Federal Court Cour fédérale

Date: 20190722

Docket: T-1779-18

Citation: 2019 FC 957

Ottawa, Ontario, July 22, 2019

PRESENT: The Associate Chief Justice Gagné

IN THE MATTER OF A REFERENCE PURSUANT TO SUBSECTION 18.3(1) OF THE *FEDERAL COURTS ACT*, R.S.C. 1985, C. F-7 OF QUESTIONS OR ISSUES OF LAW AND JURISDICTION CONCERNING THE *PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT*, S.C. 2000, C. 5 THAT HAVE ARISEN IN THE COURSE OF AN INVESTIGATION INTO A COMPLAINT BEFORE THE PRIVACY COMMISSIONER OF CANADA

BETWEEN:

THE PRIVACY COMMISSIONER OF CANADA

Applicant

REASONS FOR ORDER AND ORDER

I. Nature of the Matter

[1] In 2016, the Office of the Privacy Commissioner of Canada [OPC] became invested in the issues of online reputation and of whether a "right to be forgotten" exists in Canadian law. Meanwhile, an individual [Complainant] filed a complaint with the OPC alleging that Google was contravening the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [PIPEDA] by continuing to display links in its search results to news articles concerning the Complainant. The Complainant alleged that these news articles are misleading, outdated,

inaccurate, and that they disclose sensitive information. The Complainant requested that Google remove their [the Court chose to use a gender-neutral pronoun] name from the search results for any search of their name, a procedure commonly referred to as "delisting" information from a search engine.

[2] During the OPC's investigation of the complaint, Google LLC [Google] raised two preliminary jurisdictional issues, which were submitted as reference questions by the OPC to this Court.

[3] Google brought a motion arguing that the OPC reference questions should be reframed more broadly to address freedom of expression and access to information issues or, alternatively, that the reference should be struck.

[4] The Canadian Broadcasting Corporation/Société Radio-Canada [CBC] and a coalition of various other media organizations [Media Coalition] brought two motions to be added as parties to the reference, or in the alternative, to be given leave to intervene.

[5] In an order dated March 1, 2019, Prothonotary Mireille Tabib dismissed the motions brought by CBC and the Media Coalition, with leave to file another application for leave to intervene following the determination of Google's motion.

[6] In a subsequent order dated April 16, 2019, Prothonotary Tabib dismissed Google's motion to expand the scope of the reference questions.

[7] This Court is now seized of Rule 51 motions appealing the two orders issued by Prothonotary Tabib.

II. Facts

[8] In 2016, the OPC undertook a public consultation and call for essays on the issues of online reputation and of whether a "right to be forgotten" exists in Canadian law. After receiving 28 submissions, the OPC published a draft position paper on online reputation, in which it proposed solutions that balance the freedom of expression and the privacy interests of individuals.

[9] On June 16, 2017, the Complainant filed a complaint with the OPC alleging that Google was contravening PIPEDA by displaying links to online news articles concerning them in search results when their name is searched using Google's search engine service. The Complainant alleged that the news articles were outdated, inaccurate, and that they disclosed sensitive information about their sexual orientation and their medical condition, which has caused and continues to cause the Complainant serious harm. The Complainant requested that Google delist the articles from the search results. Google declined to remove the search results and encouraged the Complainant to resolve the matter by contacting the publishers of the news articles.

[10] The OPC notified Google of the complaint and requested its response to the allegations contained therein. Google submitted that PIPEDA did not apply because (i) the operation of its search engine is not a commercial activity within the meaning of paragraph 4(1)(a) of PIPEDA; and (ii) its search engine is exempt from PIPEDA because it is a journalistic or literary operation

within the meaning of paragraph 4(2)(c) of PIPEDA. Alternatively, Google submitted that PIPEDA contravened section 2(b) of *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

[11] The OPC submitted the jurisdictional issues to the Federal Court by way of reference. The questions were framed as follows:

> - 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?
>
> - 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?

[12] Google filed a notice of intention to participate in the reference and a notice of constitutional question on (i) whether the application of PIPEDA to a search engine engages or infringes section 2(b) of the Charter and on (ii) whether the obligation to delist links from search results engages or infringes section 2(b) of the Charter.

[13] On November 2, 2018, Prothonotary Tabib rendered an *ex parte* order allowing the Complainant, Google, and the Attorney General of Canada to become parties to the reference by serving and filing a Notice of Intention to Participate. The November 2, 2018 order also addressed the issue of the factual material that will constitute the record for the determination of

the reference. Lastly, the order allowed the Complainant or Google to file a motion challenging the scope of the reference questions.

[14] Google filed a notice of motion to vary the November 2, 2018 order to confirm that it had "already served and filed a notice of constitutional question dated October 15, 2018" and that "the scope of the reference questions already includes the inextricably intertwined constitutional issues set out in the notice of constitutional question".

[15] CBC filed a notice of motion for joinder as a party or, in the alternative, leave to intervene with a right to file evidence, cross-examine and otherwise participate, including the right of appeal, as a party to the reference proceeding. The Media Coalition also filed a motion record requesting the same relief.

[16] On March 1, 2019, Prothonotary Tabib dismissed the motions brought by CBC and the Media Coalition, with leave to bring another application for leave to intervene following the determination of Google's motion, on the grounds that it was premature for them to participate in the proceedings at this stage.

[17] CBC and the Media Coalition have both filed motions appealing the March 1, 2019 order. However, the Media Coalition discontinued its appeal on May 31, 2019.

[18] On April 16, 2019, Prothonotary Tabib dismissed Google's motion on the grounds that the reference questions, as framed, were appropriate. Google now seeks to appeal this order.

III. Impugned Decisions

A. *The Order dismissing the Motions for Joinder and Leave to Intervene*

[19] In an order dated March 1, 2019, Prothonotary Tabib dismissed the motions filed by CBC and the Media Coalition.

[20] She noted that when the Court is faced with a request for intervenor status, it must first determine what is truly in issue in the underlying proceeding (*Canada (Attorney General) v Canadian Doctors for Refugee Care*, 2015 FCA 34 at para 4).

[21] In the present case, the Prothonotary found that the OPC's reference application was not an ordinary application for judicial review, but rather, a reference brought pursuant to the special powers granted to the OPC under section 18.3 of the *Federal Courts Act*, RSC 1985, c F-7 [Act].

[22] For this reason, the Prothonotary held that she had to take into account the underlying proceeding as well as the specific reference questions formulated by the OPC.

[23] The reference was brought in the context of an investigation by the OPC into a complaint against Google.

[24] It is not disputed that the underlying complaint raises issues of freedom of expression. However, Google also raised two jurisdictional issues:

> first, 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 second, that even if its search engine is a commercial activity, it is in any event exempt from the application of PIPEDA by virtue of the journalistic exemption provided in paragraph 4(2)(c) of PIPEDA when providing users with access to news media content and providing news producers with access to readers.
>
> (Decision, at para 8)

[25] The OPC chose to refer only these two jurisdictional issues to the Court.

[26] CBC and the Media Coalition argued that the OPC attempted to artificially narrow the scope of the true issues before it and that answering the reference questions in a way that confers jurisdiction on the OPC would result in delisting lawful news media content from internet search results.

[27] However, the Prothonotary found that this assumption relied on a series of speculative leaps as to the outcome of various steps in the OPC’s investigation process. The OPC would first have to complete its investigation, find the complaint to be well-founded, determine that delisting is the appropriate remedy, and determine that delisting does not infringe Charter rights. Also, the OPC’s recommendation, whatever it may be, would be non-binding, and delisting would only occur if Google voluntarily complies or if the Complainant or the OPC bring an application under section 14 of PIPEDA. As such, the Prothonotary found that the cornerstone of CBC’s and the Media Coalition’s arguments conflates all subsequent steps and determinations into the preliminary jurisdictional issue.

[28] The Prothonotary held that the only issue in the reference proceeding was the determination of whether Part 1 of PIPEDA applies to Google in respect of its collection, use or disclosure of personal information in the operation of its search engine service. This will determine whether the OPC has jurisdiction to investigate the underlying complaint.

[29] While the reference questions, as framed by the OPC, may raise certain Charter arguments as an aid to statutory interpretation, the reference questions do not include a determination of whether PIPEDA is invalid or inapplicable.

[30] Having determined that the reference questions did not raise Charter issues, the Prothonotary refused to join CBC and the Media Coalition as parties because their presence was neither proper nor necessary for the reference, nor was it required for a full and effectual determination of all the issues in the reference.

[31] The definition of “party” and Rule 323 of the *Federal Courts Rules*, SOR/98-106 [Rules] do not prevent a person to apply for joinder if they meet either of the tests set out in paragraph 104(1)(b) of the Rules.

[32] The first test requires a person to demonstrate that they “ought to have been joined as a party”. However, CBC and the Media Coalition were not targeted by the initial complaint and there is no mechanism for them to intervene in the investigation of the complaint. Moreover, the OPC did not seek determination of who should have been a party to the underlying complaint, and deciding this issue would impermissibly expand the reference’s scope. Therefore, the

Prothonotary held that CBC and the Media Coalition are not persons who ought to have been joined as parties to the reference.

[33] The second test requires a person to demonstrate that their presence before the Court is necessary for the full and effectual determination of all the issues. It is only necessary for a person to be joined as a party where that person would be bound by the result of the proceeding and where the question cannot be effectually and completely settled unless that person is a party (*Stevens v Canada (Commissioner, Commission of Inquiry)*, [1998] 4 FC 125). The Prothonotary held that CBC and the Media Coalition would not be bound by the outcome of the reference because the only result will be to determine whether the OPC has jurisdiction to investigate the complaint made against Google.

[34] Even if the scope of the reference was expanded to include Charter issues, its outcome would not affect or bind CBC and the Media Coalition, or require them to take any action. A potential delisting would not affect them more than any other content provider whose webpage may appear in search engine results. As such, the Prothonotary concluded that CBC and the Media Coalition ought not to be joined as parties.

[35] The Prothonotary also declined to grant CBC and the Media Coalition intervener status based on the factors identified in *CUPE v Canadian Airlines International Ltd*, 2000 FCA 233 at para 8:

> 1) Is the proposed intervener directly affected by the outcome?
>
> 2) Does there exist a justiciable issue and a veritable public interest?

> 3) Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?
>
> 4) Is the position of the proposed intervener adequately defended by one of the parties to the case?
>
> 5) Are the interests of justice better served by the intervention of the proposed third party?
>
> 6) Can the Court hear and decide the case on its merits without the proposed intervener?

[36] The Prothonotary held that CBC's and the Media Coalition's submissions assumed that Google's motion to expand the scope of the reference would be successful and that Charter issues should be decided as part of the reference. She found the application to intervene to be premature in light of how the reference questions are currently framed.

[37] CBC and the Media Coalition were unable to explain what evidence they would file or what argument they would make to assist the Court in determining the reference questions. They could not even state the position they might take with respect to the reference questions as framed.

[38] As a result, the Prothonotary declined to grant leave to intervene, with leave to reapply after the determination of Google's motion to expand the scope of the reference questions.

[39] The Prothonotary also noted that CBC and the Media Coalition would not be allowed to intervene for the purpose of Google's motion.

B. *The Order dismissing the Motion to expand the scope of the reference questions*

[40] In a subsequent order, Prothonotary Tabib dismissed Google's motion to expand the scope of the reference questions.

[41] The Prothonotary first held that she did not have the authority to vary the scope of the reference questions, as framed by the OPC. The discretion as to how reference questions are framed belongs exclusively to the federal board, commission or other tribunal, on a plain reading of paragraph 18.3(1) of the Act. Parties may not "tinker" with the questions posed or "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 FCT 1000, Order of Prothonotary Aronovitch cited as Appendix A; Order of Prothonotary Aronovitch dated April 17, 2002 in Court file T-139-02).

[42] There is no exception to this general principle on the basis that the questions a party wishes to raise are constitutional in nature. A notice of constitutional question cannot allow a party to do indirectly what it cannot do directly.

[43] There is no support in the Act for Google to raise a constitutional issue that is not put in issue by the reference questions as framed by the OPC. Parties do not have an absolute right to put constitutional questions to the Court at any stage in the proceedings.

[44] Rules 320 to 323 do not contemplate any role for the Court or the parties to modify the scope of the reference questions. Since Rule 321 requires the OPC to state the reference questions in the Notice of the Application, the Court could only vary the reference questions if the OPC files an Amended Notice of Application. Otherwise, the only remedy the Court can grant is to strike the reference, with or without leave to amend.

[45] In addition, constitutional issues cannot be determined without a sufficient factual record. There is no evidence that the OPC has made the necessary findings of fact for the resolution of a constitutional issue. Moreover, the November 2, 2018 order only allows the parties to seek leave to introduce "additional background" and not adjudicative facts. The parties cannot submit their own facts in the absence of findings by the OPC. Therefore, the Prothonotary held that she could not expand the scope of the reference to address the constitutional issues raised by Google.

[46] The Prothonotary noted that this did not preclude Google from arguing that it would be inappropriate to answer the reference questions without addressing the constitutional issues. Furthermore, depending on the factual record, it could be possible to rule on both the reference questions and the constitutional issues.

[47] The Prothonotary also dismissed Google's alternative argument that the reference should be struck. A reference may be struck where it does not meet the conditions of subsection 18.3(1) of the Act, notably when:

- The issue is one for which the solution is not susceptible of putting an end to the dispute;
- The issue does not arise in the course of a matter before the Tribunal;

- The facts upon which the question is to be resolved have not been proven or admitted before the Tribunal.

[48] A reference could also potentially be struck where it is presumptive of the answer, is filed for tactical or strategic reasons, or is otherwise abusive of the power granted (*Kobo Inc v The Commissioner of Competition*, 2014 CACT 8 at para 9).

[49] The Prothonotary disagreed with Google's submission that the OPC has already come to a conclusion with respect to the reference questions and that the reference was merely academic. If the Court decides the reference questions in favour of Google and determines that PIPEDA does not apply to Google's search engine, the constitutional questions simply do not arise and the Court is not bound to answer the constitutional question (*State Farm Mutual Automobile Insurance Co v Privacy Commissioner of Canada*, 2010 FC 736). If the Court decides that PIPEDA applies to the search engine, and if after investigation, the OPC issues a recommendation that the information be delisted, Google will be in the exact same position as if the reference had not been brought and may commence a *de novo* review process.

[50] Moreover, Google retains the option to argue on the merits that the Court ought not to answer the reference questions without considering the constitutional issues.

[51] The Prothonotary held that dismissing Google's motion would not result in "litigation by instalments" because the answer to the reference could resolve the dispute. Also, the reference presupposes that a tribunal can choose to refer only certain questions to the Court. A reference cannot be struck simply because a party disagrees about which issues have been referred

(*Reference re Postal Services Continuation Act, 1987 (Canada)*, [1989] FCJ No 239 (FCA) at para 9).

[52] Since the reference questions can be answered and could put an end to the proceeding, the Prothonotary found there was no basis to conclude that they were improper, irregular or abusive. The Prothonotary dismissed Google's motion to expand the scope of the reference and to vary the November 2, 2018 order.

IV. Issues

[53] Prothonotary Tabib heard the two motions separately, first addressing CBC's motion for joinder. However, the two appeals were heard during the same special sitting of the Court, and the order in which the appeals were heard was reversed. I will dispose of the appeals in the order in which they were heard.

[54] Google's appeal raises the following issues:

A. *Did the Prothonotary err by precluding Google from raising a constitutional argument or response to the s. 18.3 reference application?*

B. *Did the Prothonotary err in deferring to the return of the merits hearing the question of whether this Reference can be resolved without determining the constitutional issues?*

C. *Did the Prothonotary err in her analysis of Google's alternative argument that the Reference should be struck if the constitutional issues could not be raised?*

[55] CBC's appeal raises the following issues:

A. *Should CBC be added as a party pursuant to Rule 104?*

B. *Should CBC be granted status as an intervener pursuant to Rule 109?*

V. Standard of Review

[56] The standard of review of a Prothonotary's order is the same as that identified by the Supreme Court in *Housen v Nikolaisen*, 2002 SCC 33 (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 64, 79). The Court will not intervene unless there is an error on a question of law or an extricable legal principle, or if the decision is based on a palpable and overriding error in regard to the facts.

VI. Analysis

GOOGLE'S APPEAL

A. *Did the Prothonotary err by precluding Google from raising a constitutional argument or response to the s. 18.3 reference application?*

[57] There was substantial disagreement at the hearing over how the issue should be framed. This disagreement arises from the conceptual gap that separates the parties and their submissions.

[58] The OPC submitted that the question should be whether a party to a reference can vary the scope of a reference. To this end, the OPC's arguments were based on section 18.3 of the Act

and how it only allows a federal tribunal or the Attorney General of Canada, but not a private party, to submit reference questions to the Federal Court.

[59] On the other hand, Google submitted that the proper question should be whether a party can raise a constitutional defence in response to a reference question. Google argues that the Prothonotary's decision prevents it from raising a constitutional issue it should be entitled to raise and from constituting the evidentiary record necessary to the resolution of that constitutional issue.

[60] In essence, the OPC argues that Google is attempting to raise a new issue in the proceeding that was not included in the reference questions as framed by the OPC. Google responds that it is entitled to raise a constitutional defence because it is necessary to fully answer the reference questions.

[61] It is essential to properly characterize what is before the Court for the purposes of this motion. Following Google's argument, the issue of constitutionality is "inextricably intertwined" with the reference questions, such that the constitutional issues must be answered in order to answer the reference questions.

[62] The reference questions, as framed, are effectively asking whether or not Google's search engine falls within the boundaries of PIPEDA as defined under section 4. To that question, Google answers that certain sections of Part 1 of PIPEDA cannot apply because they would

infringe Google's right to free speech, and that as a result, Charter arguments are necessary to interpret whether Google falls inside or outside of the boundaries of PIPEDA.

[63] First, I am of the view that the Prothonotary correctly interpreted section 18.3 of the Act and Rule 321 of the Rules. Parliament granted federal tribunals the special authority to engage the Federal Court's assistance in answering questions of law or jurisdiction that have arisen in the course of proceedings before them. The questions to be answered on a reference are within the sole purview and discretion of the Tribunal and need not be the ultimate question at issue before them (*Section 4 of the Patented Medicines (Notice of Compliance) Regulations (Re)*, 2002 FCT 1000, Order of Prothonotary Aronovitch cited as Appendix A; *Martin Service Station Ltd v Minister of National Revenue*, [1974] 1 FC 398 (FCA) at paras 4-6, 14; aff'd [1977] 2 SCR 996).

[64] Second, I am also of the view that she was right in refusing to buy into Google's argument that the issue of constitutionality is "inextricably intertwined" with the reference questions.

[65] Google claims that "the first step in analysing a question of federal tribunal jurisdiction must always be whether the jurisdiction afforded under the enabling statute is constitutionally valid." I agree with the OPC that this proposition, if accepted, would fundamentally alter the nature of a Charter analysis. It would require a Court to assess the constitutionality of a statute before it even knows whether the statute applies and, if it does, how it applies and what impact it has on a Charter-protected right.

[66] It is difficult to understand how Google can claim that PIPEDA applies in a way that breaches its constitutional rights, before PIPEDA has even been applied to it. In my view, the fundamental flaw with this position is that Google is attempting to rely on its constitutional arguments as a response to the jurisdictional issue raised in the reference. Google's argument is circular, because for PIPEDA to infringe Google's rights, it must first apply to Google in one way or another, so as to limit a Charter right. In order to determine whether freedom of expression is engaged, the Court needs to answer the following questions:

> In sum, to determine whether an expressive activity is protected by the Charter, we must answer three questions: (1) Does the activity in question have expressive content, thereby bringing it, prima facie, within the scope of s. 2 (b) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, **does an infringement of the protected right result from either the purpose or the effect of the government action?** (Criminal Lawyers' Association, at para. 32, summarizing the test developed in City of Montréal, at para. 56).
>
> (*Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2 at para 38) (Emphasis added)

[67] For PIPEDA to "infringe" Google's rights, PIPEDA must first apply to Google. Otherwise, paragraph 2(b) of the Charter cannot be engaged. Even if the first two questions raised in *Canadian Broadcasting Corp* are answered in Google's favour, there is no way to determine whether an infringement would result, since PIPEDA has not yet been applied to Google. In other words, there is no indication that PIPEDA, in any way, limits the operation of a search engine. At this time, no news article has been ordered delisted and it is speculative, at this stage, to assume that this will be the result of the investigation.

[68] I find that it is possible to answer the jurisdictional question without answering the constitutional question. The jurisdictional question only asks whether PIPEDA applies, not whether it infringes Google's rights. Google's argument arises from a conceptual flaw: raising a defence that there is no jurisdiction because of the Charter challenge effectively concedes that the statute applies in some way. If the statute did not apply, because Google falls outside of PIPEDA's boundaries, no infringement of the right to free speech could result. It is possible to respond to the jurisdictional issue, subject to any Charter arguments being raised later before the appropriate forum empowered to make factual and legal findings; however, it is not possible to answer the constitutional question without first determining if PIPEDA applies. The OPC has already recognized in its 2016 Consultation Paper that it faces a challenging balancing of rights:

> As for the "right to be forgotten" debate, if such a mechanism were to be considered in Canada, there would need to be a careful balancing with other societal values, such as the right to freedom of expression, which is guaranteed under the Canadian Charter of Rights and Freedoms.

[69] Google claims that the mere application of PIPEDA to a search engine is enough to breach its right to free speech because, among other things, Part 1 of PIPEDA would force Google to obtain a person's consent to the collection, use or disclosure of personal information.

[70] If Google challenges the constitutionality of certain provisions of Part 1 of PIPEDA, it would have to explain how those provisions infringe its right to free speech. It cannot be reasonably disputed that section 4 of PIPEDA, on its own, contains no such limitations. To the extent that there is any infringement of Google's right to free speech, this infringement does not arise from section 4 of PIPEDA, but from other provisions in Part 1 of PIPEDA, such as the requirement to obtain consent before collecting, using or disclosing personal information in

section 7 of PIPEDA. Google's constitutional challenge to the constitutionality of provisions of PIPEDA that are not even referred to in the reference questions also presupposes that PIPEDA applies to Google's search engine.

[71] Google submits that a litigant can raise a constitutional response in any proceeding. However, the reference questions in this proceeding are artificially limited by the nature of a reference proceeding, such that the reference proceeding is narrower than the underlying investigation. The OPC must still make a decision on the other aspects of the underlying investigation, assuming it ultimately has jurisdiction to do so. Google is still free to raise the constitutional objection at any stage in the underlying proceeding if it is unsuccessful at the jurisdictional stage. As such, Google will not have been denied the right to raise a constitutional issue. Google cannot raise it in the reference proceeding, because as discussed above, it is not yet relevant to the legal analysis.

[72] The OPC could have chosen not to bring this reference. In such a case, Google would not have been in a position to raise constitutional issues at this stage of the OPC's investigation. A right to raise the constitutional issues does not accrue to Google simply because the OPC decided to put the preliminary jurisdictional questions to the Court.

[73] If Google were correct in arguing that PIPEDA is unconstitutional on its face, it could have brought a direct constitutional challenge seeking a declaration of invalidity. Raising a Charter argument only in the context of this reference proceeding is an admission that PIPEDA's constitutionality cannot be divorced from its application to a specific set of facts before the OPC.

[74] Therefore, the Prothonotary did not err by precluding Google from raising a constitutional argument in the reference proceeding.

B. *Did the Prothonotary err in deferring to the return of the merits hearing the question of whether this Reference can be resolved without determining the constitutional issues?*

[75] Given my conclusion on the previous question, it follows that the Prothonotary did not err by deferring to the judge hearing the application the ultimate determination as to whether the reference questions can be answered as framed.

[76] Google will have another opportunity to argue, at the merits stage, that the reference questions are improper and that they should not be answered.

[77] Google also has the opportunity to ask for leave to "file additional background information that is relevant to the reference questions" (November 2, 2018 Order at para 10). It appears to me that is exactly the kind of information Google says it would like to file:

> 60. […] Google intends to lead evidence that this provision [section 4 of PIPEDA] was put into PIPEDA in order to exclude from its operation constitutionally protected speech.
>
> (Google Appeal Written Representations at para 60)

[78] That kind of evidence could be "relevant background information" to the extent it supports an argument that section 4 of PIPEDA was drafted so as to exclude Google's activities from PIPEDA's scope of application. Nevertheless, if it becomes apparent at the merits stage that the reference questions are improper, the judge retains the discretion to decline answering them. In that situation, the OPC will make the determination regarding section 4 of PIPEDA on its

own. If the OPC finds that PIPEDA applies to Google's search engine, the investigation will proceed to the merits, at which point Google will have the opportunity to raise constitutional arguments.

[79] I cannot find any error of law or fact in the Prothonotary's decision that, at this stage, the reference questions are not improper and the constitutional questions are not inextricably intertwined with the reference questions. Nor is there any error in leaving the door open to the judge hearing the application to decide, after having considered the evidence that will be filed, that he or she should decline to answer the reference questions.

C. *Did the Prothonotary err in her analysis of Google's alternative argument that the Reference should be struck if the constitutional issues could not be raised?*

[80] Google's alternative argument that the reference should be struck because the questions cannot be answered is without merit. As discussed above, while it is impossible to determine whether section 4 and every provision of Part 1 of PIPEDA are constitutionally valid, unless Google admits that it is subject to PIPEDA, it is possible to determine whether section 4 applies to Google.

CBC'S APPEAL

D. *Should CBC be added as a party pursuant to Rule 104?*

[81] CBC argues that it will be bound by the result of the reference and that accordingly, it should be joined as a party. I disagree with CBC's submissions.

[82] CBC has not shown how it would be bound by the result of the reference questions as they are currently framed or that it meets the test established in *Stevens v Canada (Commissioner, Commission of Inquiry)*, [1998] 4 FC 125 (FCA).

[83] CBC has merely shown that it could potentially be affected by the result, but its interest does not rise to a sufficient level to make it a necessary party. If CBC were a necessary party, only because it may be affected by the outcome of the reference, every other person who uses Google or who posts information on the internet would also be a necessary party.

[84] CBC further argues that interpreting PIPEDA in a way that would permit its application to Google and in a way that would permit delisting lawfully available information could infringe its rights to freedom of expression. As a result, CBC should be entitled to participate in this proceeding because paragraph 2(e) of the *Canadian Bill of Rights*, SC 1960, c 44 guarantees it a right to a fair hearing for the determination of its rights and obligations.

[85] In my opinion, the *Canadian Bill of Rights* cannot apply to allow CBC to take part in these proceedings as a party. Paragraph 2(e) of the *Canadian Bill of Rights* creates no substantive right to a hearing where some form of hearing is not already provided by law (*Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at paras 116-117). If no right to a hearing is provided by law, PIPEDA does not "deprive" any person of a right to a fair hearing and paragraph 2(e) is not engaged.

[86] Also, a hearing under paragraph 2(e) must entail "the application of law to individual circumstances" (*Authorson v Canada (Attorney General)*, 2003 SCC 39 at para 61). In this case, the Court is called upon to answer two reference questions, not to perform any adjudicative function or to dispose of rights. Therefore, there is no determination of CBC's rights and obligations and paragraph 2(e) does not apply.

E. *Should CBC be granted status as an intervener pursuant to Rule 109?*

[87] I agree with the Prothonotary that CBC' application for leave to intervene was premature since the scope of the reference had not yet been finally determined. CBC's proposed submissions presuppose that the scope of the reference would be expanded.

[88] It is of course open for CBC to reapply for leave to intervene at a later date with a motion record that meets the criteria set out in paragraph 109(2)(b) of the Rules. The OPC has in fact indicated that a properly framed motion to that effect would not be contested.

[89] In my opinion, the Prothonotary's decision does not prevent CBC from bringing another motion for leave to intervene, even if Google's appeal regarding the scope of the reference is dismissed.

[90] The Prothonotary's order states that CBC can reapply "following the determination of Google's motion to vary the scope of the reference". Contrary to CBC's argument at the hearing, this does not suggest that Google's motion necessarily has to be granted in order for CBC to be able to reapply for leave to intervene.

[91] A reading of the entirety of her reasons also suggests that the Prothonotary has not decided to definitively prevent CBC from reapplying for leave to intervene.

[92] First, she does not say that CBC will be prevented from doing so in the event that Google's motion is dismissed. She simply says that the media parties can reapply "at a later date" (Decision, at para 1).

[93] Second, her reason for dismissing the media parties' motion is not that they cannot meet the criteria relevant to the decision to grant leave, but instead that their motion record, as submitted to the Court, did not comply with Rule 109(2)(b) (Decision, at para 45). This provision reads as follows:

Leave to intervene	**Autorisation d'intervenir**
109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109 (1)** La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
Contents of notice of motion	**Avis de requête**
(2) Notice of a motion under subsection (1) shall	**(2)** L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :
(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and	**a)** précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;
(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.	**b)** explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

Directions	**Directives de la Cour**
(3) In granting a motion under subsection (1), the Court shall give directions regarding	**(3)** La Cour assortit l'autorisation d'intervenir de directives concernant :
(a) the service of documents; and	**a)** la signification de documents;
(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	**b)** le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

(Emphasis added)

[94] As explained by the Prothonotary, CBC's motion for leave to intervene "assumes that the scope of the reference is as wide as that sought by Google in its pending motion" (Decision, at para 44). The submissions made by CBC were therefore not relevant to the reference questions as framed, which made it problematic to assess its motion and to determine whether it could properly be granted leave to intervene. CBC's submissions before the Prothonotary did not allow her to determine how CBC could contribute to the determination of the reference, which was fatal to the motion for leave to intervene.

[95] Nothing prevents CBC and other media parties from applying for leave to intervene if they can explain to the Court how they would be able to assist in answering the reference questions.

VII. Conclusion

[96] For these reasons, the Court is dismissing both appeals of the Prothonotary’s orders respectively dated March 1, 2019 and April 16, 2019. As the parties did not request their costs, none will be granted.

ORDER

THIS COURT ORDERS that:

1. Google LLC's appeal of the Order of Prothonotary Mireille Tabib dated April 6, 2019 is dismissed;
2. Canadian Broadcasting Corporation/Société Radio-Canada's appeal of the Order of Prothonotary Mireille Tabib dated March 1, 2019 is dismissed.

"Jocelyne Gagné"
Associate Chief Justice

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**
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JUNE 26-27, 2019
REASONS FOR ORDER AND ORDER:	GAGNÉ A.C.J.
DATED:	JULY 22, 2019

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