Court File No. T-1779-18

FEDERAL COURT

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

B E T W E E N:

THE PRIVACY COMMISIONER OF CANADA

Applicant

MEMORANDUM OF FACT AND LAW OF THE ATTORNEY GENERAL OF CANADA

ATTORNEY GENERAL OF CANADA

Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, Ontario K1A 0H8
Fax: 613-954-1920

Per: Christopher Rupar/ Kirk Shannon/ Fraser Harland
Tel: 613-670-6290/ 613-670-6345/ 613-670-8515

Email: Christopher.Rupar@justice.gc.ca
Kirk.Shannon@justice.gc.ca
Fraser.Harland@justice.gc.ca

Counsel for the Attorney General of Canada

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Overview

1. The Attorney General of Canada ("AGC") largely adopts the arguments advanced by the Privacy Commissioner of Canada and the complainant in their respective written submissions. The attempt by Google LLC ("Google") to distance or disentangle its search engine from its lucrative advertising business is disingenuous. As one of the most profitable corporations in the world, Google's business is built on the pervasive use of its search engine by the world's population. Google should not be permitted to artificially distance its profit-making activities from the central source of its utility and renown – its search engine. This Court should find that Google collects, uses and discloses personal information in the course of a commercial activity, as defined in the *Personal Information Protection and Electronic Documents Act* ("PIPEDA").

2. Similarly, based on the established legal test for the journalism exception in PIPEDA, Google does not collect, use or disclose personal information for journalistic purposes *and for no other purpose*. The journalism exception in PIPEDA does not apply.

3. When considering both of the reference questions at issue, however, the Court must employ the established approach to statutory interpretation. The overly-expansive interpretation of PIPEDA is not warranted. Reference to or reliance on interpretative techniques that are based on *Charter* values or the quasi-constitutional nature of the legislation are neither required nor appropriate in the present case.

Part I – Facts

4. The AGC accepts the facts as set out by the complainant and the Privacy Commissioner.

Part II – Issue

5. The issues in this case are as follows:

a. Does Google, in the operation of its search engine service, collect, use or disclose personal information in the course of commercial activities within the meaning of paragraph 4(1)(a) of PIPEDA when it indexes web pages and presents search results in response to searches of an individual's name?

b. Is the operation of Google's search engine excluded from the application of Part 1 of PIPEDA by virtue of paragraph 4(2)(c) of PIPEDA because it involves the collection, use or disclosure of personal information for journalistic purposes and for no other purpose?

Part III – Argument

A. The AGC Supports the Arguments Advanced by the Privacy Commissioner and the Complainant

6. In relation to both reference questions, the central issue before this Court is one of statutory interpretation. In undertaking this analysis, the AGC agrees with a large part of the analysis and the result urged by the Privacy Commissioner and the complainant. An assessment of the text, context and purpose of the relevant provisions of PIPEDA clearly reveals that Google search is a commercial activity and that it does not have an exclusively journalistic purpose.

i) Google Collects, Uses or Discloses Personal Information in the Course of Commercial Activities

7. There can be little serious argument that Google does not collect, use, and disclose personal information through its search engine. As noted by the Privacy

Commissioner, Google has not yet taken issue with this proposition.[1] Indeed, Google search only functions because Google collects mass amounts of online information (which can be deeply personal as in the case of the complainant), stores that information on its servers, and then discloses that information to its users in the form of search results. The more central question before the court is whether this collection, use and disclosure of personal information occurs in the course of commercial activities.

8. The AGC is in agreement with the Privacy Commissioner and the complainant that Google's search engine falls within the scope of commercial activity within the meaning of subsection 4(1) of PIPEDA.

9. First, Google's search engine is intrinsically linked to its multi-billion dollar advertising business. Advertisements appear in Google search results themselves.[2] Further, Google uses the information gathered from its search engine so that its advertisements are more targeted and effective.[3] It is disingenuous for Google to assert that its search engine operates merely as a tool to allow individuals to access information online. Rather, the success of its advertising business depends on people using its search engine.

10. In fact, domestic and international courts that have already contemplated this specific question have dismissed Google's arguments that its search engine and advertising business can reasonably be viewed as separate. The British Columbia Supreme Court determined that "the two parts of Google's business are inextricably

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[1] Privacy Commissioner factum, at para. 52.
[2] Google, "Paid Search Advertising on Ads", Affidavit of Nathalie Lachance affirmed May 14, 2019 ("Lachance Affidavit"), Exhibit S-21; Google, "Where your ads will appear on Google", Lachance Affidavit, Exhibit S-22.
[3] Google, "Why you're seeing an ad", Lachance Affidavit, Exhibit S-18; Google, "Google Ads: How Google uses your data for ads", Lachance Affidavit, Exhibit S-24, p 2.

linked; neither service can stand alone."[4] The European Court of Justice similarly found that Google's search engine could not be profitable without its advertising and that its advertising could not function without its search engine.[5] The essential role that Google's search engine plays in its profitmaking supports the argument that it falls within the scope of commercial activity in PIPEDA.

11. Second, the purpose of PIPEDA would be frustrated if its privacy protections did not extend to services that appear free to the user but net billions of dollars for the company. Indeed, failing to bring such services under the ambit of PIPEDA would leave Canadians without privacy protection in their use of services offered by many of the most ubiquitous and profitable technology companies. Parliament explicitly designed PIPEDA to offer reasonable privacy protections "in an era in which technology increasingly facilitates the circulation and exchange of information."[6] The legislation's clear purpose further supports Google's search engine falling within its scope.

12. Finally, the *State Farm* case is distinguishable from the specific facts at issue in this reference. As noted by both the Privacy Commissioner and the complainant, in *State Farm* this Court held that the focus must be on the primary activity or conduct.[7] In that case, the primary activity was the collection of evidence to mount a defence to a civil claim.[8] Google's search engine cannot be distinguished or disentangled from its commercial activities in the same way the primary conduct in *State Farm* could. Rather, its search engine is an intrinsic and necessary component of its commercial activities. Based on the evidence and the findings of other courts, a fair assessment of primary

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[4] *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, Attorney General of Canada's Book of Authorities ["BOA"], Tab 8 at para. 60.
[5] *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12, BOA Tab 10 at para. 56.
[6] PIPEDA, s. 3, BOA Tab 1.
[7] Privacy Commissioner factum, at para. 78; Complainant's factum, at para. 40.
[8] *State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada*, 2010 FC 736, BOA Tab 17, at para. 106.

activity at issue in this reference also leads to the conclusion that Google's search engine falls within the scope of commercial activity.

13. As a result, and for the further reasoning set out in the facta of the Privacy Commissioner and the complainant, Google, through its search engine, collects, uses or discloses personal information in the course of commercial activities within the meaning of paragraph 4(1)(a) of PIPEDA.

ii) The Journalism Exception Does Not Apply

14. Google does not engage in journalism. Among other functions, Google's search engine facilitates the public's access to web-based journalism. In this way, Google resembles a television cable company that facilitates access to television journalism. The legal definition of what constitutes a journalistic purpose cannot be so wide as to include a company whose role, at most, is to act as a conduit through which some users gain access to journalism created and hosted by third parties.

15. As ably set out by the Privacy Commissioner and the complainant, the journalism exception at paragraph 4(2)(c) of PIPEDA only applies when an organization collects, uses or discloses personal information for a journalistic purpose *and for no other purpose*. Exclusivity of purpose is therefore key: Parliament did not intend to insulate the work of organizations that engage in both journalism and other commercial activities.

16. The exclusivity of purpose requirement renders the exception inapplicable in the present case. Even if this Court were to find that a portion of Google's work furthers a journalistic purpose, this journalistic purpose is incidental to Google's "larger purpose of providing automated access to third party content, whatever nature it may be…"[9]

[9] *NT 1 and NT 2 v. Google LLC*, [2018] 3 All ER 581, BOA Tab 12 at para. 100.

17. In any event, Google does not meet this Court's three-part test for what constitutes a journalistic purpose, set out in *A.T. v. Globe24h.com*.[10] First, the purpose of Google's search engine activities is not to inform the community of issues that the community values. Rather, Google broadly aims to make all of the world's information universally accessible.[11] The search engine's ability to inform the community on matters the community values is, at best, untargeted, haphazard and unintentional.

18. Second, there is no element of original production in Google's posting of search results in response to a user's query. As acknowledged by Google, it simply indexes third party information already available on the internet.[12]

19. Finally, Google's automated search engine involves no "self-conscious discipline calculated to provide an accurate and fair description of the facts, opinion and debate at play within a situation."[13] Relevant results are listed (accompanied by relevant advertising) without any deliberate assessment regarding whether they present a fair and accurate description of both sides to a given situation.

20. As a result, and for the further reasoning set out in the facta of the Privacy Commissioner and the complainant, Google's search engine does not engage the journalism exception set out in paragraph 4(2)(c) of PIPEDA.

B. Established Principles of Statutory Interpretation Must be Applied

21. To reach the above result, however, this Court does not need to resort to the imprecise concepts of *Charter* values or quasi-constitutionality. The impugned

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[10] *A.T. v. Globe24h.com*, 2017 FC 114, BOA Tab 9 at para. 68.
[11] Google LLC Mission Statement, cited in Preliminary Findings of Fact Jurisdictional Issues, Privacy Commissioner of Canada, File PIPEDA-035253, Exhibit R to the Lachance Affidavit, May 14, 2019, at para. 23.
[12] Letter dated March 2, 2018 from David Fraser, counsel for Google LLC, Exhibit F to the Lachance Affidavit, May 14, 2019, at p. 2.
[13] *A.T. v. Globe24h.com*, 2017 FC 114, BOA Tab 9 at para. 68.

provisions are not ambiguous. Further, PIPEDA's broad application is best discerned from its context and purpose, not from its quasi-constitutional nature.

i) Fundamental Principles of Statutory Interpretation

22. The "modern approach" to statutory interpretation is the accepted norm. Under this approach, the proper way to construe a statutory provision is to read its words "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."[14] As noted in *Bell ExpressVu*, this approach demonstrates the important role that context plays in the interpretation of legislation because words "take their colour from their surroundings."[15] The modern approach to statutory interpretation has been summarized by the Supreme Court:

> The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.[16]

23. In addition to this overarching approach to statutory interpretation, the Supreme Court has provided guidance on specific issues related to the interpretation of legislation that is helpful in this case:

a. Parliament is skilful and careful in choosing the words of legislation and does so with a specific purpose in mind; therefore, there is a

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[14] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R., BOA Tab 16 at para. 21. See also *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, BOA Tab 3 at para. 41.
[15] *Bell ExpressVu v. The Queen*, [2002] 2 S.C.R. 559, 2002 SCC 42, BOA Tab 4 at paras. 26-27.
[16] *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54, BOA Tab 6 at para. 10.

presumption against tautology in that words found in legislation are not generally considered redundant. As this Court has noted, "[t]he legislator does not speak in vain."[17]

b. Courts must be extremely reluctant to alter the words Parliament has used in legislation, particularly where, as in this reference, the constitutional validity of the legislation is not at issue.[18]

c. A purely literal approach, without looking at the context of the legislation, should not be followed.[19]

ii) Quasi-Constitutional Status of the Legislation and Unwritten Constitutional Principles Do Not Alter Interpretation of Legislation

24. The Privacy Commissioner seems to suggest that the "quasi-constitutional" nature of PIPEDA means that it is provided broader or special recognition during the statutory interpretation exercise.[20] While the Court should be mindful of the quasi-constitutional nature of legislation, and give the legislation full effect, this feature of the legislation does not warrant a departure from the ordinary rules of statutory interpretation.[21] The quasi-constitutional status of legislation should not been used as a means to take a more expansive view of a term than that intended by the legislature. [22]

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[17] *Bell ExpressVu v. The Queen*, [2002] 2 S.C.R. 559, 2002 SCC 42, BOA Tab 4 at para. 37.
[18] See generally: *R. v. Clay*, [2003] 3 S.C.R. 735, 2003 SCC 75, BOA Tab 14 at para. 55 where the majority cautioned against reading down legislation absent a successful constitutional challenge to the legislation.
[19] *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28, BOA Tab 2 at para. 26.
[20] Privacy Commissioner's factum, para. 38
[21] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665, 2000 SCC 27, BOA Tab 13 at para. 31.
[22] *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563, 2005 SCC 74, BOA Tab 7 at paras. 23, 40, 54.

25. The Supreme Court has stressed the need for courts to apply the principles of statutory interpretation in an even and consistent manner. In *Lavigne v. Canada*, it was held that the special status that is accorded to certain legislation, such as characterizing the legislation as quasi-constitutional, does not "operate to alter the traditional [modern] approach to the interpretation of legislation."[23]

26. Even in the constitutional context, unwritten constitutional principles should not be used to create rights beyond those already reflected in the written text of the constitution.[24] In the *Quebec Secession Reference*, the Court held that "in certain circumstances" unwritten constitutional principles such as federalism, democracy, constitutionalism and protection of minorities may give rise to substantive legal obligations and limit certain government action. However, that Court also recognized that the written text has a "primary place" in determining constitutional rules. The need to rely on extrinsic aids arises only where there are "problems or situations [that] arise which are not expressly dealt with by the text of the Constitution".[25] The unwritten principles are not "an invitation to dispense with the written text of the Constitution."[26] Similarly, in this case, the quasi-constitutional nature of PIPEDA should only be considered relevant to the extent that the text, context and purpose do not already provide clarity. This is not such a case.

iii) Charter Values

27. The concept of *Charter* values also has minimal utility in this reference. As noted by the Privacy Commissioner, *Charter* values can be used as an aid to statutory

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[23] *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53, BOA Tab 11 at para. 25.
[24] See e.g. *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49, BOA Tab 5 at para. 65.
[25] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, BOA Tab 15 at para. 32.
[26] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, BOA Tab 15 at para. 53.

interpretation, but only in cases where there is genuine ambiguity as to the meaning of a provision.[27]

28. The reasons *Charter* values have a limited role in statutory interpretation are that "a blanket presumption of *Charter* consistency could sometimes frustrate true legislative intent"[28] and legislatures would be "largely shorn" of their ability to prescribe reasonable limits on *Charter* rights and freedoms. As the Supreme Court stated in *Bell ExpressVu*:

> To reiterate what was stated in *Symes*, *supra*, and *Willick*, *supra*, if courts were to interpret all statutes such that they conformed to the *Charter* this would wrongly upset the dialogic balance. Every time the principle were applied, it would pre-empt judicial review on *Charter* grounds, where resort to the internal checks and balances of s. 1 may be had. In this fashion, the legislatures would be largely shorn of their constitutional power to enact reasonable limits on *Charter* rights and freedoms, which would in turn be inflated to near absolute status. Quite literally, in order to avoid this result a legislature would somehow have to set out its justification for qualifying the *Charter* right expressly in the statutory text, all without the benefit of judicial discussion regarding the limitations that are permissible in a free and democratic society. Before long, courts would be asked to interpret this sort of enactment in light of *Charter* principles. The patent unworkability of such a scheme highlights the importance of retaining a forum for dialogue among the branches of governance. As such, where a statute is unambiguous, courts must give effect to the clearly expressed legislative intent and avoid using the *Charter* to achieve a different result.[29]

29. In this case, a proper assessment of the text, purpose and context of PIPEDA yields clear results. *Charter* values, therefore, should not factor into the analysis.

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[27] Privacy Commissioner factum, at para. 39, citing *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, [2015] 3 S.C.R. 300, 2015 SCC 47, BOA Tab 18 at para. 25.
[28] *Bell ExpressVu v. The Queen*, [2002] 2 S.C.R. 559, 2002 SCC 42, BOA Tab 4 at para. 64.
[29] *Bell ExpressVu v. The Queen*, [2002] 2 S.C.R. 559, 2002 SCC 42, BOA Tab 4 at para. 66.

Part IV – Order Requested

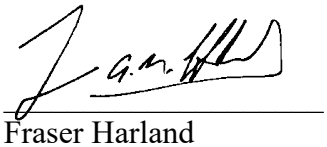
30. The AGC requests that:

a. This Court answer the first reference question in the affirmative and the second reference question in the negative.

November 9, 2020


Christopher Rupar


Kirk Shannon


Fraser Harland

Counsel for the Attorney General of Canada

PART V – LIST OF AUTHORITIES

Legislation

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

Case Law

Alberta Union of Provincial Employees v. Lethbridge Community College, [2004] 1 S.C.R. 727, 2004 SCC 28

Bell Canada v. Canada (Attorney General), 2019 SCC 66

Bell ExpressVu v. The Queen, [2002] 2 S.C.R. 559, 2002 SCC 42

British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473, 2005 SCC 49

Canada Trustco Mortgage Co. v. Canada, [2005] 2 S.C.R. 601, 2005 SCC 54

Charlebois v. Saint John (City), [2005] 3 S.C.R. 563, 2005 SCC 74

Equustek Solutions Inc. v. Jack, 2014 BCSC 1063

A.T. v. Globe24h.com, 2017 FC 114

Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, C-131/12

Lavigne v. Canada (Office of the Commissioner of Official Languages), [2002] 2 S.C.R. 773, 2002 SCC 53

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Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), [2000] 1 S.C.R. 665, 2000 SCC 27

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Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27

Case Law Continued

State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada, 2010 FC 736

Wilson v. British Columbia (Superintendent of Motor Vehicles), [2015] 3 S.C.R. 300, 2015 SCC 47