Federal Court  Cour fédérale

Date: 20190301

Docket: T-1779-18

Citation: 2019 FC 261

Ottawa, Ontario, March 1, 2019

PRESENT: Madam Prothonotary Mireille Tabib

IN THE MATTER OF a reference pursuant to subsection 18.3(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of 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

ORDER AND REASONS

[1] The Canadian Broadcasting Corporation and a group of Canada's largest media organizations acting together under the designation "the Media Coalition" have brought motions seeking to be added as parties to the present reference, or alternatively, seeking leave to intervene as if they were full parties. For ease of understanding, the two moving parties will be referred to collectively as the media parties. For the reasons below, the motions will be dismissed, with leave for the media parties to reapply for intervenor status at a later date.

I. Preliminary Remarks

[2] As recognized by Justice Stratas of the Federal Court of Appeal in *Canada (Attorney General) v Canadian Doctors for Refugee Care* 2015 FCA 34, when faced with requests for intervenor status, the Court must first determine what is truly in issue in the underlying proceeding. That is equally true when faced with a request to be added as a party to a proceeding.

[3] The underlying proceeding is not an ordinary judicial review application. It is a reference, brought by the Privacy Commissioner of Canada pursuant to the special powers conferred on it as a federal board, commission or tribunal by s 18.3 of the *Federal Courts Act* RSC 1985, c F-7. Understanding the purpose and scope of the reference process is key to a proper determination of what is truly at issue in this proceeding.

[4] The reference procedure allows a tribunal that is tasked with an adjudicative or advisory function to refer to the Federal Court for determination any question of law, jurisdiction or practice and procedure that arises in the course of its duties and would be determinative of a specific matter that is pending before it (*Re: Immigration Act (Canada)* 1991 F.C.J. No 1155, 137 NR 64, *Air Canada v Canada (Commissioner of Official Languages)* 1997 F.C.J. No 976). While tribunals will typically only use the reference process for important issues of law that may have far ranging implications, references must necessarily arise in and be determinative of a specific matter before them. As the Federal Court of Appeal found in *Alberta v West Coast Energy Inc.* (1997) 208 NR 154 (FCA), “the Court is not empowered to determine academic questions of law – its role is to determine, not simply to consider”. The issue or issues referred

are defined by the tribunal itself, and need not be the ultimate questions at issue before it (*Martin Service Station Ltd v Minister of National Revenue* [1974] 1 FC 398; affirmed [1977] 2 SCR 996).

[5] The identification of the true issue before the Court in the underlying reference must therefore not only take into account the underlying proceeding in which the reference question arises, but also the specific reference question the tribunal has formulated.

II. The Proceedings before the Court

[6] The reference is brought in the context of the investigation by the Office of the Privacy Commissioner ("OPC") into a complaint made by an individual against Google LLC ("Google"). The complainant alleges that Google is contravening the *Personal Information Protection and Electronic Documents Act* SC 2000, c 5 ("*PIPEDA*"), by continuing to prominently display links to news articles concerning him in search results when his name is searched using Google's search engine. The complainant alleges that the news articles in question are outdated and inaccurate and disclose sensitive information such as his sexual orientation and a serious medical condition, and that the fact that Google prominently links these articles to his name in search results causes him direct harm. He requested that Google remove the articles from search results using his name, a procedure also referred to as "deindexing".

[7] It is not disputed that the underlying complaint raises important and ground-breaking issues relating to online reputation, including whether a "right to be forgotten" should be recognized in Canada, and if so, how such a right can be balanced with the Charter protected

rights to freedom of expression and freedom of the press. Google, in response to the complaint, expressly asserted that if *PIPEDA* did apply to its search engine and required it to deindex lawful, public content from its search results, then *PIPEDA* would contravene s 2(b) of the *Canadian Charter of Rights and Freedoms*, in a way that cannot be saved by s 1 of the *Charter*.

[8] These wider substantive issues are not the only issues raised in the complaint. In particular, Google in its initial response to the complaint has raised the following two preliminary 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. If Google is correct in respect of either of the jurisdictional issues, the Privacy Commissioner would have no jurisdiction to further investigate the complaint or to make any finding or recommendation in its respect.

[9] The Privacy Commissioner has chosen to refer only those two jurisdictional issues to the Court and in its Notice of Application, has formulated the reference questions as follows:

> (1) Does Google, in the operation of its search engine service, collect, use or disclose personal information in the course of commercial activities within the meaning of paragraph 4(1)(a) of *PIPEDA* when it indexes webpages and presents search results in response to searches of an individual's name?
>
> (2) Is the operation of Google's search engine service excluded from the application of Part I of *PIPEDA* by virtue of paragraph 4(2)(c) of *PIPEDA* because it involves the collection, use or disclosure of personal information for journalistic, artistic or literary purposes and for no other purpose?

[10] In compliance with Rule 322 of the *Federal Courts Rules* SOR/98-106, which governs the conduct of references brought under s 18.3 of the *Federal Courts Act*, the Privacy Commissioner made an *ex parte* motion to establish which persons were to be notified of the reference, the materials on which the reference is to be determined, and other procedural matters. The resulting order, issued by the undersigned, required the Privacy Commissioner to notify Google, the complainant and the Attorney General of the reference, and provided that any of these persons could become parties to the reference by serving and filing the Notice of Intention to Participate contemplated by Rule 323. The Order confirmed that the materials for the reference would be provided by the Privacy Commissioner only, but that the parties could seek leave of the Court to file supplementary affidavits to include additional background information that is relevant to the reference. The Order also provided that "should either the Complainant or Google wish to challenge the appropriateness of the reference question" they were to file a motion to that effect within 15 days of filing their Notice of Intention to Participate.

[11] Google filed such a motion, seeking to expand the scope of the reference to include the *Charter* issue of whether, if *PIPEDA* applies to the operation of its search engine and requires deindexing, it would contravene s 2(b) of the *Charter*. It also filed a Notice of Constitutional Question with respect to that issue as well as the issue of whether interpreting *PIPEDA* as applying to its search engine infringes s 2(b) of the *Charter*. As that motion could be viewed as a motion to vary the *ex parte* order setting the reference process, it was felt that it should be heard by the undersigned, rather than by the newly appointed Case Management Judge.

[12] The media parties insisted that their motions to be added as parties be heard prior to Google's motion to expand the scope of the reference and that they should also be heard by the undersigned, since their aim was also to vary that part of the *ex parte* order that helped define the persons that should be given notice of the reference and be given an opportunity to become parties. They further argued that if they were indeed necessary parties to the reference, they should have the opportunity to participate in all interlocutory motions, including Google's motion. Alternatively, their request to be given intervenor status included leave to intervene on Google's motion.

[13] The determination as to what is truly at issue in the underlying proceeding must therefore be made looking only at the Notice of Application as it currently exists, and without taking into account Google's proposed expansion of the scope of the reference. The parties' acquiescence to this approach is confirmed by the fact that neither Google's Notice of Motion to expand the scope of the reference nor its Notice of Constitutional Question were included in any of the motion materials filed in respect of the media parties' motions.

III. What Is at Issue in This Proceeding?

[14] The media parties, supported by Google, essentially argue that what is truly at issue in the underlying reference is whether the Privacy Commissioner's proposed regulation of Internet searches offends the Charter protected rights of freedom of expression and freedom of the press.

[15] The media parties' position as to the true questions at issue is informed, not only by the nature of the underlying complaint and the relief sought by the complainant should his complaint

be upheld, but by the consultation process in respect of online reputation conducted by the OPC since 2015 and the Draft Position Paper it published in January 2018 following that process. The media parties argue that in that Draft Position Paper, the OPC has indicated its intention to recognize a "right to be forgotten" in Canada and to establish, through *PIPEDA*, a deindexing process in respect of Internet search results that return information which the OPC finds inaccurate, incomplete or incorrect. They thus argue that a positive answer to the limited jurisdictional questions submitted by the Privacy Commissioner in the reference will effectively greenlight the OPC's proposed process, with the result that internet news content will henceforth be subject to deindexing. Deindexing in turn squarely raises the issues of freedom of expression and freedom of the press, as they submit the OPC itself has recognized in the Draft Position Paper.

[16] The media parties suggest that by formulating the reference questions as he has, the Privacy Commissioner is attempting to artificially narrow the scope of the true issues before the Court to foreclose a proper debate on important *Charter* issues and do an end-run around their right to be heard in respect of matters that affect them directly. They thus urge the Court to take a broader view of what is truly at issue in this matter.

[17] The media parties' submissions proceed from the fundamental assumption that the Court's determination of the jurisdictional questions in a way that confers jurisdiction on the OPC to investigate the underlying complaint will inevitably result in deindexing lawful news media content from internet search results. That assumption however relies on a series of speculative leaps as to the outcome of numerous steps in the OPC's investigation process and in

the elaboration and implementation of any recommendations that might result from it. Indeed, even if the reference confirmed *PIPEDA*'s application to Google's search engine service, the OPC would still have to conduct its investigation into the complaint, find it well founded, in the sense that the search results at issue return inaccurate, incomplete or incorrect information, determine that de-indexing is an appropriate remedy in the circumstances and determine that deindexing does not infringe Charter protected rights. If and when the OPC reaches that determination, its powers are limited to issuing a non-binding recommendation. The ultimate act of deindexing would in turn either require Google to voluntarily comply with the recommendation or that the Court comes to the same series of conclusions in a subsequent *de novo* review of the matter in the context of an application to the Court pursuant to s 14 of *PIPEDA*, brought by the complainant or the Privacy Commissioner.

[18] The media parties' reliance on assumptions as to the ultimate result to form the cornerstone of their argument conflates all subsequent steps and determinations into the preliminary issue. This approach ignores the reference questions as expressly formulated in the Notice of Application and has the effect of turning the process adopted by the Privacy Commissioner in this matter on its head, transforming the preliminary jurisdictional issues as framed by the Privacy Commissioner into the final, ultimate determination of all matters before him. Whether the Privacy Commissioner correctly framed the reference questions or whether Google is entitled to broaden the reference questions will be a matter to be determined later, on Google's motion. At this time, the Court must take the reference as framed in the existing Notice of Application. It is not appropriate, and the Court declines to engage in speculation as to the outcome of the process before the OPC in identifying the issues in the reference.

[19] The reference questions, as set out in the Notice of Application and reproduced in paragraph 9 these reasons, focus on the characterization of what Google does in operating its search engine service a certain way, and on the characterization of the purposes of that particular operation. More particularly, and in light of the issues raised by Google in its preliminary response to the underlying complaint made against it, they ask: (1) whether Google engages in a "commercial activity" as contemplated in s 4(1)(a) of *PIPEDA* in presenting search results in response to an individual's name; and (2) whether that operation of Google's search engine service is for a journalistic or literary purpose and for no other purpose, as contemplated in s 4(2)(c) of *PIPEDA*. The reference poses these questions specifically in the context and for the application of the following paragraphs of s 4 of *PIPEDA*:

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.

[20] It follows from the above that what is truly at issue in this application is 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. The answer to that question will in turn be determinative of whether the Privacy Commissioner has jurisdiction to receive and proceed to investigate the underlying complaint. How the Privacy Commissioner is to proceed with his investigation, in the event Part 1 of *PIPEDA* is determined to apply to Google's operation of its search engine service, as well as the findings or recommendations he may eventually make, are outside the scope of the reference as it currently stands.

[21] The media parties submit that the determination of the questions, even as currently framed by the Privacy Commissioner, still does raise *Charter* arguments. In particular, they submit that the operation of Google's search engine is, in and of itself, an exercise in the exchange of information and that it is thus inherently a form of expression. The very notion of this expression being subject to *PIPEDA* constitutes a limit to freedom of expression. The Court accepts that the determination of the issues on this reference may require consideration of the *Charter*. Indeed, the Court must ensure that it interprets the provisions of *PIPEDA* that are at issue in a manner that respects rather than offends constitutionally protected rights. That said, there is a difference between using the *Charter* as an aid to statutory interpretation and using it to challenge the applicability or validity of the statute. The reference questions as framed contemplate the consideration of the *Charter* in the interpretation of s 4(1)(a) and 4(2)(c) of *PIPEDA*, but does not include the determination of whether, when properly interpreted, their application would contravene the *Charter*.

IV. Are the Media Parties Proper or Necessary Parties to the Reference?

[22] Having determined what is and is not at issue in the reference, the Court may now proceed to consider whether the media parties should, as they urge, be joined as additional parties to it, in accordance with Rule 104(1)(b) of the *Federal Courts Rules*. The Privacy Commissioner submits that Rules 320 to 323, which set out specific provisions applicable to references brought pursuant to s 18.3 of the *Federal Courts Act*, constitute a complete code that has the effect of ousting the application of Rule 104 and of preventing any person other than those contemplated in Rule 323 from applying to be joined as a party to a reference, and that, even if Rule 104(1)(b) is applicable, the media parties do not meet either of the criteria provided in that Rule.

[23] This part of the Court's reasons will therefore consider the following issues:

(a) Does Rule 104(1)(b) apply to references?

(b) Are the media parties persons who ought to have been made parties to the reference?

(c) Is the presence of the media parties necessary for a full and effectual determination of all issue in the reference?

(a) Does Rule 104(1)(b) apply to references?

[24] The provisions relevant to this analysis are set out below:

2. "party" means

(b) in respect of an application,

(i) where a tribunal brings a reference under section 18.3 of the Act, a person who becomes a party in accordance with rule 323,

(ii) where the Attorney General of Canada brings a reference under section 18.3 of the Act, the Attorney General of Canada and any other person who becomes a party in accordance with rule 323, and

(iii) in any other case, an applicant or respondent;

104(1) At any time, the Court may

(b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.

321 A notice of application in respect of a reference shall set out

(a) the name of the court to which the application is

2. « parties »

b) dans une demande :

(i) dans le cas d'un renvoi fait par un office fédéral en vertu de l'article 18.3 de la Loi, toute personne qui devient partie au renvoi aux termes de la règle 323,

(ii) dans le cas d'un renvoi fait par le procureur général du Canada en vertu de l'article 18.3 de la Loi, le demandeur et toute personne qui devient partie au renvoi aux termes de la règle 323,

(iii) dans tout autre cas, le demandeur et le défendeur;

104 (1) La Cour peut, à tout moment, ordonner :

b) que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance; toutefois, nul ne peut être constitué codemandeur sans son consentement, lequel est notifié par écrit ou de telle autre manière que la Cour ordonne.

321 L'avis de demande concernant un renvoi contient les renseignements suivants :

a) le nom de la cour à laquelle la demande est

addressed;

(b) the name of the applicant; and

(c) the question being referred.

322 Where the Attorney General of Canada or a tribunal makes a reference, the Attorney General or tribunal shall bring an ex parte motion for directions as to

(a) which persons shall be given notice of the reference;

(b) the material that will constitute the case to be determined on the reference;

(c) the preparation, filing and service of copies of the material;

(d) the preparation, filing and service of memoranda of fact and law;

(e) the procedure for the hearing of the reference;

(f) the time and place for the hearing of the reference; and

(g) the role, if any, of the tribunal in question.

323 Any of the following persons may become a party to a reference by serving and filing a notice of intention to participate in Form 323:

(a) the Attorney General of

adressée;

b) le nom du demandeur;

c) la question qui est l'objet du renvoi.

322 Le procureur général du Canada ou l'office fédéral qui fait un renvoi demande à la Cour, par voie de requête ex parte, des directives sur :

a) l'identité des personnes qui doivent recevoir signification de l'avis de demande;

b) la composition du dossier sur lequel le renvoi sera jugé;

c) la préparation, le dépôt et la signification de copies du dossier;

d) la préparation, le dépôt et la signification des mémoires exposant les faits et le droit;

e) la procédure à suivre lors de l'audition du renvoi;

f) les date, heure et lieu de l'audition;

g) le rôle de l'office fédéral dans l'instance, s'il y a lieu.

323 Les personnes suivantes peuvent devenir parties au renvoi en signifiant et en déposant un avis d'intention à cet effet, établi selon la formule 323 :

a) le procureur général du

Canada;	Canada;
(b) the attorney general of a province, for the purpose of adducing evidence or making submissions to the Court under subsection 57(4) of the Act; and	b) un procureur général d'une province qui a l'intention de présenter une preuve ou des observations à la Cour conformément au paragraphe 57(4) de la Loi;
(c) a person who participated in the proceeding before the tribunal in respect of which the reference is made.	c) les personnes qui ont participé à l'instance devant l'office fédéral visé par le renvoi.

(Emphasis added)

[25] The primary purpose of Rule 323 is to provide a mechanism for the joinder of necessary or proper parties to a reference without the need for judicial intervention. Given that the reference process is intended as a special mechanism for tribunals to bring to the Court for determination questions of general importance that arise in the context and are determinative of a specific matter pending before them, this Rule presupposes that the Attorney General of Canada, the Attorneys General of provinces, where the constitutionality of any statute or regulation is at issue, and the persons who participated in the proceeding before the tribunal in respect of which a reference is made, will be proper or necessary parties. The definition of "party" in Rule 2 recognizes these persons' status.

[26] To interpret Rules 2 and 323 as not merely permissive but limitative of the classes of persons who can have party status in a reference cannot be reconciled with the other provisions relating to references. Indeed, such an interpretation would leave no room for the tribunal that brings the reference to be considered as an applicant, as expressly contemplated in rule 321, or to be granted the role of a party in the reference in an order made pursuant to Rule 322.

[27] Furthermore, importing a limitative purpose to Rules 2 and 323 is unnecessary. Outside the mechanisms provided in Rules 321 and 322 for the tribunal's participation or Rule 323 for the joinder of Attorneys General and persons who participated in the underlying proceeding, no person could in any event be joined as a party unless they can meet the conditions set out in Rule 104(1)(b) that is, that the person ought to have been joined as a party or is one whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined. To the extent situations may arise where a person other than the tribunal bringing the reference or those contemplated in Rule 323 would be capable of demonstrating that it is a proper or necessary party to a reference, interpreting the Rules so as to prevent the Court from providing a remedy would be contrary to the general principle set out Rule 3, that the Rules be interpreted so as to secure the just determination of every proceeding on its merits.

(b) Are the media parties persons who ought to have been made parties to the reference?

[28] Rule 104 contemplates two distinct grounds for adding a person as a party: that the person ought to have been joined as a party or that the person's presence before the Court be necessary. The first ground, that a person ought to have been joined as a party, presupposes that there be a requirement, either in the statute pursuant to which the proceeding was initiated, or in the *Federal Courts Rules*, that the person be named as a party. In the case of a reference, Rule 323 and any order made pursuant to Rule 322 establish the persons who need to be notified and may become parties. The media parties are not contemplated by these provisions and they have

not identified any provision in the *Federal Courts Act*, the *Federal Courts Rules* or *PIPEDA* pursuant to which they "ought" to have been named as parties to this reference.

[29] The only argument the media parties have presented in respect of Rule 104's first ground for inclusion is that they ought to have been made parties to the underlying complaint.

[30] It is clear however that no complaint has been made against the media parties in the underlying complaint. There are, further, no provisions in *PIPEDA* pursuant to which the OPC could force a person other than the complainant or the person against whom a complaint has been made to participate in the investigation of the complaint. There are no provisions in *PIPEDA* pursuant to which such a person could intervene in the investigation of a complaint made under Part 1 of *PIPEDA*. There are accordingly no grounds to support the media parties' argument that they ought to have been made parties to the underlying complaint.

[31] In any event, it seems to the Court that seeking a determination of who should have been made a party to the proceeding underlying a reference, where that issue is not framed as a question submitted to the Court, impermissibly expands the scope of the reference and constitutes a collateral attack on the work of the referring tribunal.

[32] The Court is therefore not satisfied that the media parties are persons who ought to have been joined as parties to the reference.

(c) Is the presence of the media parties necessary for a full and effectual determination of all issue in the reference?

[33] The main thrust of the media parties' argument is on the second branch of Rule 104, that their presence before the Court is necessary for the full and effectual determination of all the issues.

[34] All parties recognize that the test to be applied in determining whether a party is necessary has been authoritatively set out in *Stevens v Canada (Commissioner, Commission of Inquiry)* [1998] 4 FC 125, citing from English case law, as follows:

> What makes a person and necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately. That would mean that on the construction of a clause in a common form contract many parties would claim to be heard, and if there were power to admit any, there is no principle of discretion by which some could be admitted and others refused. The Court might often think it convenient or desirable that some of such persons should be heard so that the Court could be sure that it has found a complete answer, but no one would suggest that it is necessary to hear them for that purpose. <u>The only reason which makes it *necessary* to make a person a *party* to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party</u>.
>
> (Emphasis added)

[35] The media parties argue that they are "necessary" parties because they will be bound by the result of the reference. They submit that the reference questions are merely a threshold issue to the immediate implementation of "the right to be forgotten" and of the deindexing of news stories that is a necessary component thereof, and that the content that they provide will inevitably be deindexed. They argue that some of the news stories which triggered the complaint

were published by at least some members of the Media Coalition and that the deindexing of the stories thus directly affect them. They submit that their *Charter* protected rights to freedom of expression and freedom of the press is directly engaged and will be breached by the result. They argue that there is no other mechanism through which their concerns can be heard and argued, such that their presence in the reference is necessary for a complete determination of the issues.

[36] The media parties' arguments thus essentially rest on the underlying assumption that what is truly at issue in this reference is the constitutionality of the Privacy Commissioner "intended" institution of a deindexing process in respect of lawful news content from Internet search results. However, as determined above, that is not what is truly at issue in this reference. What is at issue here is only whether Google is subject to or exempt from the application of Part 1 of *PIPEDA* in respect of how it collects, uses or discloses personal information in the operation of its search engine service when it presents search results in response to an individual's name.

[37] The only direct result or effect of the answer to the questions raised in this reference will be to determine whether the OPC may proceed to investigate the complaint made against Google. The media parties are neither intended nor required to be bound by that result. The questions, as framed in the reference, can be effectually and completely settled without the presence of the media parties. The mere fact that consideration of the *Charter* protected right of freedom of expression may be involved in aid of interpreting the relevant provisions of *PIPEDA* does not make the media parties necessary for the full and effectual determination of all issues.

[38] Even assuming that the scope of the reference were to be expanded to include the issue of whether applying *PIPEDA* to Google's operation of its search engine to require it to deindex lawful content contravenes s 2(b) of the *Charter*, the Court would hesitate to conclude that the media parties' presence before it is necessary to fully and effectually determine all issues.

[39] The Court accepts, for the purpose of this argument, that deindexing may significantly affect the ability of content providers to reach their intended audience and for the public to access media content. Even as argued by the media parties, however, that is only the practical effect of the implementation of a recommendation to deindex. If deindexing is recommended or required, its implementation does not require that any action be compelled from or prohibited against the media parties, any other content provider, or any user of the search engine. The only action required would be by Google. Deindexing could and would produce its effect without the need for the other persons "affected" by it to be "bound" by the result of the proposed expanded reference.

[40] The impact of a potential deindexing requirement may be significant, but it does not affect the media parties any more directly than it would affect other content providers or those who use Google's search engine service to gain access to content. To hold that the media parties are, by reason of the practical effect of a decision, necessary to the full and effectual determination of all issues would require that all others that are equally affected also be recognized as necessary parties and be made parties to the reference.

[41] The absurdity of such a result illustrates that the interest the media parties seek to have recognized on this motion should more properly be construed as the interest of an intervener rather than that of a party. To paraphrase the passage cited in *Stevens* above, the interest expressed by the media parties is the interest of one that has relevant evidence to give or has an interest in the correct solution of some question and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately. That kind of interest may well support a motion for leave to intervene, but it does not make one a necessary party to a proceeding.

[42] The Court thus concludes that the media parties ought not to be added as parties to the reference.

V. Should the media parties be granted intervener status?

[43] The media parties seek, as an alternative relief, that they be granted intervener status with the right to file evidence, cross-examine and otherwise participate as parties to the proceeding. The media parties' arguments on that issue focus on the factors identified by the Federal Court of Appeal as relevant to the exercise of the Court's discretion to grant leave in *C.U.P.E. v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 as follows:

> a. Is the proposed intervener directly affected by the outcome?
>
> b. Does there exist a justiciable issue and a veritable public interest?
>
> c. Is there an apparent lack of any other reasonable or efficient means to submit the question of the Court?

d. Is the position of the proposed intervener adequately defended by one of the parties to the case?

e. Are the interests of justice better served by the intervention of the proposed third party?

f. Can the Court hear and decide the cause on its merits without the proposed intervener?

[44] In their analysis of how the factors apply to this case, the media parties rely, in large part, on the same flawed assumptions as to what is truly at issue in the reference. For that reason, the media parties' submissions are largely irrelevant and inapplicable to the reference as currently framed. To the extent the media parties' request to be granted intervener status assumes that the scope of the reference is as wide as that sought by Google in its pending motion, the media parties' motion for leave to intervene is clearly premature.

[45] Assessing the media parties' motion for leave to intervene on the reference as currently framed, is however problematic, because the media parties have failed to comply with the basic requirements of Rule 109(2)(b), which provides that:

(2) Notice of a motion [for leave to intervene] shall	(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :
(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of the 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.

[46] The media parties say that they wish to participate with all the rights of a party, including to file evidence, and assert generally that their evidence and perspective are "necessary", "important" and "distinct" from the other parties'. However, they do not otherwise describe what evidence they would propose to file, or what argument they would propose to make. They do not describe how any evidence they might lead or any argument they might make would assist in the determination of a factual or legal issue.

[47] It seems to the Court that the media parties have not given much thought to what they would have to contribute to the determination of the reference if it were limited to the questions as currently framed in the Notice of Application. Indeed, given that the issues currently framed in the reference focus on whether Google's operation of its search engine is a commercial activity and the purpose for which Google collects, uses or discloses personal information, it is not clear what evidence the media parties might be able to contribute that might assist the Court's determination. Asked at the hearing to state the position they might take in respect of each of the questions as framed in the reference, counsel for the media parties candidly admitted that they could not provide an answer, having not even seen the evidentiary record constituted by the Privacy Commissioner for the purpose of the reference.

[48] The media parties' inability to explain the nature of the evidence they would intend to file or of the argument they would propose to make on the reference as currently framed is fatal to their motion. Absent that information, there is no basis on which the Court might conclude that this evidence or those arguments would be of assistance, would not otherwise be brought by the other parties and would not merely be a duplication of Google's efforts.

[49] The media parties' request for leave to intervene on Google's motion to vary the scope of the reference is similarly afflicted and doomed to fail. The media parties have not described what they might contribute, in terms of evidence or argument, to Google's motion that might be distinct from Google's own contribution, or helpful to the Court's determination of that motion. They have not even put Google's motion materials before the Court.

[50] Furthermore, the Court notes that interveners are as "guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way" (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 174 at para 54; see also *Canada v Canadian Doctors for Refugee* above at para 19). Accordingly, they should be expected to wait until the table is set before requesting a seat at it. It would be highly irregular for a non-party to be allowed to intervene for the purpose of supporting a party's efforts to expand the scope of the proceedings. The Court should only contemplate doing this when the proposed intervener's contribution is well-defined and the Court is satisfied that this contribution is relevant, important and in the interest of justice. That is not the case here.

ORDER

THIS COURT ORDERS that:

1. The motions of the Canadian Broadcasting Corporation and of the Media Coalition are dismissed, with leave for them to reapply for leave to intervene following the determination of Google's motion to vary the scope of the reference.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1779-18
STYLE OF CAUSE:	IN THE MATTER OF a reference pursuant to subsection 18.3(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of questions or issues of law and jurisdiction concerning the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 that have arisen in the course of an investigation into a complaint before the Privacy Commissioner of Canada THE PRIVACY COMMISSIONER OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 11, 2019
ORDER AND REASONS:	TABIB P.
DATED:	MARCH 1, 2019

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