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

BETWEEN:

THE PRIVACY COMMISSIONER OF CANADA

Applicant

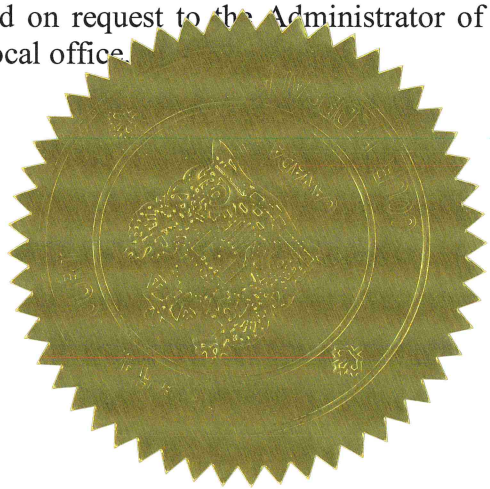
NOTICE OF APPLICATION OF THE PRIVACY COMMISSIONER OF CANADA
Application for a reference under section 18.3 of the
Federal Courts Act, R.S.C. 1985, c. F-7

A REFERENCE HAS BEEN COMMENCED by the applicant. The questions being referred by the applicant appear at paragraph 1 of page 1.

THIS REFERENCE will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Ottawa, Ontario.

IF YOU WISH TO PARTICIPATE IN THIS REFERENCE, to receive notice of any step in the reference or to be served with any documents in the reference, you or a solicitor acting for you must prepare a notice of intention to participate in Form 323 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.



DATED AT OTTAWA, this 10 day of October 2018.

Issued by: _____
(Registry Officer) Gino Montesanto

Address of
local office: Federal Court
Thomas D'Arcy McGee Building
90 Sparks Street
Ottawa, Ontario
K1A 0H9

APPLICATION

1. This is an application by the Privacy Commissioner of Canada ("Privacy Commissioner" or "Commissioner") pursuant to subsection 18.3(1) of the *Federal Courts Act,* R.S.C. 1985, c.F-7 to refer the following questions of law and jurisdiction to the Federal Court for hearing and determination ("the reference questions"):

   (1) Does Google LLC ("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 the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA" or "the Act") when it indexes web pages and presents search results in response to searches of an individual's name?

   (2) Is the operation of Google's search engine service 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, artistic or literary purposes and for no other purpose?

The grounds for the application are:

2. The Privacy Commissioner is the officer responsible for overseeing and ensuring compliance with Canada's federal privacy laws. The Privacy Commissioner oversees the *Privacy Act*, R.S.C. 1985, c. P-21, which applies to federal government institutions, and PIPEDA, which applies to organizations in the private sector engaged in commercial activities.

3. In light of the powers, duties and functions conferred on the Privacy Commissioner by these statutes, the Commissioner is a "federal board, commission or other tribunal" as defined by section 2 of the *Federal Courts Act*.

4. With some exceptions, PIPEDA applies to every organization in respect of personal information that the organization collects, uses or discloses in the course of commercial activities by virtue of paragraph 4(1)(a) of the Act.

5. Certain organizations and activities are excluded from the application of PIPEDA by operation of subsection 4(2) of the Act. Pursuant to paragraph 4(2)(c), PIPEDA does not apply to 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.

6. Individuals may file complaints with the Privacy Commissioner against an organization for contravening its obligations under PIPEDA. The Commissioner is empowered by PIPEDA to investigate such complaints and to report the Commissioner's findings and recommendations, if any, to the complainant and the organization concerned.

7. Google is a US-based for-profit corporation that offers, among other things, a service that allows users to search for content on the World Wide Web by inputting search terms into its search engine ("the search engine service").

8. The Office of the Privacy Commissioner ("OPC") received a complaint from an individual alleging that Google is contravening PIPEDA by continuing to prominently display links to online news articles concerning him in search results when his name is searched using Google's search engine service (OPC File: PIPEDA-035253). The complainant requested that Google remove the articles in question from search results for searches of his name, but Google declined to take such action at that time, suggesting instead that the complainant start by contacting the publishers of the articles.

9. The complainant alleges that the news articles in question are outdated, inaccurate and disclose sensitive information such as his sexual orientation and a serious medical condition. The complainant maintains that the fact that Google prominently links these articles to his name in search results has caused, and continues to cause him, direct harm. The complainant argues that PIPEDA applies to Google's operation of its search engine and requires it to remove the links at issue from search results for any search of his name. The complainant submits that Google's search engine service is a key component of Google's business model. He also submits that no exemption under PIPEDA applies to this activity.

10. As part of the OPC's investigation of the complaint ("the complaint investigation"), the OPC notified Google of the complaint and obtained its representations in response. In its submissions, Google has taken the position that PIPEDA does not apply to it in the circumstances because the operation of its search engine service is not a commercial activity within the meaning of paragraph 4(1)(a) of PIPEDA. Google has also asserted that in any event its search engine service is exempt from PIPEDA by virtue of paragraph 4(2)(c) of the Act because it is a journalistic or literary operation, particularly when providing an individual user with access to news media content and providing news media producers with access to readers. Google has submitted that the OPC should conclude that the matter does not fall within PIPEDA and close the file.

11. Google has asserted that if PIPEDA does apply to its search engine service and requires it to deindex lawful, public content from its search results then PIPEDA would contravene section 2(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") and would not be saved by section 1 of the *Charter*.

12. In order to resolve, as a first step, the jurisdictional dispute that has arisen in the course of the complaint investigation, the Privacy Commissioner seeks a determination by the Federal Court as to whether PIPEDA applies to Google's operation of its search engine.

13. In anticipation of the filing of this reference, on August 10, 2018, the OPC shared with the parties to the complaint a draft of its Preliminary Findings of Fact. The OPC invited parties to review the draft and provide comments by August 31, 2018. The deadline for comments for both parties was subsequently extended until September 10, 2018 following a request for an extension from Google.

14. The OPC carefully reviewed and considered the submissions from both parties and made a number of revisions to the Preliminary Findings of Fact as a result. The revised Preliminary Findings of Fact were issued to the parties prior to the filing of this Notice of Application.

15. The resolution of the reference questions will determine whether the OPC can proceed with the complaint investigation. The questions posed are therefore not academic as they

relate to a live dispute currently before the OPC. In addition to this complaint, the OPC has received several other similar complaints alleging that Google is contravening PIPEDA by continuing to display links to content containing the complainants' personal information in search results. Thus, an answer to the reference questions will be of assistance in the resolution of multiple complaints.

16. The questions being put to the Court are also appropriate for a reference under subsection 18.3(1) of the *Federal Courts Act*. They are questions of law and jurisdiction concerning the scope of application of PIPEDA. The facts concerning the operation of Google's search engine service that are necessary to decide the reference questions are largely not in dispute and can form an appropriate basis for this Court to make determinations on the reference questions. Both parties to the complaint have had the opportunity to comment on the facts that the OPC proposes form the basis for the reference.

17. In the circumstances, a binding decision by this Court is the only means of obtaining legal certainty as to whether PIPEDA applies to Google's search engine service. At the conclusion of a complaint investigation, the OPC is limited to reporting the Commissioner's findings and recommendations to an organization pursuant to section 13 of PIPEDA, but these are not binding. In order to obtain a binding determination, the complainant or the OPC would have to apply to the Federal Court for a *de novo* hearing of the matter. A reference proceeding is therefore an efficient means of obtaining a binding judicial determination with respect to the reference questions.

18. In the circumstances, the resolution of the reference questions could potentially put an end to the dispute and will greatly assist in the resolution of other complaints. The reference is therefore an appropriate and reasonable way to proceed in the circumstances.

19. The *Federal Courts Act*, R.S.C. 1985, c. F-7, including sections 2 and 18.3.

20. The *Federal Courts Rules*, SOR/98-106, including Rules 321 to 323.

21. The *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, including paragraphs 4(1)(a) and 4(2)(c).

22. Such other grounds as counsel for the applicant may advise and the Court may permit.

The application will be supported by the following material:

a) The material that this Court directs will constitute the case to be determined on the reference pursuant to the motion to be brought by the Privacy Commissioner under Rule 322; and

b) Such further and other material as the Applicant may advise and this Honourable Court may permit.

DATED this 9th day of October, 2018.

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