: *Personal Information Protection and Electronic Documents Act*” (March 23, 2017);

(ii) testimony before the House of Commons Standing Committee on Access to Information, Privacy & Ethics (ETHI), “Bill C-51: *Security of Canada Information Sharing Act* (SCISA)” (November 22, 2016);

(iii) testimony before the House of Commons Standing Committee on Access to Information, Privacy & Ethics (ETHI), “Canada’s Ageing *Privacy Act*: The Need for Modernization”, (September 20, 2016); Report of the Standing Committee on Access to Information, Privacy & Ethics, “Protecting the Privacy of Canadians: Review of the *Privacy Act*”, (December 2016), Fourth Report, 42nd Parliament, 1st Session;

(iv) testimony before the Legislative Assembly of British Columbia Special Committee to Review the *Freedom of Information and Protection of Privacy Act*, on the implications of recent trade agreements for legislative provisions aimed at protecting the privacy of government-held Canadian data in cross-border contexts (November 18, 2015);

(v) testimony before the House of Commons Standing Committee on Industry, Science and Technology (INDU), on Bill S-4: the *Digital Privacy Act*, addressing the need for strong and enforceable privacy rights and on the dangers of an overly permissive cyber security information-sharing regime (February 19, 2015);

(vi) testimony before the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) on the evolving privacy implications of social media (Study: Privacy and Social Media, June 19, 2012); and

(vii) testimony before the House of Commons Standing Committee on Industry, Science and Technology (INDU), on Bill C-27: *Electronic Commerce Protection Act*, addressing the regulation of unsolicited electronic messages and the unauthorized installation of computer programs (September 28, 2009).

(c) Quasi-Judicial Tribunals

12. CIPPIC has participated in various activities before quasi-judicial administrative tribunals in pursuit of its objectives. A representative sample of CIPPIC's advocacy in this field includes:

(i) filing an *amicus curae* brief, jointly with McGill University's Centre for Intellectual Property Policy, in *Eli Lilly v. Government of Canada* UNCT/14/2, a NAFTA trade dispute before an arbitration tribunal involving the compliance of Canada's utility standard under patent law with Canada's obligations under North American Free Trade Agreement;

(ii) representation of the OpenMedia Engagement Network in *In re: An Applicant and the Vancouver Police Department*, BC OIPC File No: F15-63155, a written inquiry before the Information & Privacy Commissioner of British Columbia examining the refusal of the Vancouver Police Department to respond to an access to information demand requesting records relating to IMSI catchers, a surreptitious surveillance tool;

(iii) an intervention in *Application Regarding Vidéotron's Unlimited Music Zero Rating Service*,

CRTC File Nos: 8661-P8-201510199 & 8622-V42-20150735 (September 1, 2015), regarding the potential impact on online innovation that would arise from a digital music platform operated by a mobile wireless service provider;

(iv) participation in Telecom Notice of Consultation CRTC 2012-557, *Proceeding to establish a mandatory code for mobile wireless services*, October 11, 2012, CRTC Reference No.: 8665-C12-201212448, a regulatory proceeding which examined challenges arising from managing jurisdiction conflicts and in consumer protections regimes within Canada and at the federal level, as applied to wireless service provider contracts; and

(v) a complaint and intervention in *CIPPIC v Facebook*, PIPEDA Case Summary #2009-008, applying Canadian privacy laws, norms and principles to the new and emerging medium of online social networking.

13. In addition to its parliamentary, quasi-judicial and judicial activities, CIPPIC routinely advises and represents both individuals and organizations on a range of issues related to consumer rights, access to justice issues, and standard-form contracts in digital society.

14. Through these activities, CIPPIC has offered valuable perspectives on the development of consumer rights, access to justice issues, and Internet law and policy in Canada. CIPPIC's expertise is further supplemented by its Faculty advisors and, more generally, its role within the University of Ottawa's Faculty of Law and Centre for Law, Technology and Society.

III. CIPPIC'S INTEREST IN THIS APPEAL

15. CIPPIC's historical concern regarding public policy issues arising at the intersection of law and technology places this appeal squarely within its mandate. CIPPIC's enduring interest in consumer protection issues is reflected in CIPPIC's extensive contributions to policy and legal discussions around such matters. Questions regarding the conditions under which businesses holding disproportionate bargaining power can effectively opt out of Canadian courts, laws and standards raise broad implications for the general public, extending beyond the interests of the parties to this appeal

IV. POSITION AND PROPOSED SUBMISSIONS

16. If granted leave to intervene, CIPPIC would make the following arguments:

(i) the digitization of society and increasing reliance on non-negotiated standard-form contracts involving consumers have exacerbated the power imbalance between consumers and large corporations, while an outdated (and inadequate) legislative framework endorses the use of arbitration clauses to block access to justice and effectively extinguish a growing swath of consumer and other substantive rights;

(ii) relative to large corporations, small and medium enterprises (SMEs), including sole proprietors, often experience vulnerability and power and informational imbalance similar to that of individual consumers;

(iii) ignoring the realities of small businesses and the technology-driven shifts in today's consumer marketplace also leaves a new category of "prosumers"—hobbyist or self-employed individuals—in an equally precarious position when it comes to access to justice; and

(iv) the Court's determinations in this case will impact access to justice beyond the consumer context, in other areas where non-negotiated standard-form contracts containing arbitration clauses are prevalent, such as employment law, franchise law, and, increasingly, tort law.

17. CIPPIC will expand on these submissions if leave to intervene is granted;

18. I believe that CIPPIC's submissions will be of assistance to the Court in deciding the important issues raised by this appeal. CIPPIC's submissions will be unique in that they will derive from its public interest mandate, and will address impacts of the *Consumer Protection Act* not addressed by others. CIPPIC will inform its submissions with its extensive experience articulating and advancing the public interest when addressing consumer protection issues.

19. I make this Affidavit in support of CIPPIC's Motion for Leave to Intervene in this appeal and

for no improper purpose.

SWORN before me at the City of

)

[original signed]

Ottawa in the Province of Ontario
this 13th of July, 2018

)

)

Tamir Israel

[original signed]

David A. Fewer, Commissioner for Taking Oaths

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PART I – FACTS

A. OVERVIEW

1. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (“CIPPIC”) seeks an Order granting it leave to intervene in this appeal. This appeal will address issues with broad public policy implications for consumer rights, access to justice, and standard-form contracts in digital society. Its determination will affect the ability of Canadians to benefit from domestic standards, legal protections and access to Canadian courts in disputes arising from their digital activities. As greater amounts of daily activity adopt a digital aspect, the outcome of this appeal will have farther-reaching impact.

2. By means of its proposed intervention, CIPPIC offers to assist the Court in its consideration of the Internet policy and public interest issues before it by offering useful submissions different from those of other parties. In formulating these submissions, CIPPIC will draw on the unique and multi-faceted

knowledge and expertise it has developed through its specialized activities in this area of law.

B. THE PROPOSED INTERVENER - CIPPIC

3. CIPPIC is a legal clinic based at the University of Ottawa's Centre for Law, Technology and Society. Its mandate is to advocate in the public interest on issues arising at the intersection of law and technology. CIPPIC's advocacy and public outreach activities engage matters relating to consumer rights, access to justice, and standard-form contract in digital society such as those at issue in this appeal.

Affidavit of Tamir Israel, "Israel Affidavit", sworn on July 16, 2018, Motion Record, Tab 2, para 3 and 5

4. Courts have regularly recognized CIPPIC's capacity to assist on questions relating to Internet policy and the public interest. In particular, CIPPIC has participated in a number of judicial proceedings that implicate many of the same issues raised by this appeal. These include: *Douez v Facebook Inc*, 2017 SCC 33 (addressing consumer access to domestic class proceedings against a non-negotiable forum selection clause regarding privacy rights implicit in the *Charter*); *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 (can an online e-commerce platform vitiate customers' procedural rights to sue in court and, effectively, as a class, by means of a non-negotiable contract term); and *Bell Canada v Amtelecom*, 2015 FCA 126 (addressing the need to account for broader public interest and public policy implications when applying common law doctrines relating to the retrospective application of regulatory action to pre-existing customer contracts).

Israel Affidavit, Motion Record, Tab 2, paras 7-10

5. CIPPIC's expertise in this field is multi-faceted, including non-judicial activity such as its Parliamentary testimony on matters relating to protection of individual rights such as privacy on global social networking sites (ETHI Parliamentary Study on Privacy and Social Media); its participation in global policy-making on cross-border privacy protection (30-year review of the *OECD Guidelines on Privacy and Transborder Data Flows*); and its participation in a regulatory proceeding establishing extensive consumer protections in wireless telephone and internet service provider contracts (Telecom Notice of Consultation CRTC 2012-557).

Israel Affidavit, Motion Record, Tab 2, paras 11-12

PART II – STATEMENT OF QUESTIONS AT ISSUE

6. The only issue before the Court in this motion is whether CIPPIC should be granted leave to intervene in this matter of public interest.

PART III - ARGUMENT

7. An applicant seeking leave to intervene before this Court must address two issues:

- (i) whether the applicant has an interest in the issues raised by the parties to the appeal; and
- (ii) whether the applicant’s submissions will be useful to the Court and different from those of the other parties.

Reference re Workers’ Compensation Act, 1983 (Nfld), [1989] 2 SCR 335, para 8; *R v Finta*, [1993] 1 SCR 1138, para 5; *Rules of the Supreme Court of Canada*, SOR/2002-156, ss 55, 57(2)

A. CIPPIC’S INTEREST IN THIS APPEAL

8. The matters raised by this appeal engage issues relating to consumer rights, access to justice, and standard-form contracts in a digitized society. These matters are all of central importance to CIPPIC’s mandate, which is to advance Internet policy in the public interest. The resolution of this Appeal directly and seriously implicates this aspect of CIPPIC’s work and mandate.

Israel Affidavit, Motion Record, Tab 2, paras 6-12

B. USEFUL AND DIFFERENT SUBMISSIONS

9. An applicant seeking leave to intervene before this Court must demonstrate that its proposed intervention will provide “useful and different submissions”. This criterion is satisfied by an applicant who has a history of involvement in the issues raised by the appeal, giving the applicant expertise that can shed fresh light or provide new information on the matter.

Reference re Workers’ Compensation Act, 1983 (Nfld), [1989] 2 SCR 335, para 1

10. CIPPIC's submissions will be useful because CIPPIC brings to these proceedings the experience of a legal clinic that has worked with various stakeholders and in multi-faceted policy and law-making processes on matters relating to consumer rights, access to justice, and standard-form contracts in a digitized society. CIPPIC can therefore offer the Court a useful, public interest-oriented perspective on the issues raised in this Appeal.

Israel Affidavit, Motion Record, Tab 2, para 6-12

11. CIPPIC's submissions will be different from those of the other parties. Its submissions will be informed by its extensive experience in law and policy relating to consumer rights, access to justice, and standard-form contracts in a digitized society. CIPPIC is eminently capable of assisting the Court by providing thoughtful submissions on the considerations that should guide courts' decisions in determining how to interpret section 7(5) of the *Arbitration Act* in the context of an increasingly digitized society and economy, where mere participation necessitates entering into consumerist and contractual relationships.

12. Additionally, CIPPIC's proposed intervention does not raise any concerns that have traditionally led this Court to refuse intervention. CIPPIC does not intend to expand the issues under appeal beyond those raised by the existing parties. We outline our proposed intervention in the following paragraphs.

***Reference re Workers' Compensation Act, 1983 (Nfld)*, [1989] 2 SCR 335, at para 12**

C. CIPPIC'S PROPOSED SUBMISSIONS

13. If granted leave, CIPPIC will propose arguments contextualizing this case within the rapidly evolving jurisprudence addressing consumer rights and access to justice afforded to customers of large suppliers in Canada, particularly with respect to standard-form contracts in an increasingly digitized world. CIPPIC will also raise important policy considerations around the characterization of consumers and small and medium enterprises in contractual relationships: technology-facilitated participation in society and business has to a certain extent eroded distinctions between the two groups in a way that implicates access to justice and fundamental rights. The past decade's extension of private contracts into

daily personal life necessitates a rebalancing of traditional interests in tests such as that driving section 7(5) of the *Arbitration Act*, SO 1991, c 17, as well as the preferability analysis under section 5(1)(d) of the *Class Proceedings Act*, SO 1992, c 6. In particular, CIPPIC will argue:

(i) The digitization of society and increasing reliance on non-negotiated standard-form contracts involving consumers have exacerbated the power imbalance between consumers and large corporations, while an outdated (and inadequate) legislative framework endorses the use of arbitration clauses to block access to justice and effectively extinguish a growing swath of consumer and other substantive rights. Courts, legislators, and academics have well established that the inherent power imbalance between consumers and large corporations ought to impact the enforcement of consumer standard-form contracts. With the digitization of society and technology increasingly mediating people’s everyday affairs, non-negotiated contracts of adhesion have proliferated throughout many spheres of life. Consumers today navigate a dramatically different society and economy than when the Province of Ontario amended section 7(5) of the *Consumer Protection Act* in 2002, and when this honourable Court decided *Dell Computer Corp. v Union des consommateurs*, 2007 SCC 34. Contemporary consumer issues range far beyond the matters addressed by the *Consumer Protection Act*, such as the quasi-constitutional right to privacy of social networks’ users or the labour rights of individuals deemed independent contractors in the so-called “gig economy.” As a consequence, the narrow scope of consumer protection legislation has come to inadvertently impose significant barriers to consumers seeking access to justice.

(ii) Relative to large corporations, small and medium enterprises (SMEs) and sole proprietors often experience vulnerability and power and informational imbalance similar to that of individual consumers. Regulators, legislators, and academics have recognized this power asymmetry. For example, in the *Wireless Code*, setting minimum rights for wireless service consumers, the Canadian Radio-Television and Telecommunications Commission (CRTC) recognized “that small businesses, given their size and purchasing power, face the same issues as individual consumers...”.

Telecom Regulatory Policy CRTC 2013- 271, *The Wireless Code*, at para 27 and footnote 5 (emphasis added).

Australia has taken this principle even further, by extending protections under the *Australian Consumer Law* (ACL) to small businesses. The Final Report of the 2017 Australian Consumer Law Review noted that “small businesses can be as time poor as ordinary consumers and lack knowledge and expertise about products they buy.” If the same underlying factors regarding power imbalance, lack of negotiating power, information asymmetry, and lack of sophistication apply to small businesses as to consumers, then a principled analysis would militate towards allowing small businesses to join with consumers in a class proceeding where their contracts were the same.

Competition and Consumer Act 2010, Schedule 2, The Australian Consumer Law, s 23; Legislative and Governance Forum on Consumer Affairs, Australian Consumer Law Review: Final Report, Commonwealth of Australia (March 2017), at page 73.

(iii) Ignoring the realities of small businesses and the technology-driven shifts in today’s consumer marketplace also leaves a new category of “prosumers”—hobbyist or self-employed individuals—in an equally precarious position when it comes to access to justice. Prosumers (an amalgamation of “producer” and “consumer”) are individuals who run their own small or side businesses, often exclusively through an online platform such as Etsy, YouTube, Uber, or Airbnb, as well as sole proprietors and those deemed independent contractors in the so-called “gig economy.” A contemporary reading of standard-form contracts, and the arbitration clauses within them, would recognize that in today’s digitized and technology-facilitated world, many prosumers enter into what may be considered business transactions with a level of legal or commercial sophistication akin to that of the average consumer.

(iv) The Court’s determinations in this case will impact access to justice beyond the consumer context, in other areas where non-negotiated standard-form contracts containing arbitration clauses are prevalent, such as employment law, franchise law, and, increasingly, tort law. When parties with lower bargaining and information power, such as consumers, SMEs, or prosumers, are in contractual relationships whose subject-matter is outside of the scope of the *Consumer Protection Act*, arbitration clauses will effectively bar them from both accessing the courts and accessing class action proceedings. This is particularly problematic given that class proceedings are largely the only meaningful way to obtain access to justice in cases involving diffuse interests, distributed

harm, unfairness, or wrongdoing, and prohibitive costs of individually seeking redress.

14. CIPPIC will expand upon these submissions if granted leave to intervene.

PART IV– COSTS

15. CIPPIC will not seek costs in this matter and asks that costs not be awarded against it in this motion or in the appeal if leave to intervene is granted.

PART V– ORDER SOUGHT

16. CIPPIC respectfully requests an Order from this Court:
- (i) granting CIPPIC leave to intervene in this appeal;
 - (ii) permitting CIPPIC to file a factum of no greater length than 10 pages;
 - (i) permitting CIPPIC to present 10 minutes of oral argument at the hearing of this appeal; and
 - (ii) such further or other Order as deemed appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of July, 2018.

[original signed]

[original signed]

David Fewer

Marina Pavlović

Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC)

University of Ottawa, Faculty of Law

57 Louis Pasteur Street

Ottawa, ON K1N 6N5

Tel: (613) 562-5800 x 2558

Fax: (613) 562-5417

Email: dfewer@uottawa.ca

Tel: (613) 562-5800 x 2675

Tel: (613) 562-5124

Email: Marina.Pavlovic@uOttawa.ca

Counsel for the Proposed Intervener

PART VI – TABLE OF AUTHORITIES

<i>Authority</i>	<i>Reference in Argument</i>	
	<u>Cases</u>	
1	<i>Reference re Workers' Compensation Act, 1983 (Nfld.) (Application to intervene)</i> , [1989] 2 SCR 335, 1989 CanLII 23 (SCC), < http://canlii.ca/t/1ft35 >	7, 9 and 12
2	<i>R v Finta</i> , [1993] 1 SCR 1138, 1993 CanLII 132 (SCC), < http://canlii.ca/t/1fs3t >	7
	<u>Government Publications</u>	
3	Legislative and Governance Forum on Consumer Affairs, <i>Australian Consumer Law Review: Final Report</i> , Commonwealth of Australia (March 2017), < https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf >	13
	<u>Legislation</u>	
4	<i>Competition and Consumer Act 2010</i> , Schedule 2, <i>The Australian Consumer Law</i> , s 23, < http://consumerlaw.gov.au/the-australian-consumer-law/legislation/ >	13
5	<i>Rules of the Supreme Court of Canada</i> , SOR/2002-156, ss 55, 57(2)	7
6	Telecom Regulatory Policy CRTC 2013- 271, <i>The Wireless Code</i> , < https://crtc.gc.ca/eng/archive/2013/2013-271.htm >	13