Cour d'appel fédérale | Federal Court of Appeal

Date: 20230929

Docket: A-250-21

Citation: 2023 FCA 200

CORAM: **WEBB J.A.**
GLEASON J.A.
LASKIN J.A.

BETWEEN:

GOOGLE LLC

Appellant

and

THE PRIVACY COMMISSIONER OF CANADA, THE ATTORNEY GENERAL OF CANADA and THE COMPLAINANT

Respondents

and

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, CANADIAN BROADCASTING CORPORATION/SOCIÉTÉ RADIO-CANADA, CTV NEWS, A DIVISION OF BELL MEDIA, POSTMEDIA NETWORK INC., THE GLOBE AND MAIL INC., TORSTAR CORPORATION, ROGERS MEDIA INC. and LA PRESSE INC.

Interveners

Heard at Toronto, Ontario, on October 25 and 26, 2022.

Judgment delivered at Ottawa, Ontario, on September 29, 2023.

REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	GLEASON J.A.
DISSENTING REASONS BY:	WEBB J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Introduction

[1] Is the operation by Google LLC of its search engine, Google Search, excluded from the application of Part 1 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [PIPEDA], because it involves the collection, use, or disclosure of personal information for journalistic, artistic, or literary purposes and for no other purpose? On a reference by the Privacy Commissioner of Canada, the Federal Court (2021 FC 723, Gagné A.C.J.) answered that question "no".

[2] Google now appeals to this Court. It submits that in giving that answer, the reference judge erred in two main respects.

[3] First, Google submits, the reference judge should have struck out the notice of application for a reference, or declined to answer the question. It says that the question could not properly be answered, and should not have been answered, in a "Charter vacuum"—that is, without considering whether subjecting Google's search engine to Part 1 of PIPEDA would infringe the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*—and without considering whether the Commissioner has jurisdiction to determine Charter issues.

[4] Second, and in the alternative, Google submits that the reference judge too narrowly interpreted the exemption in paragraph 4(2)(c) of PIPEDA. That exemption applies when an

organization collects, uses or discloses personal information for journalistic, artistic or literary purposes and does not collect, use or disclose it for any other purpose. The reference judge erred in applying that exception, Google contends, in holding that only a publisher of news can act with a journalistic purpose, when the principles of statutory interpretation support a broad meaning of the term that includes dissemination of news. Therefore, if the reference question is to be answered, Google submits that this Court, giving the judgment the reference judge should have given, should set aside her answer and answer the question "yes".

[5] For the reasons set out below, I would not accept Google's submissions and would dismiss this appeal.

[6] In setting out those reasons, I will start with a review of the relevant elements of the statutory framework. I will then describe the background to the reference, including the operation of Google Search and the complaint that gave rise to the reference. Next, I will review the decision of the Federal Court and the errors that Google asserts it committed. Finally, I will address the asserted errors in turn.

II. Statutory framework

[7] Part 1 of PIPEDA, entitled "Protection of Personal Information in the Private Sector," is Canada's federal private sector privacy legislation. (Part 2 of PIPEDA, entitled "Electronic Documents", is not in issue here.)

[8] The purpose of Part 1, set out in section 3 of the Act as follows, is to establish rules that balance individuals' right of privacy in personal information with organizations' need to collect, use, or disclose that information:

3 The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.	**3** La présente partie a pour objet de fixer, dans une ère où la technologie facilite de plus en plus la circulation et l'échange de renseignements, des règles régissant la collecte, l'utilisation et la communication de renseignements personnels d'une manière qui tient compte du droit des individus à la vie privée à l'égard des renseignements personnels qui les concernent et du besoin des organisations de recueillir, d'utiliser ou de communiquer des renseignements personnels à des fins qu'une personne raisonnable estimerait acceptables dans les circonstances.

[9] Section 4 of PIPEDA governs the application of Part 1. Where Part 1 applies to an organization, the organization is subject to a series of principles in its collection, use, or disclosure of personal information. Among them is the principle set out in section 4.3 of Schedule I of the Act. It stipulates that "the knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate" / "Toute personne doit être informée de toute collecte, utilisation ou communication de renseignements personnels qui la concernent et y consentir, à moins qu'il ne soit pas approprié de le faire.".

[10] Section 4 reads in relevant part as follows (emphasis added):

4 (1) This Part applies to every organization in respect of personal information that	**4 (1)** La présente partie s'applique à toute organisation à l'égard des renseignements personnels :
(a) the organization collects, uses or discloses in the course of commercial activities; […]	**a)** soit qu'elle recueille, utilise ou communique dans le cadre d'activités commerciales; […]
(2) This Part does not apply to: […]	**(2)** la présente partie ne s'applique pas : […]
(c) any organization in respect of personal information that the organization collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose.	**c)** à une organisation à l'égard des renseignements personnels qu'elle recueille, utilise ou communique à des fins journalistiques, artistiques ou littéraires et à aucune autre fin.

[11] Certain definitions, set out in section 2 of the Act, bear on the scope of these provisions:

organization includes an association, a partnership, a person and a trade union.	**organisation** S'entend notamment des associations, sociétés de personnes, personnes et organisations syndicales.
personal information means information about an identifiable individual.	**renseignement personnel** Tout renseignement concernant un individu identifiable.

[12] However, the statute contains no definition of "journalistic purpose" / "fins journalistiques" or of "journalism" / "journalisme".

[13] The Privacy Commissioner of Canada, an officer of Parliament, is mandated to oversee compliance with PIPEDA. Section 11 of the Act authorizes an individual to file with the Commissioner a written complaint against an organization for contravening, among other things,

a provision of Division 1 of Part 1 of the Act, which deals with the protection of personal information. The Commissioner may also initiate a complaint if satisfied that there are reasonable grounds to investigate a matter.

[14] Subject to certain exceptions not applicable here, section 12 of the Act requires the Commissioner to investigate complaints. Section 12.1 of the Act gives the Commissioner or a delegate, in the conduct of an investigation, powers that include compelling oral or written evidence, compelling production of records, and entry of any premises other than a dwelling-house.

[15] However, the Commissioner has no authority to compel a resolution of a complaint or to grant a remedy to the complainant. Rather, PIPEDA vests remedial authority in the Federal Court. As set out in section 13, the most the Commissioner may do in response to a complaint is to issue a report containing findings and recommendations. By section 14, it is then open to the complainant—or to the Commissioner where the Commissioner initiated the complaint and certain other pre-conditions are met—to apply to the Federal Court for a hearing. By section 15, the Commissioner may also, with leave of the Court, appear as a party to any hearing applied for under section 14.

[16] A hearing under section 14 is “a proceeding de novo”. By section 17, it is to be heard in a summary way unless the Court considers that inappropriate. What is in issue in a section 14 hearing “is not the Commissioner’s report, but the conduct of the party against whom the complaint is filed.” “[T]he report of the Commissioner, if put in evidence, may be challenged or

contradicted like any other document adduced in evidence": *Englander v. TELUS Communications Inc.*, 2004 FCA 387 at paras. 47-48; *Canada (Privacy Commissioner) v. Facebook, Inc.*, 2023 FC 533 at para. 49.

[17] Section 16 of PIPEDA confers on the Federal Court broad remedial powers. They include authority to make compliance orders and award damages, including damages for any humiliation the complainant has suffered.

III. Background to the reference

A. *Operation of Google Search*

[18] Google describes its mission as "to organize the world's information and make it universally accessible". Google Search is the world's leading internet search engine; some estimates suggest that it is used to conduct 70 to 75 percent of all internet searches globally. According to Google, millions of searches using Google Search are carried out each day.

[19] In her reasons, the reference judge helpfully summarized as follows the operation of Google Search:

> [14] Google Search operates through three basic functions: crawling, indexing, and displaying search results. Crawling is an automated process that involves the use of software called a "crawler" that continuously accesses publicly available webpages and transmits information from those webpages to be indexed or referenced. As pages are updated over time, Google's crawlers access the updated version of the pages. Information identified by the crawler is then added to an index where Google organizes the information. This index displays an entry for each word on each webpage indexed. The index is updated if a new webpage appears or an existing webpage is altered or removed.

> [15] When an individual enters a search query, Google Search uses algorithms to display search results linking to the relevant web pages in the index, ranked from most to least relevant. Google Search displays the title of the webpages, links to the webpages, and automatically generated short textual "snippets" from the webpages. The information displayed is content from the webpage itself and is subject to the instructions of website operators.
>
> [16] Google displays responses to a user search query in the order that Google considers of likely interest to the user as determined by algorithms maintained by Google, which analyze many different factors, including how recent the content is and the number of times it has been linked to by prominent websites.

[20] The reference judge went on to summarize the role of website operators in the process and the way in which Google derives revenue from Google Search:

> [17] Website operators have control over whether their content is displayed by Google Search. Website operators may configure their servers to refuse to respond to requests for access from one of Google's crawlers, preventing the contents of that URL from being indexed and displayed by Google Search. Operators can also provide more detailed instructions to Google on whether and how to capture particular content through files titled "robots.txt".
>
> [18] For news articles, like the content at issue here, news organizations control what stories appear in Google Search as part of their overall journalistic mission: first, by deciding what to publish on their website; then, by deciding whether to remove or change any information on their website; and finally, they can use robots.txt files to direct Google on which stories from their websites to include in Google Search. The evidence before the Court is that all of the news organizations at issue in the complaint allowed Google to include their web pages in Google Search.
>
> [19] Google generates revenue when users click on advertisements displayed in a search result. Although ads are not displayed in response to all queries, whether ads appear will depend on keywords selected by advertisers and not on categories of search that Google chose to exempt from advertisement. An advertiser creates the text of the advertisement and selects keywords in respect of which it wants its advertisement to be displayed. That advertisement will then be displayed in response to a query for those keywords. On a search result where advertisements are displayed, they are given the "Ad" label and appear before the search results.

B. *The complaint*

[21] In June 2017, the complainant, whose identity is protected by a confidentiality order, lodged with the Commissioner a complaint against Google. In the complaint, the complainant alleged that internet searches of his name using Google Search were yielding links to news articles about him containing outdated, inaccurate, and sensitive information, and that Google's disclosure of this information was directly exposing him to harms. These included physical assault, employment discrimination, and severe social stigma, as well as persistent fear. The complainant sought the Commissioner's assistance in having links to his sensitive personal information de-listed from Google's search results.

[22] Acting at the Commissioner's suggestion, the complainant approached Google and asked that it remove the links that were of concern to him. Google was not prepared to do so. It advised the complainant to resolve any disputes directly with the website owner, and provided instructions on how to request a change.

[23] The Commissioner advised Google of the complaint and asked for a written response. In its response, Google argued that the Commissioner had no jurisdiction because PIPEDA did not apply. Google's position was that it is not engaged in commercial activity when it presents search results, so that paragraph 4(1)(a) does not bring it within PIPEDA. In the alternative, Google maintained that it serves a journalistic purpose when it provides search results leading to journalistic content, and thus is excluded from PIPEDA by operation of paragraph 4(2)(c). It further argued that any interpretation of PIPEDA that would prohibit Google from providing search results leading to journalistic content would contravene the Charter.

C. *The reference*

[24] Before the complaint was filed, the Commissioner had begun to consider, and had initiated a public consultation on, the issue of online reputation, including whether, and if so, how, a "right to be forgotten" could apply in Canada. The "right to be forgotten" is a concept that has been the subject of discussion by academics, lawmakers, and legal professionals in Canada and around the world. At its essence, it is about whether individuals have a right to have publicly available private information about them removed from the internet. Its proponents often emphasize the privacy and autonomy interests that they say underlie and justify the right. However, the question whether there is a right to be forgotten is not before this Court in this appeal; the reference questions are far more limited.

[25] While the complaint was pending, the Commissioner published a draft position paper on online reputation. It expressed the view that PIPEDA applies to online search engines like Google Search, and in certain circumstances could require removal of links to content containing personal information. The Commissioner invited and received public comments on the paper, which remains in draft form.

[26] Subsection 18.3(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. authorizes a federal board, commission, or other tribunal to refer questions to the Federal Court:

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.	**18.3 (1)** Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

[27] By rule 321(c) of the *Federal Courts Rules*, S.O.R./98-106, the notice of application commencing the reference is to set out the question (or questions) being referred.

[28] After considering Google's position in response to the complaint and the public comments on the draft position paper, the Commissioner decided to refer two of the jurisdictional issues raised by Google to the Federal Court:

> (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 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?

[29] The Commissioner chose not to refer a third issue that Google had raised—whether any interpretation of PIPEDA that would prohibit Google from providing search results leading to journalistic content would contravene the freedom of expression guaranteed by section 2(b) of the Charter.

D. *Google's attempts to expand the reference*

[30] Google brought a motion for an order specifying that the reference would include the Charter issue, which it characterized as "inextricably intertwined" with the questions as framed,

and granting it leave to file a record on the issue. In the alternative, it sought an order striking out the application for a reference.

[31] Prothonotary (her then title) Tabib dismissed the motion (*Reference Re Subsection 18.3(1) of the Federal Courts Act*, 2019 FC 261). She held it to be clear that the federal board, commission or other tribunal making a reference has the sole prerogative to determine its scope, and that neither the Court nor a party to a reference is entitled to add to or modify the questions referred, whether or not the addition or modification relates to constitutional issues. However, she stated, it remained open to Google to argue on the merits of the reference that the Court could not or should not answer the reference questions as framed without considering the constitutional issues, and that if the Court agreed it could decline to answer the questions. She also concluded that on the record before her, there was no basis on which the application for a reference should be struck out.

[32] Google appealed the prothonotary's order by way of motion to the Federal Court. The motion was heard by Gagné A.C.J. (who later became the reference judge). She dismissed the motion (*Reference Re Subsection 18.3(1) of the Federal Courts Act*, 2019 FC 957).

[33] In doing so, she agreed with the prothonotary that the discretion as to how reference questions are framed belongs exclusively to the federal board, commission, or other tribunal making the reference, and that entitlement is unaffected by whether or not the issue a party seeks to raise is a constitutional issue. The prothonotary was also right, she concluded, to refuse to

accept Google's argument that the issue of constitutionality was "inextricably intertwined" with the reference questions.

[34] The motion judge proceeded to reject Google's submission that determining the constitutionality of PIPEDA must be the first step in determining the jurisdiction it confers. This submission, she stated, would require a court to assess the constitutionality of a statute before it knows whether the statute applies and, if it does, how it applies and what impact it has on a Charter-protected right. She went on to state that Google would have another opportunity to argue, at the merits stage, that the reference questions are improper and should not be answered. Finally, the motion judge held to be without merit Google's alternative argument that the application for a reference should be struck out because the reference questions could not be answered.

IV. The decision on the reference

[35] Before embarking on her analysis of the two questions referred by the Commissioner (reproduced above at paragraph 28), the reference judge noted that Google had proposed a third question, which she set out as follows:

> Should this Court simply decline to answer the Reference questions or dismiss the Reference because the questions cannot/should not be answered without addressing the constitutional issues and/or because there is an inadequate evidentiary record before this Court?

[36] This question, she stated, contained a contradiction. Courts should refrain from addressing constitutional questions in the absence of an adequate evidentiary record and, as she

had concluded in dismissing the appeal from the prothonotary's order, these questions were better left for the Commissioner, who with the benefit of a complete evidentiary record would be in a position to assess whether PIPEDA can, without violating Charter values, apply as the complainant seeks to have it apply. Therefore, she stated, she would answer only the two questions the Commissioner had referred.

A. *Answer to question 1*

[37] The reference judge began her answer to the first question by characterizing the issues before her as issues of statutory interpretation calling, as the Supreme Court stated in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 10, for "the words of an Act […] to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." The first question, she stated, raised two sub-questions: (1) whether in the operation of its search engine, Google discloses, collects or uses personal information, and (2) whether it does so in the course of commercial activities.

[38] On the first sub-question, the reference judge determined that Google engages in collection when its crawlers access and copy the content on publicly accessible webpages, that it uses and discloses personal information of the subjects of a search, and that (as Google acknowledged) it also collects, uses, and discloses personal information of the individuals performing a search.

[39] On the second sub-question, she rejected Google's contention, based on the traditional meaning of the term, that its search engine is not engaged in commercial activities. She described Google's approach to this sub-question, which focused in large part on the fact that a search is free to the user, as "microscopic", and as failing to recognize that personal information has itself become a commodity, which can be mined and used for profit. She referred to, among other things, the fact that Google is a for-profit corporation, and its acknowledgments that the bulk of its revenue comes from advertising, and that its search and other online services generate most of its advertising revenue. She found that "every component of [Google's] business model is a commercial activity as contemplated by PIPEDA." Accordingly, she answered the first reference question in the affirmative.

[40] On appeal, Google does not challenge that conclusion, though it maintains, as discussed below, that the reference judge erred in answering the questions in the first place.

B. *Answer to question 2*

[41] In answering this question, the reference judge did not accept Google's submission, supported by the intervener Canadian Broadcasting Corporation / Société Radio-Canada (CBC), that she should consider only the articles published by recognized news media that prompted the complaint. She pointed out that even if the Court's analysis was limited to searches on an individual's name, a search of that kind could return not only news articles but a variety of other types of content, including personal blogs and websites, social media sites, and websites of businesses, governments, and non-governmental organizations. The resulting display of personal information, she stated, could go well beyond media content; it was "wide and varied".

[42] The reference judge went on to address the contention that Google Search facilitates access to information, such as news media, and should therefore be regarded as publishing that information, an element of journalism. In declining to accept that proposition, the reference judge drew by analogy on *Crookes v. Newton*, 2011 SCC 47 at paras. 27-30, in which the Supreme Court held in the defamation context that hyperlinks do not amount to publication of the linked information. Like hyperlinks, she reasoned, internet searches give the search engine no control over content, express no opinion, and involve no content creation. An "ordinary understanding of the word journalism," she stated, "encompasses content creation and content control […]".

[43] The reference judge found support for this proposition in the three-part definition of journalism developed by the Ethics Advisory Committee of the Canadian Association of Journalists (CAJ), proposed by the Commissioner and accepted by the Federal Court in *AT v. Globe24h.com*, 2017 FC 114 at para. 68. According to that definition, as set out by the Court in *Globe24h.com*,

> an activity should qualify as journalism only where its purpose is to (1) inform the community on issues the community values, (2) it involves an element of original production, and (3) it involves a "self-conscious discipline calculated to provide an accurate and fair description of facts, opinion and debate at play within a situation".

[44] The reference judge concluded that the operation of the Google search engine did not meet the *Globe24h.com* test, even if only the search results for the complainant's name were considered:

> [F]irst, Google makes information universally accessible, which is much broader than informing a community about issues the community values; second, Google does not create or produce anything—it only displays search results; and third, there is no effort on the part of Google to determine the fairness or the accuracy of the search results. The publishers would be accountable for the accuracy of the content of a search result, not Google.

[45] Continuing with her analysis of the second question, the reference judge turned to the "and for no other purpose" element of paragraph 4(2)(c). She agreed with the proposition put forward by Google that this phrase does not exclude commercial organizations because, in order for a paragraph 4(2)(c) issue to arise, the organization must be engaged in commercial activities within the meaning of subsection 4(1).

[46] However, she stated, citing the statutory interpretation principle that the legislature does not speak in vain and the presumption against tautology, this did not mean that the phrase has no meaning. The exemption under paragraph 4(2)(c) applies only where information is collected, used or disclosed exclusively for journalistic purposes, and she saw it as clear that the purposes of Google Search extend beyond journalism. She characterized its primary purpose as to index and present search results. This, she stated, was not primarily a journalistic purpose, because the only defining feature of journalism it entailed was to facilitate access to information.

[47] The reference judge also rejected the CBC's submission that PIPEDA should be interpreted and applied in a manner that protects the freedom of expression guaranteed by the Charter. Referring to the Supreme Court's decision in *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 at para. 25, she stated that it was not necessary to resort to Charter values in interpreting a statute absent a genuine ambiguity in its

interpretation. She saw no ambiguity in the case before her: Parliament had limited PIPEDA to protecting journalism specifically and not expression more generally; it had protected the collection, disclosure, and use of personal information only for exclusively journalistic purposes; and the ordinary understanding of journalism, as proffered by journalists themselves, did not extend to Google's search engine.

[48] She expressed her overall conclusion on the paragraph 4(2)(c) exemption issue as follows: "Google's purposes for collecting, using and disclosing personal information […] are not journalistic, and they are certainly not exclusively so." Accordingly, she answered "no" to the second reference question.

[49] In concluding her reasons, the reference judge noted that her answers to the two reference questions "[did] not determine the outcome of the complainant's complaint, the power of the Commissioner to recommend deindexing, the constitutionality of PIPEDA, or any other non-reference question that is better left to the Commissioner's proceedings."

V. Standard of review

[50] Google submits that the standard of review on appeal is correctness on all issues, because the reference questions are questions of law. The Commissioner agrees that the correctness standard applies. The Attorney General disagrees. His position is that, because the reference questions at issue in this appeal are questions of jurisdiction, they necessarily involve questions of fact and mixed fact and law. Consequently, he submits, the Federal Court's decision is subject to review on the palpable and overriding error standard.

[51] I cannot agree with the Attorney General. Reference questions posed under subsection 18.3(1) of the *Federal Courts Act* may require a supporting factual foundation (usually put forward by the tribunal seeking the determination of the reference questions itself): *Reference Re Military Grievances External Review Committee Regarding Questions of Law*, 2018 FC 566 at paras. 19, 27. But in this case, as the reference judge stated at paragraph 6 of her reasons, the reference was "factually linked" to the complainant's June 2017 complaint to the Privacy Commissioner. There is no real dispute between the parties as to the other facts underlying the reference, which relate to Google Search. The substantive questions at issue are at bottom questions of statutory interpretation. There is therefore nothing that would justify a departure from correctness as the applicable standard of review: see, for example, *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at para. 33; *Price v. Canada*, 2012 FCA 332 at para. 14.

VI. Issues on appeal

A. *Did the reference judge err in relation to the Charter issues?*

[52] Google makes three arguments in relation to the reference judge's treatment of the Charter issues. First, Google submits that she failed to consider its argument that the reference questions should not be answered, and the reference should be dismissed, unless the Court decided the Charter issues. Second, it submits that the reference judge incorrectly assumed that the Commissioner has jurisdiction to consider the Charter. Third, it submits that she erred in law by proceeding to answer the reference questions without considering the Charter. I will address these arguments in turn.

(1) Did the reference judge err by failing to consider Google's argument that the reference questions should not be answered absent consideration of the Charter?

[53] This question arises from the statements in the reasons of the prothonotary in dismissing Google's motion to expand the reference, and the statements by the motion judge in her reasons for decision on appeal from the prothonotary's decision, that Google would be able to argue at the return of the reference application that the reference questions should not be answered. Google says that despite these assurances, the reference judge failed to consider Google's position.

[54] I see no merit in this submission. As Google acknowledges in paragraph 31 of its memorandum, it argued this very point before the reference judge. She expressly dealt with the point, albeit briefly, in her reasons, and rejected Google's position, as summarized at paragraphs 35-36 above. She was not obliged to do more. Nothing in the statements by the prothonotary or the statements on appeal from her decision suggested that the judge deciding the reference would necessarily accept a submission by Google that the reference questions should not be answered absent consideration of the Charter.

(2) Did the reference judge err by assuming that the Commissioner has jurisdiction to consider the Charter?

[55] This question arises from the statement by the reference judge at paragraph 23 of her reasons, made in refusing Google's request that she decline to answer the questions put by the Commissioner unless she addressed the constitutional issues. The constitutional issues, the reference judge stated, were best "left for the Commissioner who will benefit from a complete

evidentiary record and will be in a better position to assess whether PIPEDA can be applied in the way the Complainant wishes it to apply, without violating Charter values." There is similar language in paragraph 97 of her reasons (the concluding paragraph), in which she observed that her answers to the two reference questions "[did] not determine the outcome of the Complainant's complaint, the power of the Commissioner to recommend deindexing, the constitutionality of PIPEDA, or any other non-reference question that is better left to the Commissioner's proceedings."

[56] I see no error in these statements. In attacking them, Google relies heavily on the principle, set out by the Supreme Court in *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at paras. 34-36, that an administrative tribunal may decide constitutional issues only if it has express or implied authority to determine questions of law. But there is no need to consider that principle here. It is common ground that under the scheme of PIPEDA, discussed above at paragraphs 14-15, the Commissioner's role in relation to questions of law is advisory and recommendatory only, and that determinations of legal questions are left to the Federal Court in proceedings under section 14.

[57] As both the Attorney General and the Commissioner submit, this does not mean that the Commissioner is barred from considering the Charter in carrying out the functions vested in him—functions that do not entail deciding questions of law. These include investigating and reporting on complaints, formulating his advice and recommendations, and preparing the submissions he is authorized to make in a hearing under section 14 before the Federal Court.

[58] Indeed, in carrying out their administrative function, "administrative decision-makers must act consistently with the values underlying the grant of discretion, including Charter values": *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 24. Particularly in light of the *Doré* principle, the reference judge cannot be faulted for recognizing that her answers to the reference leave open questions that call for the Commissioner not to authoritatively decide, but to consider, the Charter or Charter values.

(3) Did the reference judge err in law by proceeding to answer the reference questions without considering the Charter?

[59] Google submits that by determining the reference questions in favour of the Commissioner without considering the Charter, the reference judge erred by, in effect, granting the Commissioner the power to interfere with Charter-protected expressive activities without determining whether the grant of this power is constitutional. This, it submits, results in the ongoing infringement of the Charter in the absence of a finding that the infringement is justified.

[60] In my view, this submission misconceives both the purpose and the effect of the reference.

[61] As the Attorney General points out, determining whether legislation establishing an administrative scheme is constitutional in its application to a particular activity is ordinarily a two-step process; see, for example, *Deacon v. Canada (Attorney General)*, 2006 FCA 265 at paras. 1, 26. The first step entails determining whether the legislation applies to the activity in question—in other words, whether the administrative agency has jurisdiction under its constating

statute. If the legislation applies, it is necessary to proceed to the second step, which consists of assessing whether in that application the legislation contravenes the Charter. If the legislation does not apply, so that the administrative agency has no jurisdiction, there is no need to move to the second step because the constitutional issue does not arise.

[62] The Supreme Court's decision in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 at para. 17, provides a further illustration, in a case also involving privacy legislation (that of Alberta). There the Supreme Court first considered whether the collection, use, and disclosure of personal information that was in issue was subject to the legislation, or whether any exemptions applied. It then, having accepted the adjudicator's finding that no exemptions applied, went on to conclude that a breach of freedom of expression was made out.

[63] By contrast, in *State Farm Mutual Automobile Insurance Co. v. Privacy Commissioner of Canada*, 2010 FC 736 at paras. 13, 17, 106-107, 119, the Federal Court, having concluded at the first step that on a proper construction the activity in question was not commercial activity subject to PIPEDA, and was therefore not subject to the statute and beyond the jurisdiction of the Commissioner, declined to proceed to the second step and to consider the constitutionality of the legislation.

[64] In this case, the reference questions were intended and crafted to involve only the first step. That was a choice the Commissioner was entitled to make in the exercise of the discretion conferred by subsection 18.3(1) of the *Federal Courts Act* "to refer any question or issue of law,

or jurisdiction or of practice and procedure to the Federal Court for hearing and determination” / “renvoyer devant la Cour fédéral pour audition et jugement toute question de droit, de competence ou de pratique et procedure”.

[65] If the reference judge had determined at the first step that the legislation does not apply to Google Search, it would not be necessary to proceed to the second step. But given the conclusion of the reference judge at the first step that PIPEDA does apply, the second question, that of constitutionality, remains open. Through what process it may ultimately be decided is not yet clear, though a *de novo* hearing under section 14 of PIPEDA, after the Commissioner has concluded his investigation and issued his report, is one obvious possibility. But it is apparent at a minimum that, as the reference judge observed, her conclusion at the first step does not decide the constitutional question.

(4) Conclusion on asserted errors in relation to the Charter issues

[66] I conclude that the reference judge made none of the errors asserted by Google in relation to the Charter issues.

B. *Did the reference judge err in interpreting and applying the “journalistic purpose” exemption?*

[67] Google submits that to the extent that the reference judge did not err in answering the reference questions in the absence of the Charter issues, she erred in her analysis of the second reference question, and in concluding that the “journalistic purpose” exemption in paragraph 4(2)(c) does not apply.

[68] There are three components to this argument. First, Google submits, the principles of statutory interpretation support a broad definition of "journalistic purpose," one that includes disseminating the news. Second, it submits, the reference judge erred by accepting and applying the definition of "journalism" adopted in *Globe24h* (reproduced above at paragraph 43). And third, it submits, she erred by failing to consider that paragraph 4(2)(c) applies to specific information, rather than an organization as a whole. I will address the three components in sequence.

(1) Did the reference judge err by failing to recognize that the principles of statutory interpretation support a broad definition of "journalistic purpose" that includes disseminating the news?

[69] There is no dispute as to the applicable principles of statutory interpretation. They call for a textual, contextual, and purposive analysis: *Canada Trustco* (cited by the reference judge, as noted above, at paragraph 38 of her reasons) and *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 (cited by both Google in its memorandum and by the Attorney General in his), among many other cases.

[70] Google submits that the application of these principles requires the conclusion that "journalistic purpose" includes the distribution of journalistic content—that it includes what Google describes as "the entire journalistic process," from gathering information through to publication and dissemination. It states that PIPEDA is not designed solely to protect privacy. Rather, its object is to strike a balance between privacy and other legitimate interests, including freedom of expression. It argues, referring to the legislative history of PIPEDA, that Parliament

intended that paragraph 4(2)(c) be "a broad exemption that excludes Charter-protected speech from PIPEDA and protects freedom of the press."

[71] Google further submits that while the words "journalistic, artistic or literary purposes" are not defined, certain commonly used definitions of "journalism" and "journalist" include the distribution of journalistic works. It refers in particular to the definitions in *Encyclopedia Britannica* ("Journalism", *Encyclopedia Britannica, Inc*., online: published January 27, 2021) and the *Canada Evidence Act*, R.S.C. 1985, s. 39.1. The former defines "journalism" as "the collection, preparation, and distribution of news and related commentary and feature materials […]". The latter defines "journalist" as "a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media […]." Google also relies on the recognition by the Supreme Court of Canada that freedom of the press encompasses "the right to transmit news and other information": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480 at para. 24.

[72] Google notes that there is almost always an intermediary between the publisher and the reader of news. Among the examples of intermediaries it cites, in addition to search engines, are convenience stores and librarians. It submits that to exclude intermediaries in interpreting paragraph 4(2)(c) would render the exemption for "journalism" ineffective.

[73] The final contextual factor that Google invokes is the scheme of PIPEDA and, in particular the relationship between the inclusion in paragraph 4(1)(a) and the exclusion in

paragraph 4(2)(c). Its argument is that paragraph 4(2)(c) applies only to information that has already been captured under paragraph 4(1)(a) because it is collected, used, or disclosed in the course of commercial activities. It follows, Google submits, that the fact that information is used for a commercial purpose cannot preclude the exemption in paragraph 4(2)(c) from applying, and the exemption must apply to information used for both a commercial and a journalistic purpose.

[74] I am not persuaded by Google's submissions based on the principles of statutory interpretation. I see them as problematic in a number of respects.

[75] First, to the extent that Google relies, as it appears to do, on the values associated with Charter-protected freedom of expression and freedom of the press, its submissions run afoul of the rule that absent "genuine ambiguity", Charter values "have no role to play as an interpretive tool": *Wilson v. British Columbia (Superintendent of Motor Vehicles)* at para. 25. As the Supreme Court stated in *R. v. Rodgers*, 2006 SCC 15 at para. 19 (citations omitted),

> If this limit were not imposed on the use of the *Charter* as an interpretive tool, the application of *Charter* principles as an overarching rule of statutory interpretation could well frustrate the legislator's intent in the enactment of the provision. Moreover, it would deprive the *Charter* of its more powerful purpose—the determination of the constitutional validity of the legislation.

[76] A "genuine ambiguity" arises only where, after applying the "modern approach" to statutory interpretation—the textual, contextual, and purposive analysis referred to above—there are "two or more plausible readings, each equally in accordance with the intentions of the statute": *R. v. Jarvis*, 2019 SCC 10 at para. 105; *Bell ExpressVu Limited Partnership v. Rex*,

2002 SCC 42 at paras. 29, 62. I agree with the Attorney General and the Commissioner that no "genuine ambiguity" in this sense has been shown.

[77] Second, while Google acknowledges that PIPEDA aims to strike a balance between privacy and other legitimate interests, and cites statements from the legislative history describing both freedom of expression and individuals' privacy rights as "sacred", it ascribes to Parliament the intention that paragraph 4(2)(c) be "a broad exemption that excludes Charter-protected speech from PIPEDA […]" (Google's memorandum at paragraph 64). These propositions cannot stand together: there is no room for balancing if PIPEDA exempts all Charter-protected speech. It is the express statement of purpose in section 3 of PIPEDA that constitutes the most significant, reliable and authoritative indicator of legislative purpose: *R. v. Sharma*, 2022 SCC 39 at para. 88; *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 at para. 130. That purpose statement, set out above in paragraph 8, calls for balancing.

[78] Third, Google appears to attach no or minimal significance to the word "purpose" in the expression "journalistic purpose", and gives the word no meaning in interpreting the paragraph 4(2)(c) exemption. Rather, Google's focus is on the fact of dissemination of news, not its purpose. I will elaborate below on the importance of the word "purpose" in interpreting the paragraph 4(2)(c) exemption.

[79] Fourth, I see no merit to Google's submission based on the relationship between paragraph 4(1)(a) and paragraph 4(2)(c). As the reference judge recognized at paragraph 87 of her reasons, and the Attorney General observes in his submissions to this Court, to accept

Google's submission would in effect read the phrase "and for no other purpose" out of the statute. That would offend the principle that Parliament does not speak in vain, and that it would not have legislated an exemption whose terms could never be met: *Canada v. Loblaw Financial Holdings Inc*., 2021 SCC 51 at para. 64. I note again in this regard that the focus of paragraph 4(2)(c) is different from that of paragraph 4(1)(a): the inclusionary provision looks to the collection, use, or disclosure of personal information in the context of the organization's activities, while the exemption provision looks to the collection, use, or disclosure of personal information through the lens of the specific purpose motivating that conduct.

[80] I would not give effect to Google's submissions based on the principles of statutory interpretation.

(2) Did the reference judge err by accepting the definition of "journalism" adopted in *Globe24h*?

[81] Google submits that the reference judge erred by adopting what it characterizes as the "restrictive" definition of "journalism" accepted by the Federal Court in *Globe24h*. It points out that *Globe24h* involved what was in essence an extortion scheme, in which a website published court decisions containing sensitive personal information, which the website owner then demanded payment to remove; it did not consider the position of intermediaries distributing news. However, Google does not appear to propose an alternative test, other than to apply the principles of statutory interpretation.

[82] The Attorney General, for his part, submits that the *Globe24h* test is the appropriate test for the purposes of paragraph 4(2)(c). He says that the test has been accepted by data protection authorities across Canada, largely mirrors the definition used by journalists' associations in Canada and elsewhere, and is consistent with Canadian jurisprudence, the language of other federal statutes, and foreign judicial decisions. For example, provincial adjudicators have applied the *Globe24h* test in interpreting the similarly worded "journalistic purpose" exemptions in the *Personal Information Protection Act*s of Alberta and British Columbia: *Luminos Consulting & Production Inc. (Re)*, 2021 CanLII 88596 (AB OIPC) at para. 23, interpreting the *Personal Information Protection Act*, S.A. 2003, c. P-6.5, paragraph 4(3)(c); *Surrey Creep Catcher (Re)*, 2020 BCIPC 33 at para. 19, interpreting the *Personal Information Protection Act*, S.B.C. 2003, c. 63, paragraph 3(2)(b). I note, however, that the provincial cases do not appear to offer a rationale for adopting this test other than its adoption by the Federal Court here.

[83] The Commissioner describes the *Globe24h* test as providing "an aid for identifying what journalism encompasses" (Commissioner's memorandum at paragraph 79). Like the reference judge, he considers it relevant that the test was proposed by the CAJ, and that the CBC (as an intervener before the Federal Court) agreed in its submissions on the reference that the test is adequate. The complainant rejects Google's position that the *Globe24h* test should not apply to it because it is an intermediary, and submits that in substance Google's actions cannot be distinguished from those of *Globe24h*.

[84] As for the interveners, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) describes the *Globe24h* test as a "useful starting point" for the analysis

of what constitutes a journalistic purpose. It submits that the extent to which an organization's conduct accords with journalistic ethics is a "strong indicator" of an exclusively journalistic purpose (CIPPIC's memorandum at paragraphs 27, 33).

[85] The other intervener, the Media Coalition, proposes a two-part test. It submits that work product of "recognized news media" should always be regarded as journalism, without further analysis. It adds that where the material is not the product of recognized news media, it is necessary to analyze whether it should be regarded as journalism, and the CAJ definition is "an adequate definition within which to begin the analysis" (Media Coalition's memorandum at paragraphs 30-35, 47).

[86] Perhaps surprisingly, none of the participants in the appeal brought to the Court's attention that the definition of journalism adopted by the CAJ, proposed by the Commissioner in *Globe24h*, and accepted by the Federal Court in that case, has been superseded by a definition updated in October 2021 and approved by the CAJ Board in December 2021; see Ethics Advisory Committee of the CAJ, "What is Journalism?" (December 2021), online: CAJ <https://caj.ca/wp-content/uploads/caj_whatisjournalism_dec_2021.pdf>. While this definition is broadly similar to the definition adopted in *Globe24h*, there are differences in formulation and in emphasis. It describes journalism as an activity that includes three criteria, all of which must be met—(1) the pursuit of truth for its audiences, (2) an act of creation and dissemination, and (3) a particular set of methods.

[87] I see the *Globe24h* definition of journalism (and the updated definition, which I will not discuss further), as largely aspirational rather than descriptive in nature. By this I mean that the definition sets standards to which those creating journalistic content should, in the view of the CAJ, aspire, even if much of what is commonly understood to be journalistic content might sometimes fall short of those standards. Thus, while the definition may be of some help in considering what constitutes a "journalistic purpose", I am not persuaded that it is conclusive.

[88] In any event, it is in my view ultimately not necessary, in order to answer the second reference question, to decide whether the reference judge erred in adopting the *Globe24h* test. Whatever test is adopted, Google Search does not collect, use, or disclose personal information for a journalistic purpose and, even if it does, it does not do so solely for that purpose.

[89] The ordinary meaning of "purpose" is "the reason for which something is done or made, or for which it exists", or "[a]n objective, goal, or end": Katherine Barber, *Concise Canadian Oxford Dictionary* (Oxford, UK, Oxford University Press, 2005) sub verbo "purpose"; *Black's Law Dictionary*, 11th ed., sub verbo "purpose". The ordinary meaning of "fin" (the French counterpart to "purpose" in section 4 of PIPEDA) is "[c]hose qu'on veut réaliser, à laquelle on tend volontairement. ➞ but, objectif"; "[c]e qui est la fois terme et but; ce pour quoi [quelque chose] se fait ou existe": *Le nouveau petit Robert*, 1993, sub verbo "fin". This is a case in which "the words of a provision are precise and unequivocal, [so that] the ordinary meaning of the words play [sic] a dominant role in the interpretive process": *Canada Trustco* at para. 10. A purpose therefore entails an intention, a desired end.

[90] As the reference judge explained in her summary of Google Search's operation, quoted above at paragraph 19, Google displays responses to a user search query ranked in the order that Google considers of most relevance to the user, as determined by algorithms maintained by Google. That is the purpose of Google Search. In carrying out that purpose, Google is agnostic as to the nature of that content: nothing turns on whether or not it is journalistic, let alone on whether it meets certain aspirational standards of journalism. Even if the search happens to return snippets that contain links to journalistic content, that cannot be said to be its purpose when Google is indifferent to whether or not it does so. At a minimum, that cannot be said to be its sole purpose.

[91] It follows, in my view, that the reference judge was correct in concluding that the exemption in paragraph 4(2)(c) of PIPEDA does not apply.

(3) Did the reference judge err by failing to consider that paragraph 4(2)(c) applies to specific information?

[92] Google submits that the reference judge erred by failing to consider the nature of the personal information before her. It says that PIPEDA and its exemptions apply on a case-by-case basis depending on the specific personal information at issue and how it is used. It points out that the text of both paragraph 4(1)(a) and paragraph 4(2)(c) (reproduced above at paragraph 10) includes the phrase "in respect of personal information", and states that this was a deliberate legislative choice.

[93] I see no error by the reference judge in this respect. The record before the reference judge gave her an ample basis to answer the second reference question. While it is true that the proper level of analysis under paragraph 4(2)(c) is how specific personal information is collected, used, or disclosed, and not the overall goals of the organization that is collecting, using, or disclosing the personal information, I do not understand the reference judge to have ignored this distinction. There was nothing in the record to suggest that Google Search operates differently depending on the specifics of the personal information it discloses.

[94] I conclude that the reference judge made no error in her treatment of the "journalistic purpose" exemption.

VII. Proposed disposition

[95] I would dismiss the appeal. The Attorney General is the only party seeking costs. In all of the circumstances, I would make no award of costs.

"J.B. Laskin"
J.A.

"I agree.
Mary J.L. Gleason J.A."

WEBB J.A. (Dissenting Reasons)

[96] I have read my colleague's reasons. I agree with the conclusions with respect to the *Charter* issues. However, I disagree with the conclusions with respect to the interpretation of the journalistic purpose exception. In my view, to the extent that Google's search engine collects and discloses journalistic articles it is excluded from the application of Part 1 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (PIPEDA). I would therefore allow the appeal.

[97] The question that is posed for the Court to answer in this matter is:

> (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?

[98] Implicit in this question is that Google's search engine service must have somehow triggered an application of Part I of PIPEDA. If the search engine did not otherwise trigger an application of Part I of PIPEDA, there would be no need to consider whether the exclusion in paragraph 4(2)(*c*) of PIPEDA is applicable.

[99] Section 4 of PIPEDA sets out the actions that will result in the application of the Act. For the purposes of this appeal, the relevant provisions are:

4 (1) This Part applies to every organization in respect of personal information that	**4 (1)** La présente partie s'applique à toute organisation à l'égard des renseignements personnels :

(a) the organization collects, uses or discloses in the course of commercial activities; […]	**a)** soit qu'elle recueille, utilise ou communique dans le cadre d'activités commerciales; […]
(2) This Part does not apply to: […]	**(2)** la présente partie ne s'applique pas : […]
(c) any organization in respect of personal information that the organization collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose.	**c)** à une organisation à l'égard des renseignements personnels qu'elle recueille, utilise ou communique à des fins journalistiques, artistiques ou littéraires et à aucune autre fin.

[100] In paragraph 85 of its memorandum, the Privacy Commissioner of Canada submits that "[t]here is no basis in the law or the wording of PIPEDA for Google's assertion that whether the Act applies depends on the specific 'personal information at issue'". I disagree.

[101] Paragraph 4(1)(*a*) of PIPEDA stipulates that "[t]his Part applies to every organization in respect of personal information that the organization collects, uses or discloses in the course of commercial activities". This restricts the application of this Part of PIPEDA to the specific personal information that an organization collects, uses or discloses in the course of commercial activities. Therefore, an organization must have collected, used or disclosed personal information in order for PIPEDA to be applicable and it only applies to that information.

[102] In this matter, Google's search engine collected and disclosed personal information contained in newspaper articles. The newspapers were published some time ago and the articles were posted on the websites maintained by the publishers of the newspapers. There is no dispute that the articles qualify as journalism.

[103] Although the Privacy Commissioner and the Federal Court Judge referred to personal information that Google's search engine may collect and disclose from personal blogs or other sites in relation to another individual, the only personal information collected and disclosed in this matter is the personal information included in the newspaper articles. Whether PIPEDA will apply to Google in respect of other personal information that Google may collect or disclose in relation to another individual, is not the case that is before this Court. The question posed must be answered in relation to the facts presented to the Court.

[104] Google's search engine collected excerpts from the newspaper articles when it crawled the internet to organize and index the content of the multitude of websites available. In this appeal, the relevant results are the excerpts from the newspaper articles and the links to the websites where the full articles can be found.

[105] The exception in paragraph 4(2)(*c*) is based on the organization's purpose in collecting, using or disclosing the particular personal information in issue. Therefore, the relevant question in this appeal is why did Google collect and disclose the personal information contained in the newspaper articles?

[106] Google's stated mission is "to organize the world's information and make it universally accessible" (paragraph 56 of Google's memorandum). Google's purpose in collecting the information found in the newspaper articles is to index this information so that it can be easily found by an individual using the Google search engine. Its only purpose in collecting the information is to make it more accessible.

[107] In response to a search request, Google provides the excerpt from the newspaper articles and provides the link to the website where the full articles can be found. Its sole purpose in disclosing this information is to provide access to the newspaper articles that could have been found by the same individual if, instead of using Google's search engine, that person would have searched the websites maintained by the publishers of the articles. Google simply facilitated access to the newspaper articles.

[108] Google's purpose was therefore to provide a link between an individual who is searching for information and the source where the information can be found on the internet. Google is helping the searcher find relevant newspaper articles and is helping the publishers distribute these articles.

[109] The role of Google can be compared to the role played by a retailer that sold the newspapers in issue when they were first published. The retailer collected the personal information when it received the newspapers from the publishers. The retailer disclosed the information when it sold the newspapers. The retailer would not otherwise perform any other journalistic function. In my view, it would not be intended that PIPEDA would apply to a retailer who sells newspapers.

[110] Another example will illustrate why, in my view, PIPEDA does not apply to the Google search engine when it collects, uses and discloses journalistic articles published by a newspaper. Assume an individual, in preparing for a newscast or other television or radio program, finds the same articles in issue in this appeal by reading a paper copy of the newspapers. If the personal

information in the article is reported as part of the program (with an acknowledgement of the source of the information), in my view PIPEDA would not apply to the collection, use or disclosure of that information as part of the television or radio program. The individual citing the article is simply distributing the news that has already been reported by the newspaper.

[111] Similarly, if instead of reading a paper copy of the newspaper, the individual finds the same articles by searching the newspaper's website and then discloses the personal information (acknowledging the source), in my view PIPEDA would not apply to the collection, use or disclosure of that information as part of the television or radio program. In my view, the result would also be the same if the individual uses the Google search engine to find the newspaper articles.

[112] In each scenario, the operator of the television or radio station is simply finding newspaper articles and reporting on what was published by the newspaper. The only functions performed by the operator of the television or radio station are the collection of the newspaper articles (by reading the newspapers or searching for the articles) and the use and disclosure of that information as part of the television or radio program. No other journalistic function is performed as the operator is relying on the journalists who wrote the articles to have verified the accuracy of the information.

[113] The activities of the operator of the television and radio station are essentially the same as the activities carried out by Google. Both the operator and Google search for information and disclose that information to the public. The operator of the television or radio station searches

newspapers and other sources for articles that would be of interest to its viewing or listening audience. A decision is made concerning when the article will be disclosed during the television or radio program. Google searches the internet and organizes the information that its search engine finds. It displays the search results based on its determination of the relevance of the information to the searcher using algorithms maintained by Google. In the case of the operator of the television or radio station, the information is disclosed to anyone who is watching or listening to the program. In Google's case, the information is disclosed to anyone who searches for the information.

[114] If PIPEDA applies to Google when its search engine finds and discloses a newspaper article, would PIPEDA apply to a television or radio station operator who searches for newspaper articles that would be of interest to its viewing or listening audience and then discloses the article? In my view, PIPEDA should not apply to either Google when its search engine finds and discloses a newspaper article (which is a journalistic article) or the operator of a television or radio station when the operator finds and discloses a newspaper article (which is a journalistic article) to its viewing or listening audience.

[115] As a result, I would allow the appeal.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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