Federal Court  Cour fédérale

Date: 20190416

Docket: T-1779-18

Citation: 2019 FC 464

Ottawa, Ontario, April 16, 2019

PRESENT: Madam Prothonotary Mireille Tabib

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 a question 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

ORDER AND REASONS

[1] By way of a reference initiated pursuant to s 18.3 of the *Federal Courts Act*, RSC 1985 c F-7, the Privacy Commissioner of Canada has referred to this Court for hearing and determination two preliminary questions of jurisdiction that arose in the context of his investigation of a complaint made against Google LLC under the *Personal Information Protection and Electronic Documents Act* SC 2000, c 5 ("PIPEDA").

[2] Google is of the view that the Privacy Commissioner has framed the questions too narrowly, and seeks a series of orders that would have the effect of recognizing the inclusion of

constitutional issues it says are inextricably intertwined with the questions referred, and would allow the constitution of a proper evidentiary record for their determination. In the alternative, Google submits that if the constitutional questions are not added or deemed to be included in the reference, the reference should be struck.

[3] For the reasons that follow, Google's motion will be dismissed.

I. Procedural Context

[4] The Privacy Commissioner has received a complaint against Google alleging that Internet searches of the Complainant's name using Google's search engine return results that prominently display links to news articles that he alleges are outdated, inaccurate and disclose sensitive personal information, in a way that causes him direct harm. The Complainant alleges that Google thus contravenes PIPEDA, and requests that Google remove the articles from search results using his name, a procedure referred to as "deindexing".

[5] In its response to the complaint, Google contested the application of PIPEDA to the operation of its search engine on a number of grounds. It alleged that PIPEDA does not apply to the operation of its search engine because it is not a "commercial activity" within the meaning of paragraph 4(1)(a) of PIPEDA, and that even if it is a commercial activity, it is in any event exempted from PIPEDA's application by virtue of the journalistic exemption provided in paragraph 4(2)(c) when linking readers and news media producers. In addition, Google argues more broadly that any interpretation of PIPEDA that would subject its search engine to its application and would require it to deindex lawful content would contravene the right to freedom

of expression, including freedom of the press, guaranteed by s 2(b) of the *Canadian Charter of Rights and Freedoms*, in a way that cannot be saved by s 1 of the *Charter*.

[6] The Privacy Commissioner, as a federal board, commission or tribunal, has the power, pursuant to s 18.3(1) of the *Federal Courts Act*, to refer for hearing and determination by this Court "any question or issue of law, of jurisdiction or of practice and procedure" that arises in a proceeding before it. In early consultations between Google and the Privacy Commissioner, Google suggested that the preliminary issues it had raised were of such general importance that the Privacy Commissioner should consider referring them to the Court pursuant to s 18.3. The Privacy Commissioner acted upon Google's suggestion, but, over Google's strenuous objections, chose to refer only the two jurisdictional questions raised by Google, as follows:

> (1) 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 webpages and presents search results in response to searches of a individual's name?
>
> (2) Is the operation of Google's search engine service excluded from the application of Part I 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 purpose?

[7] Rule 322 of the *Federal Courts Rules* SOR/98-106 provides that a tribunal who makes a reference is required to bring, on an *ex parte* basis, a motion for directions as to a variety of procedural issues, including the identification of the persons to whom notice of the reference

should be given. The divergence of views between the Privacy Commissioner and Google as to the propriety and viability of the reference questions as formulated by the Privacy Commissioner had been extensively canvassed in correspondence exchanged between the parties prior to and following the filing of the formal Notice of Application by the Privacy Commissioner. Accordingly, before a motion for directions was filed by the Privacy Commissioner, Google had already served and filed a Notice of Intention to Participate in the reference, as well as a notice of constitutional question, in which it frames the constitutional issues it wants to raise. Google also requested that the Privacy Commissioner serve it with the motion for directions contemplated in Rule 322, so that Google could have the opportunity to speak to the propriety and scope of the reference questions.

[8] The Privacy Commissioner did not consider Google's request to be compliant with the *Federal Courts Rules*; however, acknowledging Google's intention to contest the scope of the reference as drafted, the Privacy Commissioner undertook to inform the Court of Google's position and to seek directions for holding a preliminary hearing to resolve the question of the proper scope of the reference. The proposed draft order submitted by the Privacy Commissioner on its *ex parte* motion for directions contained the following provision:

> At the earliest possible opportunity, the Case Management Judge will set a hearing date in consultation with the parties, in order to confirm, as a preliminary matter, the questions that will constitute the reference.

[9] The order that issued on November 2, 2018, however, did not retain the wording proposed by the Privacy Commissioner but provided the following:

> 5. Should either the Complainant or Google wish to challenge the appropriateness of the reference questions, they shall file a motion

> to challenge the scope of the reference within 15 days of filing their Form 323.

[10] In addition, rather than accepting the Privacy Commissioner's suggestion that participants could supplement the record to be supplied by the Privacy Commissioner by filing affidavits to introduce additional background information as of right, the Court ordered that such additional material could only be filed by leave of the Court. The Order of November 2, 2018 will, in these reasons, be referred to as the "Reference Order".

[11] Google thus served and filed the present motion, seeking the following relief:

> (1) An order varying paragraph 5 of the Reference Order to confirm that the scope of the reference questions already includes the "inextricably intertwined constitutional issues" set out in Google's notice of constitutional questions or an order that these constitutional issues be included in the reference;
>
> (2) An order varying the Reference Order so that the evidence that can be filed by the parties with leave need not be limited to "additional background", but can include what is required for a proper constitutional record;
>
> (3) In the alternative to (1) and (2), an order striking the reference application on the basis that the reference questions are inappropriate and prejudicial;
>
> (4) An order varying the Reference Order to allow news media organizations to become parties to the reference; and
>
> (5) An order varying the confidentiality provisions of the Reference Order.

[12] The relief sought in paragraph 5 has been withdrawn pursuant to an agreement reached between the Complainant and Google.

[13] As for the relief requested in paragraph 4 above, it has been overtaken by the motion of certain news media organizations for an order that they be added as parties to the reference, which was dismissed by an Order dated March 1, 2019 reported at 2019 FC 261. It should be noted that in dismissing the media parties' motion, the Court found that the reference questions as framed in the Notice of Application did not include the issue of the constitutional validity of an order requiring Google to deindex news media content, nor the constitutional validity of the application of PIPEDA to the operation of Google's search engine. In making that determination, the Court did not however have the benefit of the notice of constitutional question or of Google's motion record on this motion, the media parties having insisted that their motion be heard and determined prior to Google's motion, and having failed to include the relevant materials for the Court's consideration. As a result, the Court's determination as to the true scope of what is at issue in the reference was based solely on the questions as framed in the Notice of Application, did not take into account how these questions might be supplemented by the filing of the notice of constitutional question or by an order of the Court, and is not determinative of the issues raised in this motion.

II. The Issues Raised in this Motion

[14] Although each of the parties has characterized them somewhat differently, the Court is of the view that the issues raised in this motion can be summarized as follows:

(1) Can the scope of the questions framed by a tribunal on a reference be varied or widened by the service of a notice of constitutional question or by the preliminary intervention of the Court?

(2) If the reference questions can be varied, should they be varied or deemed varied to include the constitutional questions posed by Google in this instance?

(3) If the reference questions cannot or should not be varied, should the reference be struck?

III. Analysis

A. Can the scope of the reference be varied?

[15] The bulk of Google's submissions is directed to establishing the reasons why it is necessary or appropriate for the constitutional issues to be determined as part of this reference. However, the appropriate starting point for the Court's enquiry on this motion is not the propriety or necessity of adding those issues to the reference but whether Google or the Court could, in any event, compel or direct their inclusion.

[16] It is beyond dispute that the reference questions as framed by the Privacy Commissioner do not on their face appear to include the constitutional issues raised by Google. The Privacy Commissioner was well aware of Google's views, yet drafted the questions in a way that precludes any doubt as to his intention to exclude them from the reference. However much Google might describe the constitutional issues as "ingrained in" or "inextricably intertwined

with" the reference questions, everything about its motion acknowledges that they were not intended to be submitted to the Court by the Privacy Commissioner.

[17] Google also appears to recognize that the evidentiary record constituted by the Privacy Commissioner for the purpose of the reference did not take the constitutional issues into account and may be insufficient for the proper determination for the constitutional issues. Google's request to widen the scope of the supplementary evidence the parties can seek leave to file on the reference is intended to allow it to remedy this potential evidentiary gap.

[18] The first issue before the Court is therefore not an exercise in construing the scope of the questions as posed, but the determination of whether and how their scope can be widened to include the constitutional issues.

[19] The Court agrees with the submissions made by the Privacy Commissioner and the Attorney General to the effect that the plain reading of s 18.3 of the *Federal Courts Act*, the special nature and purpose of the reference process and the existing jurisprudence of the Court all preclude a party to a reference from adding to or modifying the scope of the questions which a tribunal has chosen to refer to the Court.

[20] As mentioned, s 18.3(1) confers upon a tribunal special powers to refer to the Court for determination issues of law, jurisdiction or procedure that arise in proceedings before it. The discretion as to whether and how to use that power belongs exclusively to the tribunal. It has discretion to refer to the Court only some of the issues before it, and while a question must be

one to which a possible answer is susceptible of putting an end to the dispute, it need not be the ultimate issue of which it is seized (*Martin Service Station Ltd. v Minister of National Revenue* [1974] 1 FC 398 at para 16, affirmed at [1977] 2 SCR 996). Thus, the Court has held that the definition of the questions to be referred is within the tribunal's sole purview and that parties to a reference may not "tinker" with the question posed, nor attempt to "arrogate to themselves the discretion of the tribunal as to the facts and questions that are to be referred to the Court" (*Section 4 of the Patented Medicines (Notice of Compliance) Regulations (Re)*, 2002 FCJ 1000, Order of Aronovitch P. dated May 7, 2002, cited as Schedule A, (hereafter *"PM(NOC) Regulations Reference)"* and Order of Aronovitch, P. dated April 17, 2002 in the same case, Court file T-139-02).

[21] Google does not take issue with the correctness of this general proposition, but has sought to distinguish the decisions in the *PM(NOC) Regulations Reference* case or carve out an exception to the plain meaning of s 18.3 on the basis of the constitutional nature of the questions it wishes to raise and its service of a notice of constitutional question. It argues that s 57 of the *Federal Courts Act* entitles it to file a notice of constitutional question in response to the reference and to raise and argue the *Charter* issues it frames. It also argues, based on the comments made at p 59-1 of Professor Peter W. Hogg's work, *Constitutional Law of Canada* (5th ed., vol 2 (Toronto: Carswell)(loose leaf)), that it has an absolute right to bring up for determination the issues of the constitutional validity or applicability of the statute which is asserted in the reference:

> Judicial review of legislation can occur whenever a statute is potentially applicable to facts in proceedings before a court. If the party resisting the application of the statute argues that the statute is invalid, a constitutional issue is presented that must be resolved

> by the court. Judicial review of legislation can thus occur in any proceeding, for courts of all levels, and even before administrative tribunals.

[22] The Court does not agree with Google's submissions.

[23] S. 57 of the *Federal Courts Act*, on its plain wording, is not attributive of rights or of jurisdiction. It merely establishes a condition precedent before the Court can pronounce on the constitutional validity, applicability or operability of an Act of Parliament:

57 (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).	57 (1) Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour d'appel fédérale ou la Cour fédérale ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).

[24] The filing of a notice of constitutional question is not a panacea or substitute for a pleading, cannot be used as a device to raise an issue that is not otherwise properly pleaded or raised in a proceeding, and cannot be used to do indirectly what one cannot do directly. For example, it has been held that the service of a notice of constitutional question in an appeal does not entitle a party to the determination of its constitutional arguments where the issues were not properly raised before the Court or tribunal below (*Samodi v Canada (Min. of Citizenship and Immigration)* 2009 FCA 268, *Gitxsan Treaty Society v Hospital Employees' Union* (1999) 238 NR 73 (FCA)). S 57 of the *Federal Courts Act* is not the answer to Google's search for a mechanism by which these questions can legitimately be added to the reference if the constitutional validity, operability or applicability of PIPEDA is not directly put in issue by the reference questions themselves.

[25] Google's reliance on a snippet from Professor Hogg's well-respected work to posit the existence of an absolute right of litigants to demand and obtain the resolution of constitutional issues at any time and any stage of a judicial or administrative process, and without regard to procedural constraints, is equally ill-founded. Such a proposition cannot be reconciled with the jurisprudential recognition that the determination of the constitutional validity or operability of a statute can effectively be precluded by procedural issues, such as the absence of a notice of constitutional question (*Guindon v Canada* 2015 SCC 41), the failure to serve same in the underlying proceeding (*Somadi* and *Gitxsan*, above) or the insufficiency of the evidentiary record (*MacKay v Manitoba* [1989] 2 SCR 357).

[26] As further discussed below, the nature of the reference process and the procedural constraints inherent to it are such that they effectively preclude the forced introduction in a reference of issues of constitutional validity, applicability or operability by a party, or indeed, by the Court.

[27] The procedure set out in Rules 320 to 323 for the conduct of references does not contemplate any role or provide any right to the Court or the parties, other than the referring tribunal, in respect of the setting or approval of the questions being referred. Rule 321(c) provides that the questions being referred are to be set out in the Notice of Application for a reference:

(321) A notice of application in respect of a reference shall set out	(321) L'avis de demande concernant un renvoi contient les renseignements suivants :
(a) the name of the court to which the application is addressed;	a) le nom de la cour à laquelle la demande est adressée;
(b) the name of the applicant; and	b) le nom du demandeur;
(c) the question being referred.	c) la question qui est l'objet du renvoi.

[28] Rule 322 requires the referring tribunal to bring a motion for directions, but the list of matters on which the Court may give directions does not include the formulation, determination or approval of the reference questions:

(322) Where the Attorney General of Canada or a tribunal makes a	(322) Le procureur général du Canada ou l'office fédéral qui fait un

reference, the Attorney General or tribunal shall bring an ex parte motion for directions as to	renvoi demande à la Cour, par voie de requête ex parte, des directives sur :
(a) which persons shall be given notice of the reference;	a) l'identité des personnes qui doivent recevoir signification de l'avis de demande;
(b) the material that will constitute the case to be determined on the reference;	b) la composition du dossier sur lequel le renvoi sera jugé;
(c) the preparation, filing and service of copies of the material;	c) la préparation, le dépôt et la signification de copies du dossier;
(d) the preparation, filing and service of memoranda of fact and law;	d) la préparation, le dépôt et la signification des mémoires exposant les faits et le droit;
(e) the procedure for the hearing of the reference;	e) la procédure à suivre lors de l'audition du renvoi;
(f) the time and place for the hearing of the reference; and	f) les date, heure et lieu de l'audition;
(g) the role, if any, of the tribunal in question.	g) le rôle de l'office fédéral dans l'instance, s'il y a lieu.

[29] There are no mechanisms by which the Court or a party to a reference might intervene to approve, rephrase or expand the scope of the reference questions. Indeed, as Rule 321 requires the reference questions to be stated in the Notice of Application, any modification to these questions would require the filing of an Amended Notice of Application. As will be more fully discussed in the later part of these reasons, the case law has recognized the power of the Court to strike a Notice of Application for a reference on a preliminary motion, for example, where it

finds the question inappropriate or not susceptible of being answered. As was done in *PM(NOC)Regulations Reference*, an order striking the Notice of Application may provide for leave to amend the Notice of Application, which would allow the amendment of the reference questions and could be seen as a means by which a party might effect the modification of a reference question. However, even where the Court strikes a reference with leave to amend, the tribunal retains the ultimate discretion to choose not to amend and to allow the reference to remain struck. In other words, procedurally, a party to a reference is entitled, on a preliminary motion, to challenge the propriety of the reference question, which is precisely what the Reference Order contemplates. However, the sole remedy the Court can grant if the challenge is justified is to strike the reference, with or without leave to amend.

[30] The other procedural constraint that precludes the forced introduction of a constitutional challenge into an existing reference relates to constitution of an evidentiary record. As Google itself acknowledges, the availability of a sufficient evidentiary record is essential to the determination of the constitutional issues it wishes to raise.

[31] The Court does have, pursuant to Rule 322, a right of regard over the material that will constitute the case to be determined. However, as the Federal Court of Appeal has observed in *Immigration Act (Re)* (1991) 137 NR 64, [1977] FCJ No 1155 and *Re Public Service Staff Relations* Board [1973] FC 604, it is the tribunal that has the obligation to gather the facts and materials, to make the findings or to generate the admissions of fact upon which the issues must be determined. Furthermore, as determined in *PM(NOC)Regulations Reference*, at paragraph 34, the nature of the reference procedure requires that there be some assurance that the facts

underlying the reference have been tested and ascertained. This requires that the referring tribunal has made the required findings of fact (see also *Reference re Military Grievance External Review Committee Regarding Questions of Law* 2018 FC 566, at paragraphs 24 to 33). The Reference Order, as issued, allows the parties to seek leave to supplement the reference case, but limited to "additional background", which would preclude the introduction of true adjudicative facts.

[32] There is no evidence or consensus to the effect that the Privacy Commissioner has made the findings of fact required for the resolution of the constitutional issues raised by Google. As mentioned, Google's request to vary the Reference Order to permit the filing of evidence of adjudicative facts constitutes an acknowledgment of the likely insufficiency of the record as prepared by the Privacy Commissioner to support the determination of the constitutional issues. Since the constitutional issues cannot validly be added into the reference in the absence of a sufficient factual record, and since the parties cannot be permitted to make up for the absence of a record of finding made by the Privacy Commissioner by submitting their own facts, it follows that there are no procedural avenues by which the Court could give effect the Google's desire to add the constitutional issues. This supports the conclusion that the general principle, whereby parties to a reference are precluded from modifying the scope of a reference, is equally applicable to constitutional issues.

[33] The Court thus concludes that the scope of the questions framed by the Privacy Commissioner cannot be widened by the service of a notice of constitutional question or by the preliminary intervention of the Court.

[34] That said, the Court's decision should not be taken as a binding determination to the effect that the questions as framed are proper or that they can be determined without regard to the constitutional issues raised by Google. The Court agrees with the submissions of the Attorney General of Canada, that it remains open to Google to argue on the merits of the reference that the Court cannot or ought not to answer the reference questions as posed without also answering the constitutional issues framed in the notice of constitutional question. Should the Court agree that an answer to the reference questions requires the resolution of the constitutional issues, it could decline to answer the reference questions. To the extent the constitutional issues can be answered as a matter of law, or that the Court determines that the record before it is sufficient to provide an answer, it may be possible for the Court to answer both the constitutional questions and the reference questions.

[35] What Google cannot not do is to obtain the preliminary determination that the reference questions necessarily require the resolution of the constitutional issues, to widen reference to include them if they are not, or to interfere with the constitution of the factual record to ensure the sufficiency of adjudicative facts to resolve those issues.

[36] Having reached that conclusion, the Court need not consider whether the constitutional issues should be added or deemed to have been added in the reference, and will proceed directly to considering the issue of whether the reference should be struck.

B. Should the reference be struck?

[37] Google's motion seeks, as an alternative relief in the event the Court finds that the constitutional issues are excluded from reference, an order setting aside or striking the reference. As mentioned, the Court refrains from determining, as a matter of law, that the constitutional issues are excluded from the reference. That is a matter for the judge seized of the merits. However, given that it was the clear intention of the Privacy Commissioner that they should not form part of the reference, it will be assumed, for the purpose of the following discussion, that they are not included.

[38] It is accepted that the Court has the power to strike a reference on a preliminary motion where it is plain and obvious that it is irregular or "without merit", in the sense that it does not meet the conditions for a reference to be properly brought pursuant to Rule 18.3(1) (*Canada (Commissioner of Official Languages) (Re)* (1997) 144 FTR 161, *Information Commissioner of Canada v Canada (Attorney General)* 2014 FC 13, and *Alberta (Attorney General) v Westcoast Energy Inc* [1997] FCJ No. 77, 2018 NR 154 (FCA). Preliminary challenges that can be brought to a reference pursuant to these decisions include:

> That the issue is one for which the solution is not susceptible of putting an end to the dispute;
>
> That the issue does not arise in the course of a matter before the Tribunal;
>
> That the facts upon which the question is to be resolved have not been proven or admitted before the Tribunal.

[39] Justice D. Rennie, writing as Chairperson of the Competition Tribunal on a motion to strike a reference brought pursuant to s 124.2 (2) of the *Competition Act* RSC 1985 C-34 (which is similar to s 18.3(1)) also expressed the view that the Competition Tribunal could strike or stay

a reference that is, by its terms, presumptive of the answer, is filed for tactical or strategic reasons or is otherwise abusive of the power granted. These comments, however, can be considered *obiter* as he did not find such factors to have been established on the record before him (*Kobo Inc v The Commissioner of Competition* 2014 CACT 8). For the purpose of this discussion, the Court will assume that the factors considered in *Kobo Inc.* are equally applicable to a motion to strike a reference filed pursuant to s 18.3. However, as the Court also finds that these factors are not established on the record before it, it does not need to determine whether the reasons in *Kobo Inc.* apply to a reference before this Court.

[40] The grounds raised by Google on this motion do not easily fit into the categories identified above. Google has characterized the grounds it raises as follows: first, that deciding the reference without addressing the inextricably intertwined constitutional issues is legally untenable because it would fail to put an end to the substantive dispute as to whether using PIPEDA to effectively censor Internet search engines is constitutional, and result in litigation by instalment; and second, that the proposed reference amounts to an abuse of process, and unduly and unfairly truncates and undermines Google's substantive and procedural rights.

[41] The specific arguments made to support each of these two broad grounds tend to overlap and bleed into each other. As the Court does not find merit to any of the underlying arguments made by Google, it is perhaps easier to address each argument individually rather than consider them in the context of the two wider grounds of for which they are raised.

[42] Google submits that the Privacy Commissioner has already decided that the operation of Google's search engine is subject to PIPEDA pursuant to paragraph 4(1)(a) and that it does not qualify for the exemption in paragraph 4(2)(c), such that the reference is an attempt to rubberstamp a decision already made and is, in the absence of the constitutional issues that are truly in dispute, an academic exercise.

[43] There is no merit to this submission. While it is true that the Privacy Commissioner has come to a preliminary view as to the reference questions, the fact that he has referred them to the Court is an express acknowledgement that a reasonably arguable case can be made for a different conclusion. Having itself raised the jurisdictional issues, Google is hardly in a position to dispute that there is a reasonable possibility that the Court could give an answer to either question that is favourable to Google. Should that happen, the Privacy Commissioner would have no choice but to accept the Court's decision and to discontinue its investigation into the complaint. It is thus clear that the reference questions are not academic and that a potential solution to them could put an end to the matter before the Privacy Commissioner. The Court has further recognized, in *Information Commissioner v Canada (AG)*, above, the propriety of a reference made by an investigative body for the purpose of verifying the correctness of the conclusion it had reached, before taking the final step of issuing its report.

[44] Google also argues that the exclusion of the constitutional issues from the reference questions somehow curtails the rights it would otherwise have in a *de novo* hearing pursuant to s 14 of PIPEDA in the normal course of affairs.

[45] The Court cannot however see how the bringing of a reference affects any rights Google might otherwise have or have had. As much as Google might assert that the constitutional issues are “ingrained” in or “inextricable intertwined” with the reference questions, it is not at all plain that the resolution of the questions as phrased presupposes or determines the constitutional validity of the eventual or hypothetical application of PIPEDA to Internet search engines.

[46] If the reference results in a determination that PIPEDA does not apply the operation of the search engine as contemplated in the complaint, then the issue of its constitutional validity or applicability simply does not arise. Indeed, even if the constitutional questions were to be deemed included in the reference, the determination of whether PIPEDA applies to Google’s search engine according to its plain meaning would likely precede any determination of constitutionality, pursuant to the analytical process adopted in *State Farm Mutual Automobile Insurance Co v Privacy Commissioner of Canada* 2010 FC 736. As occurred in *State Farm,* a negative answer could even preclude the determination of the constitutional question, as it is well established that Court is not bound to answer a constitutional question when it may dispose of the case before it without doing so.

[47] If however the Court finds that PIPEDA, as drafted, applies to the impugned operation of Google’s search engine, then the Privacy Commissioner will proceed with the investigation of the complaint. Google would, in the context of that investigation, have exactly the same right as it otherwise would have had had the reference not been brought. In particular, any decision by the Privacy Commissioner to discontinue the investigation, or any finding or recommendation he might make, will be amenable to the same *de novo* review process as would otherwise have been

the case, including the right of Google to raise the constitutional issues and to constitute the required evidentiary record.

[48] Finally, and as mentioned earlier, Google retains the right to argue on the merits of the reference that the Court ought not to answer the reference questions without addressing the constitutional issues. If the Court agrees with that argument, it may decline to answer the questions, in which case Google will find itself in the same position and with the same rights as if the reference had not been brought.

[49] Google's final argument is to the effect that "bifurcating" the constitutional issue from the reference will result in litigation by installment and substantially delay the final adjudication of the important freedom of expression issues that are at stake. Apart from the fact that it rests on the incorrect assumption that the answer to the reference cannot put an end to the dispute and on speculation as to the outcome of an eventual investigation, Google's argument disregards the very nature and purpose of a reference. The reference process specifically contemplates that a tribunal can chose to refer only certain issues to the Court, and thus accepts the effective bifurcation of issues and the possibility of a certain amount of litigation "installments". The Court cannot strike a reference as inherently abusive or improper simply because a party disagrees with the choice a tribunal has made as to which of several issues it could have referred. As stated in *Canada Post Corp. (Re)* (1989) FCJ 239 (FCA), at para 9, the Court will not lightly intervene in a tribunal's choice as to what it finds necessary for its decision.

[50] The Court is therefore not satisfied that that the reference is improper, irregular or abusive, that the reference questions are incapable of being answered or not susceptible of putting an end to the proceeding, or that the reference was made in the absence of appropriate findings or admissions made before the Privacy Commissioner as to the facts upon which the questions are to be resolved. No basis has been established on the record before the Court upon which the reference should be struck.

[51] Google's submissions include a discussion of the conditions upon which the *ex parte* Reference Order can or should be varied or set aside. Given the Court's determination that the constitutional issues cannot be added to the reference, there is no basis to vary that part of the Reference Order limiting the kind of evidence which the parties may seek leave to introduce, and thus no need to consider whether the test to vary an *ex parte* order has been met. It may also be that Google felt it necessary to obtain, in addition to an order setting aside the reference, an order setting aside the Reference Order, because that was part of the Court's decision in *PM(NOC)Regulations Reference*. It may be helpful to reiterate that an order made under Rule 322 should play no role in defining or approving the reference questions, and that a motion to strike a reference should not require the variation or setting aside of such an order. The *PM(NOC)Regulations Reference* case was unique in that the Court found that the substance of the reference had indeed been established by the *ex parte* order. That is clearly not the case here, and Google's motion, insofar as it sought to strike the Reference on the basis of the impropriety of the reference questions, did not require the variation or setting aside of the Reference Order.

ORDER

THIS COURT ORDERS that:

1. Google LLC’s motion is dismissed.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1779-18
STYLE OF CAUSE:	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 THE PRIVACY COMMISSIONER OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 21, 2019
ORDER AND REASONS:	TABIB P.
DATED:	APRIL 16, 2019

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