Court File No. 41538

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

FACEBOOK, INC.

APPELLANT
(Respondent)

- and -

PRIVACY COMMISSIONER OF CANADA

RESPONDENT
(Appellant)

FACTUM OF THE INTERVENER, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

Pursuant to Rule 42 of the Rules of the Supreme Court of Canada

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Samuelson-Glushko Canadian Internet
Policy & Public Interest Clinic (CIPPIC)
University of Ottawa, Faculty of Law
Common Law Section
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

David Fewer
Melissa Dupuis-Crane

Tel: +1 (613) 562-5800 x2558
Email: dfewer@uottawa.ca
mdupuis7@uottawa.ca

Counsel for the Intervener

TO: **THE REGISTRAR**

AND TO: **McCarthy Tétrault LLP**
2400-745 Thurlow Street
Vancouver, BC V6E 0C5

Michael A. Feder, K.C
Gillian P. Kerr
Barry Sookman
Daniel G.C. Glover
Connor Bildfell

Tel: +1(604) 643-5983
Email: mfeder@mccarthy.ca
gkerr@mccarthy.ca
bsookman@mccarthy.ca
dglover@mccarthy.ca
cbildfell@mccarthy.ca

Counsel for the Appellant

Borden Ladner Gervais LLP
1300-100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: +1(613) 787-3562
Email: neffendi@blg.com

Agent for the Appellant

AND TO: **Goldblatt Partners LLP**
1400-270 Albert Street
Ottawa, ON K1P 5G8

Peter Engelmann
Colleen Bauman

Tel: +1(613) 235-5237
Email: pengelmann@goldblattpartners.com
cbauman@goldblattpartners.com

Office of the Privacy Commissioner of Canada
30 Victoria Street
Gatineau, QC K1A 1H3

Louisa Garib
Lucia Shatat
Nadia Sayed

Tel: +1(819) 664-4731
Email: louisa.garib@priv.gc.ca
lucia.shatat@priv.gc.ca
nadia.sayed@priv.gc.ca

Counsel for the Respondent

AND TO: **Jensen Shawa Solomon Duguid Hawkes LLP**
800, 304-8th Avenue SE
Calgary, AB T2P IC2

Glenn Solomon, K.C.

Tel: +1(403) 571-1507
Email: gsolomon@jssbarristers.ca

Counsel for the Intervener, Saul Benary

Supreme Advocacy LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, K.C.

Tel: +1(613) 695-8855 x1-2
Email:
emeehan@supremeadvocacy.ca

Agent for the Intervener, Saul Benary

AND TO: **Lemers LLP**
225 King Street West, Suite 1600
Toronto, ON M5Y 3M2

Jennifer Hunter

Tel: +1(416) 601-2659
Email: jhunter@lemers.ca

Counsel for the Intervener, Canadian Civil Liberties Association

Gowling WLG (Canada) LLP
2600-160 Elgin Street
Ottawa, ON K1P 1C3

Graham Ragan

Tel: +1(613) 786-8699
Email:
graham.ragan@gowlingwlg.com

Agent for the Intervener, Canadian Civil Liberties Association

AND TO: **Arvay Finlay LLP**
1512-808 Nelson Street Box 12149
Nelson Square
Vancouver, BC V6V 2H2

Kate R. Phipps

Tel: +1(604) 696-9828
Email: kphipps@arvayfinlay.ca

Counsel for the Intervener, Office of the Information and Privacy Commissioner for British Columbia

Gowling WLG (Canada) LLP
2600-160 Elgin Street
Ottawa, ON K1P 1C3

Matthew Estabrooks

Tel: +1(613) 786-0211
Email:
matthew.estabrooks@gowlingwlg.com

Agent for the Intervener, Office of the Information and Privacy Commissioner for British Columbia

AND TO: **Mouvement Legal, Inc.**
6560 avenue de l'Esplanade, Bureau 305
Montreal, QC H2V 4L5

Mark Phillips

Tel: +1(514) 441-5054
Email: mark@mouvement.legal

Counsel for the Intervener, British Columbia Civil Liberties Association

Champ and Associates
43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy

Tel: +1(613) 237-4740
Email: broy@champlaw.ca

Agent for the Intervener, British Columbia Civil Liberties Association

AND TO: **Belleau Lapointe LLP**
300 Place d'Youville, Bureau B-10
Montreal, QC H2Y 2B6

Violette Leblanc

Tel: +1(514) 987-6700
Email: vleblanc@belleaulapointe.com

Counsel for the Intervener, Option consommateurs

Michael J. Sobkin
331 Sommerset Street West
Ottawa, ON K2P 0J8

Tel: +1(613) 282-1712
Email: msobkin@sympatico.ca

Agent for the Intervener, Option consommateurs

AND TO: **Stockwoods LLP**
TD North Tower, Suite 4130
77 King Street West, PO Box 140
Toronto, ON M5K 1H1

Justin Safayeni

Tel: +1(416) 593-3494
Email: justins@stockwoods.ca

Counsel for the Intervener, Centre for Free Expression

Conway Baxter Wilson LLP
411 Roosevelt Avenue, Suite 400
Ottawa, ON K2A 3X9

David P. Taylor

Tel: +1(613) 288-0149
Email:
dtaylor@conwaylitigation.ca

Agent for the Intervener, Centre for Free Expression

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PART I – OVERVIEW

1. For two decades, courts interpreting the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*") have stated that they "balance" privacy rights against commercial interests.[1] The language of "balance"—absent from the statute itself—has led decision-makers to treat the right of privacy and the profit motive of commerce as competing values of equal import.

2. The right of privacy embodies the aspirational values of democratic governance: integrity, dignity, autonomy, and personal growth.[2] *PIPEDA* vindicates privacy—a human right and a constitutional right.[3] As this Court affirmed in *R v Bykovets* ("*Bykovets*"), digital data reveals the "biographical core" of the individual.[4] Parliament designed *PIPEDA* to protect privacy against marketplace power by entitling individuals to control dealings with their personal information. Certainty over privacy entitlements reduces risk and promotes the flourishing of commerce.

3. Human rights statutes demand a large and liberal interpretation. They do not invite courts to "balance" rights and profits. CIPPIC proposes an interpretive approach to *PIPEDA* grounded in the text of the Act. *PIPEDA*'s purpose clause, section 3, recognizes the "need" of organizations in the context of commerce, but subordinates that need to the "right of privacy". This relationship dictates the interpretation of *PIPEDA*'s justification clause, section 5(3). An organization must demonstrate that its dealings with personal information are both objectively appropriate and strictly necessary to fulfill a legitimate purpose. This interpretation prevents the "wants" of business models from overriding constitutional and human rights and ensures that a mere "click" cannot validate an illegitimate purpose.

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[1] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*].
[2] *R v Dyment*, 1988 CanLII 10 (SCC); *R v Bykovets*, 2024 SCC 6 [*Bykovets*].
[3] We use "fundamental right" as shorthand for a right that is both constitutional and human.
[4] *Bykovets*, *supra* note 2 at para 7.

PART II – POSITION ON APPELLANT'S QUESTIONS

4. CIPPIC takes no position on the ultimate disposition of this appeal. CIPPIC intervenes solely to assist the Court in identifying *PIPEDA*'s appropriate interpretive framework.

PART III – STATEMENT OF FACTS

5. CIPPIC accepts and adopts the statement of facts as set out in the Factum of the Respondent, the Privacy Commissioner of Canada.

PART IV – STATEMENT OF ARGUMENT

A. *PIPEDA* vindicates privacy, a constitutional right and a human right

i. Privacy embodies constitutional values

6. Privacy is not a creature of statute; it is a constitutional right recognized in Section 8 of the *Charter*.[5] While *PIPEDA* applies to private actors, its protections embody constitutional norms.

7. In *R v Spencer* ("*Spencer*") and *Bykovets*, this Court rejected the notion that digital information is innocuous.[6] This Court held that such data provides a digital window into the private life of the individual, revealing intimate details of their "biographical core."[7] In *Spencer*, this Court held that privacy includes the right to control the dissemination of one's information.[8]

8. The privacy intrusions of commercial platforms are functionally identical to those of the state. Both involve the collection, aggregation, sharing, and analysis of digital identifiers, to similar effect. If the *Charter* protects this data from the state to preserve "dignity, autonomy, and personal growth," then *PIPEDA* must protect it from commercial actors for the same reasons.[9]

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[5] *Canadian Charter of Rights and Freedoms*, s 8, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 8.
[6] *R v Spencer*, 2014 SCC 43 [*Spencer*]; *Bykovets*, *supra* note 4.
[7] *Bykovets*, *supra* note 2 at para 7.
[8] *Spencer*, *supra* note 6.
[9] *Ibid* at para 29.

9. In *Bykovets*, this Court confirmed that privacy is normative, not descriptive.[10] Democratic values determine the content of privacy rights, not what remains after satiating the demands of annual revenue growth. Technology and commercial opportunism cannot define the right.[11] *PIPEDA* demands a normative approach that preserves privacy against commercial appetites.

10. Privacy is a human right.[12] *PIPEDA* is human rights legislation. In *Winnipeg School Division No 1 v Craton*, this Court identified human rights legislation by its "special nature."[13] As "public and fundamental law of general application," it declares public policy on matters of general concern.[14]

11. *PIPEDA* is fundamental law. It is not a regulatory silo like the *Bank Act*, but a quasi-constitutional code governing the collection, use, and disclosure of personal information across the digital economy.[15] This function is even more crucial today as technological power destabilizes democratic norms. This Court recognizes that the privacy values first identified in public law apply equally in private law. As this Court noted in *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401* ("*United Food Workers*"), the ability to control one's personal information is "intimately connected to individual autonomy, dignity and privacy."[16]

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[10] *Bykovets*, *supra* note 2 at para 120.
[11] *Ibid* at paras 48, 52.
[12] Teresa Scassa, "A Human Rights-Based Approach to Data Protection in Canada", in Elizabth Dubois & Florian Martin-Bariteau, eds, *Citizenship in a Connected Canada: A Research and Policy Agenda* (Ottawa: University of Ottawa Press, 2020); House of Commons, Standing Committee on Access to Information, Privacy and Ethics, *Evidence*, 44-1, No 5 (7 February 2022) at 11:35 (Daniel Therrien).
[13] 1985 CanLII 48 (SCC) at 156.
[14] *Ibid*.
[15] *Bank Act*, SC 1991, c 46.
[16] 2013 SCC 62 [*United Food Workers*].

12. This constitutional reading of *PIPEDA* aligns with Canada's international commitments. The *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* recognize privacy as a fundamental human right.[17] These instruments demand that courts interpret privacy laws as shields for human dignity, ensuring the right is effective and realizable.

ii. Human rights legislation requires a large and liberal interpretation

13. Rights-vindicating statutes require a large and liberal interpretation. The classification of *PIPEDA* as human rights legislation determines the interpretive approach. As *Ontario Human Rights Commission v Simpsons-Sears* established, courts must look to the "broad purposes" of human rights legislation and interpret exceptions narrowly.[18]

14. Interpretation of *PIPEDA* should not engage a neutral, administrative approach that treats the right to privacy and an organization's interest in profiting from personal information extraction as equal policy goals. The legislative record confirms that Parliament intended to enact a fundamental protection. In introducing the legislation, the Minister of Industry explicitly stated that the drafters designed *PIPEDA* to "set a high standard in Canada for privacy protection."[19] This aligns with the evidence of then-Privacy Commissioner Bruce Phillips, who reminded Parliament that privacy is a "bedrock value [...] at the heart of liberty in a modern state."[20]

15. This interpretive understanding is consistent with the stated purpose of the Act's Preamble to "support and promote electronic commerce by protecting personal information."[21] The latter

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[17] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, art 12; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 17 (entered into force 23 March 1976).
[18] 1985 CanLII 18 (SCC) at para 12.
[19] House of Commons Standing Committee on Industry, *Evidence*, 36-1, No 76 (1 December 1998) at 15:55 (Hon. John Manley).
[20] House of Commons Standing Committee on Industry, *Evidence*, 36-1, No 77 (2 December 1998) at 16:05.
[21] *PIPEDA*, *supra* note 1.

achieves the former. *PIPEDA* crafts the mechanism commerce needs—meaningful consent—to fulfil individuals' requests implicating personal information. Privacy recognition creates the certainty that commerce requires.

iii. The content of the right must evolve with social reality

16. Interpretation of *PIPEDA* must evolve with social reality. As this Court affirmed in *R v 974649 Ontario Inc*, preserving Parliament's intention "requires a dynamic approach [...] sensitive to evolving social and material realities."[22] Parliament enacted the statute before the emergence of social networking, targeted advertising, and surveillance capitalism. The content of "meaningful consent" cannot be the same in 2026 as it was in 2000. CIPPIC proposes an interpretation of the Act's rights-vindicating provisions that addresses these new realities, ensuring that privacy protection remains effective against the extraction mechanisms of the modern digital economy.

17. To address these realities, the text establishes a strict hierarchy. Section 3 states *PIPEDA*'s purpose is to establish rules "in a manner that recognizes the right of privacy of individuals [...] and the need of organizations."[23] Parliament chose its words carefully: a "right" creates a duty, while a "need" describes a motive. The "need" of the organization defines the context (commercial activity), but it remains subordinate to the "right" of the individual. *PIPEDA* further constrains the organization's "need" to those dealings that are "for purposes that a reasonable person would consider appropriate in the circumstances."

B. The "balance" metaphor asks the wrong question

18. Despite this explicit hierarchy, courts have routinely imported a balancing exercise the statute does not support. The decisions below typify this approach. The Federal Court of Appeal,

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[22] 2001 SCC 81 at para 38.
[23] *PIPEDA*, *supra* note 1, s 3.

for example, held that "[t]he legislation requires a balance, not between competing rights, but between a need and a right."[24] This framing treats privacy and commerce as competing values of equal weight. *PIPEDA* does not balance two rights; it protects a fundamental right while regulating commercial activity.

19. The language of "balance" entered the jurisprudence through *Englander v Telus* ("*Englander*").[25] In that decision, the Federal Court of Appeal relied heavily on academic commentary and drafting history to characterize the Act as a compromise.[26] However, this reliance on external aids obscured the text. *PIPEDA* does not ask courts to balance two rights. It protects a right (privacy) and regulates an activity (commerce).

20. In *Eastmond v Canadian Pacific Railway* ("*Eastmond*"), the Federal Court endorsed an alternative interpretational approach offering fidelity to the text of the legislation. There, the Court confirmed that section 5(3) requires a justification approach.[27] However, the "balancing" metaphor from *Englander* eroded the rigour of that framework. Decision-makers now view *Eastmond* through a lens of compromise rather than justification.[28] This misapplication risks allowing an organization's "wants" to masquerade as statutory "needs," effectively bypassing justification.

21. When this Court performs a balancing exercise, as in *United Food Workers*, it does so to reconcile competing constitutional rights.[29] That logic does not apply here. An organization's

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[24] *Canada (Privacy Commissioner) v Facebook, Inc.*, 2024 FCA 140 at para 62. See also among others *State Farm Mutual Automobile Insurance Company v Privacy Commissioner of Canada*, 2010 FC 736 at para 101; *Wansink v TELUS Communications Inc.*, 2007 FCA 21 at para 10; *Google LLC v Canada (Privacy Commissioner)*, 2023 FCA 200 at para 8.

[25] 2004 FCA 387.

[26] *Ibid* at paras 40-46.

[27] 2004 FC 852 at paras 13, 127.

[28] See: *Nammo v TransUnion of Canada Inc.*, 2010 FC 1284; *Wansink v Telus Communications Inc.*, 2007 FCA 21; *AT v Globe24h.com*, 2017 FC 114.

[29] *United Food Workers*, *supra* note 16.

commercial interest is a "need" the statute recognizes, but not a "right" that competes with the values of integrity, dignity, autonomy, or personal growth.

22. *Royal Bank of Canada v Trang* ("*Trang*") models the correct approach: this Court conspicuously did not use the "balance" metaphor to describe the Act's purpose.[30] Instead, this Court adhered faithfully to the statutory text: the Act "recognizes" rights and needs. "Recognition" implies distinct existence, not trade-offs. By importing a balancing test, *Englander* introduced an interpretational mechanism that Parliament did not create and that this Court did not endorse.

23. Where Parliament intends to subject a right to a balancing exercise, it says so. For example, in the *Strengthening Environmental Protection for a Healthier Canada Act*, Parliament recognized a "right to a healthy environment" but expressly instructed that the Government "may balance that right with relevant factors."[31] Similarly, the *Conflict of Interest* Act includes a specific provision titled "Balancing" that lists the factors a decision maker "shall consider" in weighing competing interests.[32] PIPEDA offers no such instruction.

C. Sections 3 and 5(3) require a rigorous justification framework

24. Section 5(3) acts as *PIPEDA*'s justification clause. To determine if a purpose is "appropriate," the Court must apply a rigorous interpretive framework arising from the interplay between the "need" in Section 3 and the "appropriateness" in Section 5(3).

25. Courts have consistently held that mere convenience or preference cannot displace rights. While the specific mechanics vary by context, the core logic remains constant. In *R v Oakes* ("*Oakes*"), this Court established that the state must reasonably and demonstrably justify limits on

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[30] 2016 SCC 50.
[31] *Strengthening Environmental Protection for a Healthier Canada Act*, SC 2023, c 12.
[32] *Conflict of Interest Act*, SC 2006, c 9, s 39.

Charter rights, necessitating a proportionality analysis.[33] Similarly, in *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, this Court adapted the justification analysis to the private sector in a human rights context, requiring an employer to prove that a discriminatory standard is reasonably necessary to accomplish a legitimate goal.[34]

26. *PIPEDA* vindicates both constitutional values and human rights, and so its interpretation similarly requires this justificatory approach. Parliament did not enact *PIPEDA* in a vacuum. By using the normative language of "appropriateness" and "need," Parliament signaled that the Act belongs to this broader family of justification statutes. The Court need not invent a new standard; it need only apply the rigorous logic of justification that permeates Canadian law.

27. The resulting interpretive approach for *PIPEDA* must therefore employ elements common to all justification frameworks. A purpose is only valid if it satisfies both the statutory precondition of "need" and the normative standard of "appropriateness." Consequently, CIPPIC proposes a two-part interpretive inquiry evaluating: (i) whether the organization's dealing with personal information is strictly necessary to satisfy a legitimate need; and (ii) whether a reasonable person would find the organization's objective and means appropriate.

i. Necessity and Rational Connection

28. The organization must prove that the collection is strictly necessary to satisfy a legitimate "need." This requirement flows directly from Section 3, which recognizes "the need of organizations to collect, use or disclose personal information." The use of the word "need" establishes a high threshold. Parliament did not protect the "wants," "interests," or "convenience"

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[33] 1986 CanLII 46 (SCC).
[34] 1999 CanLII 652 (SCC).

of organizations; it recognized their needs. An organization must demonstrate that the collection of data is necessary for a purpose rationally connected to the provision of the service offered.

29. This framework invites the Court to distinguish between the requirements of the service and the requirements of the business model. While organizations are free to innovate, they cannot claim a statutory "need" to erode privacy rights merely to establish a revenue stream. If the organization can deliver a service free of personal information dealings, the "need" does not exist.

ii. Appropriateness

30. The organization must also demonstrate that the manner of collection is normatively appropriate. This inquiry addresses the requirement in Section 5(3) that organizations collect, use, or disclose personal information only for "purposes that a reasonable person would consider appropriate in the circumstances."

31. "Appropriateness" is a normative inquiry into the propriety of the organization's conduct. Even if the organization establishes a "need" under the first branch, the way the organization pursues that need must be appropriate. As in *Oakes*, a reasonable person would not consider an intrusion appropriate if the "severity of [its] deleterious effects" are disproportionate to the objective.[35]

32. Appropriateness therefore requires the organization to adopt the least invasive means available. If an organization chooses a method of data collection that is more invasive than necessary, it has failed to act in a manner that a reasonable person would consider appropriate. This framework ensures that the "need" of the organization validates the goal, while the "right" of the individual dictates the boundaries of the means.

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[35] *Oakes*, *supra* note 33 at para 71.

D. Consent cannot cure an illegitimate purpose

33. *PIPEDA* has not adopted the contractual standard of consent. As this Court noted in *Douez v Facebook*, individuals lack bargaining power in contracts of adhesion.[36] *PIPEDA* corrects this asymmetry, replacing contractual standards with the robust standard of meaningful consent. It does so precisely because the law cannot allow the parties' inequality to undermine the importance of privacy values in a free and democratic society. Interpretation proceeds on this understanding.

34. Clicking "I agree" is not a valid waiver of fundamental rights. This argument relies on an inapplicable "freedom of contract" framework that substitutes the fiction of consent for meaningful consent. The law does not allow individuals to contract out of human rights in the workplace (*e.g.*, agreeing to discriminatory wages). Similarly, individuals cannot waive *Charter* rights without a clear, informed, and specific statement. *PIPEDA*'s inquiry is not whether the individual clicked "I agree," but whether they provided "meaningful consent" to an organization's dealings with their personal information. That inquiry exists to eliminate practices predicated on the predatory extraction and exploitation of personal information. Such practices undermine integrity, dignity, autonomy, and personal growth in the very ways Parliament enacted *PIPEDA* to prevent.

PART V – SUBMISSIONS CONCERNING COSTS

35. CIPPIC does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of January, 2026.

Melissa Dupuis-Crane

Counsel for the Intervener

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[36] 2017 SCC 33.

PART VI – TABLE OF AUTHORITIES

Statutory Provisions		
1.	*Bank Act*, SC 1991, c 46	11
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7.	*A.T. v. Globe24h.com*, 2017 FC 114	20
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