SCC Court File No: 37833

IN THE SUPREME COURT OF CANADA
[On Appeal from the Court of Appeal for Ontario]

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

- and -

RYAN JARVIS

RESPONDENT
(Respondent)

MOTION RECORD
OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC
(Motion for leave to intervene)

Pursuant to Rules 47 and 55 of the Rules of the Supreme Court of Canada

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NOTICE OF MOTION
OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC
(Motion for leave to intervene)

Pursuant to Rules 47 and 55 of the Rules of the Supreme Court of Canada

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TAKE NOTICE that the Proposed Intervener, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), hereby applies to a Judge of the Court pursuant to Rules 47, 55 and 59(2) of the *Rules of the Supreme Court of Canada*, SOR 2002/156, as amended, for an order:

1. granting CIPPIC leave to intervene in this appeal;

2. permitting CIPPIC to file a factum of no greater length than 10 pages;

3. permitting CIPPIC to present oral arguments for 10 minutes at the hearing of this appeal; and

4. any further or other order as said Judge or this Honourable Court may deem appropriate.

AND FURTHER TAKE NOTICE that the following documentary evidence will be relied upon in support of this motion:

1. the affidavit of Tamir Israel, Staff Lawyer at CIPPIC, sworn February 12th, 2018; and

2. such further and other material as counsel may advise and this Honourable Court may permit.

AND FURTHER TAKE NOTICE THAT this motion shall be made on the following grounds:

1. CIPPIC has a direct and significant interest in this appeal, and will leverage its expertise to provide useful submissions different from those of other parties to the appeal:

   (i) CIPPIC is a legal clinic with a mandate to advocate for the public interest on legal and policy issues arising at the intersection of law and technology. Included in this mandate is the concern that the interpretation of a "reasonable expectation of privacy" in the majority decision of the Ontario Court of Appeal is currently insufficient to protect Canadian youth, particularly girls and young women, who are vulnerable to voyeurism. This case raises distinct questions of statutory interpretation, and falls within CIPPIC's purview;

   (ii) since its founding in 2003, CIPPIC has participated in numerous legal and policy processes relating to digital privacy. This has included interventions before the courts, testimony before parliamentary committees, appearances in quasi-judicial processes, as well as participation in various international policy-making fora on related issues;

   (iii) the matters raised by this appeal have implications that extend beyond those of the immediate parties. CIPPIC has a special and direct interest in these broader implications, arising from its mandate. This case raises important issues about the right to a reasonable expectation of privacy, what that right should entail, and how such rights will affect the privacy afforded to Canadian youth, particularly girls and young women;

   (iv) if granted leave to intervene, CIPPIC will draw on its extensive institutional expertise in matters related to privacy, technology facilitated violence, surveillance and youth, in order to

provide useful submissions that are different from those of other parties; and

(v) this Court has recognized CIPPIC's contributions to and expertise in this field by granting it intervener status on a number of prior occasions involving privacy issues including *Douez v Facebook Inc*, 2017 SCC 33, which addressed privacy concerns in a claim with respect to online content, *AB v Bragg Communications Inc*, 2012 SCC 46, which addressed the need to protect the privacy rights of a young victim of technology facilitated violence, and *R v Marakah*, 2017 SCC 59 and *R v Jones*, 2017 SCC 60, which addressed the expectation of privacy in personal text messages;

2. if granted leave, CIPPIC proposes to contextualize this case within rapidly evolving jurisprudence addressing privacy rights afforded to Canadians;

3. CIPPIC will frame the analysis necessitated by the voyeurism provision within the broader framework of perspectives on privacy, including those relating to torts and s. 5(3) of PIPEDA. This case raises important issues about the right of Canadians to be free from sexualized surveillance in public and quasi-public places, a right that is especially important for Canadian youth (particularly girls and young women) who are disproportionately impacted by such harmful behaviour. These issues will be of fundamental importance as technologies continue to facilitate increasingly invasive and pervasive mechanisms for watching and recording others;

4. the proposed intervention will not cause delay or prejudice to the parties;

5. CIPPIC does not seek costs and asks that it not be liable for costs to any other party in the event it is granted leave to intervene in this appeal;

6. Rules 47, 55, 57, 59 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, *as amended*; and

7. such further and other grounds as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of February, 2018.

[original signed]

David Fewer
Jane Bailey

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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the supporting documents of the application for leave to appeal, then the Respondent may serve and file the response to the motion together with the response to the application for leave.

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RESPONDENT
(Respondent)

AFFIDAVIT OF TAMIR ISRAEL

I, Tamir Israel, of the City of Ottawa, DO SOLEMNLY AFFIRM THAT:

I. INTRODUCTION

1. I am Staff Lawyer at the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) based at the Centre for Law, Technology and Society (CLTS) at the University of Ottawa's Faculty of Law. This Affidavit is sworn in support of CIPPIC's motion for leave to intervene in this appeal.

2. Except as otherwise indicated, I have personal knowledge of the matters to which I depose in this Affidavit. Where I lack such personal knowledge, I have indicated the source of my information and I verily believe such information to be true. Where specific CIPPIC activities are referred to below in which I have had no personal participation, I have familiarized myself with the relevant files, and base my account thereof on this knowledge.

3. CIPPIC is a legal clinic founded at the University of Ottawa's Faculty of Law. It was established

in September 2003 with funding from the Ontario Research Network on Electronic Commerce and an Amazon.com *Cy Pres* fund. The purpose of CIPPIC's creation was to fill voids in public policy debates on technology law issues, ensuring balance in policy and law-making processes, and providing legal assistance to under-represented organizations and individuals on matters involving the intersection of law and technology. In 2007, CIPPIC received additional funding from the Samuelson-Glushko Foundation, enabling CIPPIC to continue fulfilling its mandate and to join the international network of Samuelson-Glushko technology law clinics.

4. CIPPIC operates under a Staff Lawyer and a Director, presently myself and David Fewer, respectively. Both are called to the bar of Ontario and work for CIPPIC full time. CIPPIC benefits from the expertise of an internal Advisory Committee composed of faculty members of the Centre for Law, Technology and Society, as well as of an external Advisory Board composed of five highly respected lawyers and academics in the technology law field across North America.

5. CIPPIC's core mandate is to advocate in the public interest in debates arising at the intersection of law and technology. CIPPIC has the additional mandate of providing legal assistance to under-represented organizations and individuals on law and technology issues, and a tertiary education-based mandate that includes a teaching and public outreach component. In pursuit of these mandates, CIPPIC's activities regularly extend to provision of expert testimony to parliamentary committees, participation in regulatory and quasi-judicial proceedings and strategic interventions before the courts. CIPPIC is also deeply involved in research and advocacy on the nature and social impact of technological change, and the manner in which the evolving legal landscape interacts with the distinct challenges of a technology-driven world.

6. Some of CIPPIC's general expertise in internet policy issues is described below, with particular emphasis on activities relating to privacy, surveillance, youth and technology facilitated violence. Specific CIPPIC experience on these issues includes active participation in relevant law reform venues such as the Law Commission of Ontario, where CIPPIC Director David Fewer currently sits on the Advisory Group of a multi-year project on "Defamation in the Age of the Internet."

7. CIPPIC has also participated in important national and international initiatives relating to technology and gender-based violence, including collaborating with SafetyNet Canada to produce the guide, *Privacy, Security, Confidentiality Social Media Considerations for Violence Against Women Programs*, and contributing to submissions filed in studies on online violence against women and girls carried out by the United Nations Special Rapporteur on Violence Against Women in 2017.

8. CIPPIC is additionally a partner within The eQuality Project, a 7-year Social Sciences and Humanities Research Council funded project examining youth's relationships and connections online. This project examines young Canadians' privacy interests, technology facilitated violence and harassment experienced by youth, and the legal responses to their digital issues. The eQuality Project is a partnership of scholars, research and policy institutes, policy makers, education and community organizers with expertise in the intersection of youth and technology.

9. The eQuality Project has been invited to share its expertise on technology policy issues, especially as they affect young people, with federal, provincial and territorial privacy commissioners, Global Affairs Canada, and the Law Society of Ontario. Scholars associated with The eQuality Project have published or presented over 50 academic papers, book chapters and reports on youth and technology issues, including gender-based privacy issues, defamation, and violence.

II. INSTITUTIONAL EXPERTISE

(a) Judicial

10. CIPPIC has been granted leave to intervene by this Court on previous occasions, including:

(i) *Her Majesty the Queen in Right of British Columbia v. Philip Morris International, Inc.*, SCC File No. 37524, on balancing privacy values with rights of discovery in tobacco litigation;

(ii) *Haaretz.com, et al v Mitchell Goldhar*, 2017 SCC File No 37202, on access to justice considerations arising in jurisdiction analysis;

(iii) *R v Jones*, 2017 SCC 60, on whether the *Charter* and Part VI of the *Criminal Code* apply to text messages sought from their recipient's service provider by law enforcement;

(iv) *R v Marakah*, 2017 SCC 59, on the reasonable expectation of privacy in the text messages sent from the defendant's cell phone to another recipient;

(v) *Douez v Facebook, Inc*, 2017 SCC 33, on protecting privacy rights implicit in the *Charter* from being overridden by non-negotiable forum selection clauses;

(vi) *Canadian Broadcasting Corporation v SODRAC 2003 Inc*, 2015 SCC 57, on the application of the technical neutrality principle where efficiencies gained from technological advancements impact on copyright laws;

(vii) *R v Fearon*, 2014 SCC 77, on the expectations of privacy attracted by mobile devices such as cell phones, and the resulting need to include safeguards in the historical doctrine that permits law enforcement to search incident to arrest;

(viii) *R v Chehil*, 2013 SCC 49 and *R v MacKenzie*, 2013 SCC 50, addressing the parameters of the reasonable suspicion standard in the context of the common law power to conduct a privacy-invasive search through the deployment of a drug detection dog;

(ix) *R v TELUS Communications Co*, 2013 SCC 16, on the need to adopt a flexible, purposive approach when applying Criminal Code protections intended to safeguard against the interception of private communications to technologically advanced communications delivery methods in the context of SMS text messaging;

(x) *AB v Bragg Communications Inc*, 2012 SCC 46, on the need to ensure privacy rights are protected in the context of the open court principle, particularly in light of the greater risk to privacy posed by the online publication of judicial decisions and the heightened privacy interests of youth;

(xi) *Crookes v Newton*, 2011 SCC 47, wherein CIPPIC intervened to argue that more robust action than the mere posting of a hyperlink must occur before a hyperlink can be held to have published defamatory statements in the linked content; and

(xii) *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34, wherein CIPPIC intervened to address the appropriate adaptation of consumer contract law principles to an online environment so as to take into account unique internet issues, such as whether additional terms referenced through a hyperlink were 'external' to the contract.

11. CIPPIC has also been active in the courts as counsel to primary parties in proceedings implicating law and technology, privacy and/or violence more broadly, including:

(i) *Bell Canada v Amtelecom*, 2015 FCA 126, on the retrospective application of elements of the CRTC's Wireless Consumer Protection Code to pre-existing contractual relationships, in the context of a consumer protection regime imposed onto Wireless Service Provider contracts;

(ii) *Authors Guild v Google, Inc*, No. 05-Civ-8136 (DC) (S.D.N.Y. March 22, 2011), wherein CIPPIC acted on behalf of a group of independent Canadian authors and for the Canadian Association of University Teachers (CAUT) in opposing the proposed US-based class action settlement agreement that would have established an intermediary, Google, as a centralized hub for digital books, affecting the rights of international copyright holders, including Canadian authors, as well as the privacy rights of Canadians; and

(iii) *Lawson v Accusearch*, 2007 FC 125, wherein CIPPIC sought judicial review of the Office of the Privacy Commissioner's decision to refuse, on jurisdictional grounds, to exercise its investigatory mandate against a United States-based company collecting, using and disclosing the personal information of Canadians. CIPPIC argued that in an online world, territorial location cannot immunize an organization from the privacy protections guaranteed to Canadians by PIPEDA.

(b) Parliamentary Committees and Governmental Consultations

12. CIPPIC has had many opportunities to provide expert testimony to Parliamentary Committees and other governmental processes regarding the challenges posed by online environments, privacy and digital technologies for Canadians, a sampling of which includes:

(i) testimony before the House of Commons Standing Committee on Access to Information, Privacy & Ethics (ETHI), "Study: Personal Information Protection and Electronic Documents Act" (March 23, 2017);

(ii) testimony before the House of Commons Standing Committee on Access to Information, Privacy & Ethics (ETHI), "Bill C-51*: Security of Canada Information Sharing Act* (SCISA)" (November 22, 2016);

(iii) testimony before the House of Commons Standing Committee on Access to Information, Privacy & Ethics (ETHI), "Canada's Ageing *Privacy Act*: The Need for Modernization", (September 20, 2016); Report of the Standing Committee on Access to Information, Privacy & Ethics, "Protecting the Privacy of Canadians: Review of the *Privacy Act*", (December 2016), Fourth Report, 42nd Parliament, 1st Session;

(iv) testimony before the Legislative Assembly of British Columbia Special Committee to Review the *Freedom of Information and Protection of Privacy Act*, on the implications of recent trade agreements for legislative provisions aimed at protecting the privacy of government-held Canadian data in cross-border contexts (November 18, 2015);

(v) testimony before the House of Commons Standing Committee on Industry, Science and Technology (INDU), on Bill S-4: the Digital Privacy Act, addressing the need for strong and enforceable privacy rights and on the dangers of an overly permissive cyber security information-sharing regime (February 19, 2015);

(vi) testimony before the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) on the evolving privacy implications of social media (Study: Privacy and Social Media, June 19, 2012); and

(vii) testimony before the House of Commons Standing Committee on Industry, Science and Technology (INDU), on Bill C-27: Electronic Commerce Protection Act, addressing the regulation

of unsolicited electronic messages and the unauthorized installation of computer programs (September 28, 2009).

(c) Quasi-Judicial Tribunals

13. CIPPIC has participated in various activities before quasi-judicial administrative tribunals in pursuit of its objectives. A representative sample of CIPPIC's advocacy in this field includes:

(i) representation of the Open Media Engagement Network in *In re: An Applicant and the Vancouver Police Department*, BC OIPC File No: F15-63155, a written inquiry before the Information & Privacy Commissioner of British Columbia examining the refusal of the Vancouver Police Department to respond to an access to information demand requesting records relating to a surreptitious surveillance tool;

(ii) an intervention in *Application Regarding Vidéotron's Unlimited Music Zero Rating Service*, CRTC File Nos: 8661-P8-201510199 & 8622-V42-20150735 (September 1, 2015), regarding the potential impact on online innovation that would arise from a digital music platform operated by a mobile service provider; and

(iii) a complaint and ongoing intervention in *CIPPIC v Facebook*, PIPEDA Case Summary #2009-008, applying Canadian privacy laws, norms and principles to the new and emerging medium of online social networking.

(d) Academic Research & Public Education

14. CIPPIC has participated in research and advocacy initiatives that leveraged its expertise relating to technology assisted violence and privacy matters faced by youth and women, including:

(i) CIPPIC currently sits on the Advisory Group of a multi-year project on "Defamation in the Age of the Internet";

(ii) CIPPIC is an active participant in the eQuality Project, a 7-year project examining youth's relationships and connections online;

(iii) CIPPIC contributed to a submission to the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences in response to a call for submissions on technology facilitated violence against women (November 2, 2017);

(iv) CIPPIC's participation in SafetyNet Canada in collaboration with the British Columbia Society of Transition Houses (BCSTH) included contributions to a guide on privacy and security considerations for violence against women programs ("*Privacy, Security, Confidentiality Social Media Considerations for Violence Against Women Programs*, SafetyNet Canada/BC Society of Transition Houses, 2013);

15. In addition to its parliamentary, quasi-judicial and judicial activities, CIPPIC routinely advises and represents both individuals and organizations addressing a range of challenges related to youth, privacy and violence. CIPPIC has also participated in activities of the Law Foundation of Ontario and the United Nation's Special Rapporteur on Violence Against Women which have examined issues related to technology facilitated violence against women. CIPPIC's role in SafetyNet Canada included the generation of a guide for privacy and security for those operating programs for violence against women.

16. The eQuality Project, in which CIPPIC is a partner, regularly advises organizations, educators, and international bodies on policy issues related to youth, privacy and violence. Project members have presented research to the Office of the Privacy Commissioner of Canada, Global Affairs Canada, the Federal/Provincial/Territorial Information and Privacy Commissioners', the Law Commission of Ontario, the Law Society of Ontario and the United Nation's Special Rapporteur on Violence Against Women.

17. Through these activities, CIPPIC has had substantial impact to date on the development of privacy law and policy in Canada. CIPPIC expertise is further supplemented by its faculty advisors and, more generally, its access to the University of Ottawa's Faculty of Law and Centre for Law, Technology and Society.

III. CIPPIC'S INTEREST IN THIS APPEAL

18. CIPPIC's historical concern regarding public policy issues arising at the intersection of law and technology places this appeal squarely within its mandate. Its enduring interest in protecting individuals' privacy rights, engaging with security surveillance stakeholders, and understanding newly developing technologies that allow individuals to collect and store personal data, is best reflected in CIPPIC's extensive contributions to policy and legal discussions around such matters. The interpretation of a "reasonable expectation of privacy" raises broad implications for the general public, especially women, young people, and other vulnerable targets of voyeurism, extending beyond those of the parties to this appeal.

IV. POSITION AND PROPOSED SUBMISSIONS

19. If granted leave to intervene, CIPPIC would make three related arguments that frame the interpretation of "reasonable expectation of privacy" with jurisprudence on the concept and importance of privacy for young people, especially girls and young women in schools.

20. First, CIPPIC would frame the *normative* analysis of privacy in this case in a manner that: (i) is respectful of and consistent with other *Charter* rights such as equality and free expression; and (ii) ensures that developments in surveillance technology (such as cameras in schools) are not mechanistically presumed to undermine privacy rights. In particular, CIPPIC would assist the Court by highlighting jurisprudence that recognizes the disproportionately negative impact that voyeuristic sexual harassment in schools (and elsewhere) can have on girls' and young women's rights to privacy and to free and equal participation in public life. CIPPIC would argue that this Court should recognize the unfair impact on young people of any presumption that surveillance cameras in schools necessarily diminish the reasonableness of students' privacy expectations, given that young people in Ontario who are under age 18 are statutorily required to attend school are not typically consulted about the installation of surveillance cameras in their learning environments.

21. Second, CIPPIC would frame the *contextual* analysis of privacy in this case in a manner that: (i)

attends to a *variety* of factors (rather than largely focusing on location); and (ii) questions the wisdom of any presumption that being "in public" necessarily negates any reasonable expectation of privacy. In particular, CIPPIC would assist the Court by presenting an approach to privacy that recognizes young people's conception of privacy as a social negotiation, rather than something that is dependent upon non-disclosure or not being seen. CIPPIC would refer to jurisprudence that recognizes material distinctions between being in view of others in a "public" space and the non-consensual making of a permanent, distributable digital record of one's presence in that space, showing again how such intrusions can disproportionately negatively affect children and youth, and girls and young women in particular. Additionally, CIPPIC would draw on statutory definitions and interpretations of privacy by this and other courts and tribunals to highlight that the existence of a relationship of trust and authority can be understood to elevate expectations of privacy, a factor of particular import for teacher/student interactions.

22. Third, CIPPIC would frame a *non-risked-based* analysis of privacy in this case in a manner that ensures that the privacy rights of targets of voyeurism are not determined by focusing on whether they took steps to avoid intrusion on their rights to bodily and sexual integrity. In this case, the appellate court below took a risk-based approach by suggesting that "upskirting" intruded upon privacy rights because targets had taken measures to conceal certain body parts with a skirt. CIPPIC would highlight jurisprudence and international human rights instruments to argue that girls' and young women's rights to free and equal participation in education and elsewhere in public life can be and have been compromised by analyses that tie recognition of their privacy rights to requirements of bodily concealment and forced modesty.

23. This case raises important issues about the right of Canadians, especially young Canadians, to be free from sexualized surveillance in public and quasi-public places, a right that is particularly important for girls and young women because they are disproportionately likely to be negatively affected by such behaviour. These issues will be of fundamental importance as technological developments facilitate increasingly invasive, pervasive and surreptitious mechanisms for watching and recording others. Finally, CIPPIC's proposed intervention does not raise any concerns that have

traditionally led this Court to refuse intervention. CIPPIC does not intend to expand the issues under appeal beyond those raised by the existing parties.

24. I make this Affidavit in support of CIPPIC's Motion for Leave to Intervene in this appeal and for no improper purpose.

SWORN before me at the City of Ottawa in the Province of Ontario this 12th day of February, 2018	)))	***[original signed]*** Tamir Israel

[original signed]

David A. Fewer, Commissioner for Taking Oaths

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MEMORANDUM OF ARGUMENT
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Part I – FACTS

A. OVERVIEW

1. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC") seeks an Order granting it leave to intervene in this appeal. This appeal raises issues with broad public policy implications for privacy, equality, and free expression in an atmosphere of increasingly ubiquitous technology-facilitated surveillance and harassment. In particular, its determination will affect the ability of Canadians to be free from sexualized surveillance and harassment in public and quasi-public places, with particular implications for the bodily and sexual integrity of women and young people because they are disproportionately likely to be targets.

2. In this case, CIPPIC is particularly well positioned to fill a void potentially left by the parties with respect to reasonable expectations of privacy because it is arguably contrary to the interests of both the respondent accused and the appellant Crown to argue for a robust understanding of privacy

for victims of voyeurism. Adoption of a robust conception of privacy for victims by this Court could undermine the respondent's desired outcome in this case, and become a precedent that could restrict the surveillance capacity of the state in future cases.

3. As such, by means of its proposed intervention, CIPPIC offers to assist the Court in its consideration of the internet policy and public interest issues by offering useful submissions different from those of the parties. In formulating these submissions, CIPPIC will draw on the unique and multi-faceted knowledge and expertise it has developed through its specialized activities in this area of law.

B. THE PROPOSED INTERVENER - CIPPIC

4. CIPPIC is a legal clinic based at the University of Ottawa's Centre for Law, Technology and Society. Its mandate is to advocate in the public interest where the law intersects with technology in ways that may detrimentally impact individuals and/or society as a whole. CIPPIC's advocacy and public outreach activities have extensively engaged matters relating to privacy rights (in both criminal and civil contexts), including with respect to young people's privacy and equality, facilitated gender-based violence, and ubiquitous surveillance.

> **Affidavit of Tamir Israel, "Israel Affidavit", sworn February 12th 2018, Motion Record, Tab 2, para 3 and 6**

5. Courts have regularly recognized CIPPIC's capacity to assist on questions relating to privacy, equality, free expression, and the public interest. In particular, CIPPIC has participated in a number of judicial proceedings in which privacy intersects with equality and free expression. These include: *AB v Bragg* 2012 SCC 46, which addressed the importance of balancing privacy and free expression in order to facilitate access to justice for young victims of sexualized cyberbullying; *Warman v Fournier* 2010 ONSC 2126, on the need to protect online identity in judicial processes in order to protect free expression; *R v Fearon* 2014 SCC 77, on reasonable expectations of privacy in cell phone content; *Douez v Facebook Inc*, 2017 SCC 33, on privacy concerns relating to digital content; and *R v Marakah*,

2017 SCC 59, on the reasonable expectation of privacy in text messages. With respect to equality, CIPPIC participated in *Haaretz.com v Goldhar* 2017 SCC File No. 37202, highlighting that the test for determining the assumption of jurisdiction in cases of online defamation could have important access to justice consequences for victims of violence who wish to seek legal redress.

Israel Affidavit, sworn February 12, 2018, Motion Record, Tab 2, para 10

6. Some of CIPPIC's general expertise on privacy and equality issues is described below, with particular emphasis on activities relating to young people's privacy and equality, facilitated gender-based violence, and ubiquitous surveillance. Specific CIPPIC experience on these issues includes interventions before courts on the reasonable expectation of privacy afforded to Canadians in both civil and criminal contexts, including in relation to young people (eg *AB v Bragg*). CIPPIC also participated in important national and international initiatives relating to technology and gender-based violence, including collaborating with SafetyNet Canada to produce *Privacy, Security, Confidentiality Social Media Considerations for Violence Against Women Programs*, and contributing to submissions filed in response to the call for submissions on violence against women and girls issued by the United Nations Special Rapporteur on Violence Against Women in 2017.

Israel Affidavit, sworn February 12, 2018, Motion Record, Tab 2, paras 7, 10, 14, 15 and 16

25. 7. CIPPIC is additionally a partner within The eQuality Project, a 7-year Social Sciences and Humanities Research Council funded project, which is co-led by members of the University of Ottawa's Centre for Law, Technology and Society, of which CIPPIC is also a part. The eQuality Project is focused on young people's privacy and equality in networked spaces and its work has included interviews, articles, book chapters and advocacy examining privacy interests, technology facilitated violence and harassment experienced by youth, and the legal responses to their digital issues. The eQuality Project is a partnership of scholars, research and policy institutes, policy makers, education and community organizers with expertise in the intersection of youth and technology.

Israel Affidavit, sworn February 12, 2018, Motion Record, Tab 2, paras 8, 9, 10 and 14

Part II – STATEMENT OF QUESTIONS AT ISSUE

8. The only issue before the Court in this motion is whether CIPPIC should be granted leave to intervene in this matter of public interest.

Part III - ARGUMENT

9. An applicant seeking leave to intervene before this Court must address two issues:

(i) whether the applicant has an interest in the issues raised by the parties to the appeal; and

(ii) whether the applicant's submissions will be useful to the Court and different from those of the other parties.

Reference re Workers' Compensation Act, 1983 (Nfld), **[1989] 2 SCR 335, para 8;** ***R v. Finta,*** **[1993] 1 SCR 1138, para 6;** ***Rules of the Supreme Court of Canada,*** **SO/2002-156, ss 55, 57(2)**

A. CIPPIC'S INTEREST IN THIS APPEAL

10. The matters raised by this appeal engage the privacy, equality and expressive rights of Canadians as they are affected by technologies that facilitate ubiquitous and pervasive surveillance that frequently results in enduring digital records that can result in especially negative outcomes for girls and women. These matters are all of central importance to CIPPIC's mandate, which is to advance technology law in the public interest. The resolution of this Appeal directly and seriously implicates this aspect of CIPPIC's work and mandate.

B. USEFUL AND DIFFERENT SUBMISSIONS

11. An applicant seeking leave to intervene before this Court must demonstrate that its proposed intervention will provide "useful and different submissions". This criterion is satisfied by an applicant who has a history of involvement in the issues raised by the appeal, giving the applicant expertise that can shed fresh light or provide new information on the matter.

Reference re Workers' Compensation Act, 1983 (Nfld), **[1989] 2 SCR 335, para 12**

12. CIPPIC's submissions will be useful because CIPPIC brings to these proceedings the experience of a legal clinic that has worked with various stakeholders in multi-faceted policy and law-making processes on matters concerning privacy rights (in both criminal and civil contexts), including with respect to: young people's privacy and equality, and facilitated gender-based violence, and ubiquitous surveillance. CIPPIC can therefore offer the Court a useful, public interest-oriented perspective on the issues raised in this Appeal.

Israel Affidavit, February 12th 2018, Motion Record, Tab 2, para 5, 6, 11, 12 and 14

13. CIPPIC's submissions will be different from those of the other parties. Should it be granted leave to intervene, it will confer with any other parties granted intervener status to ensure there is no duplication in submissions. CIPPIC's submissions will be informed by its extensive experience in law and policy relating to privacy and equality with particular emphasis on activities relating to young people's privacy and equality, facilitated gender-based violence, and ubiquitous surveillance. CIPPIC is eminently capable of assisting the Court by providing thoughtful submissions relating to reasonable expectations of privacy in the context of voyeurism. Further, it is also uniquely placed to offer a robust and equality-informed analysis of privacy, an analysis that is certainly not consistent with the immediate interests of the respondent accused and could conflict with the long term interests of the appellant crown with respect to law enforcement powers.

14. Finally, CIPPIC's proposed intervention does not raise any concerns that have traditionally led this Court to refuse intervention. CIPPIC does not intend to expand the issues under appeal beyond those raised by the existing parties. We outline our proposed intervention in the following paragraphs.

Israel Affidavit, sworn February 12th 2018, Motion Record, Tab 2, para 19 and 23

C. CIPPIC'S PROPOSED SUBMISSIONS

15. The phrase "circumstances giving rise to a reasonable expectation of privacy" found in the voyeurism section of the *Criminal Code* should be interpreted and applied according to this Court's well-established jurisprudence on privacy - jurisprudence that was not taken into account by the

majority decision of the Ontario Court of Appeal. This Court has stated that privacy is *normative*, *contextual*, and *not risk-based*. If granted leave to intervene, CIPPIC would make three related arguments that frame the interpretation of "reasonable expectation of privacy" with jurisprudence on the concept and importance of privacy for young people, especially girls and young women in schools.

***R. v. Jarvis*, 2017 ONCA 778**

16. First, CIPPIC would frame the *normative* analysis of privacy in this case in a manner that: (i) is respectful of and consistent with other *Charter* rights such as equality and free expression; and (ii) ensures that developments in surveillance technology (such as cameras in schools) are not mechanistically presumed to undermine privacy rights. In particular, CIPPIC would assist the Court by highlighting jurisprudence that recognizes the disproportionately negative impact that voyeuristic sexual harassment in schools (and elsewhere) can have on girls' and young women's rights to privacy and to free and equal participation in public life. CIPPIC would argue that this Court should recognize the unfair impact on young people of any presumption that surveillance cameras in schools necessarily diminish the reasonableness of students' privacy expectations, given that young people in Ontario who are under age 18 are statutorily required to attend school, and are not typically consulted about the installation of surveillance cameras in their learning environments.

17. Second, CIPPIC would frame the *contextual* analysis of privacy in this case in a manner that: (i) attends to a *variety* of factors (rather than largely focusing on location); and (ii) questions the wisdom of any presumption that being "in public" necessarily negates any reasonable expectation of privacy. In particular, CIPPIC would assist the Court by presenting an approach to privacy that recognizes young people's conception of privacy as a social negotiation, rather than something that is dependent upon non-disclosure or not being seen. CIPPIC would refer to jurisprudence that recognizes material distinctions between being in view of others in a "public" space and the non-consensual making of a permanent, distributable digital record of one's presence in that space, showing again how such intrusions can disproportionately negatively affect children and youth, and girls and young women in particular. Additionally, CIPPIC would draw on statutory definitions and interpretations of

privacy by this and other courts and tribunals to highlight that the existence of a relationship of trust and authority can be understood to elevate expectations of privacy, a factor of particular import for teacher/student interactions.

18. Third, CIPPIC would frame a *non-risked-based* analysis of privacy in this case in a manner that ensures that the privacy rights of targets of voyeurism are not determined by focusing on whether they took steps to avoid intrusion on their rights to bodily and sexual integrity. In this case, the appellate court below took a risk-based approach by suggesting that "upskirting" intruded upon privacy rights because targets had taken measures to conceal certain body parts with a skirt. CIPPIC would highlight jurisprudence and international human rights instruments to argue that girls' and young women's rights to free and equal participation in education and elsewhere in public life can be and have been compromised by analyses that tie recognition of their privacy rights to requirements of bodily concealment and forced modesty.

19. This case raises important issues about the right of Canadians, especially young Canadians, to be free from sexualized surveillance in public and quasi-public places, a right that is particularly important for girls and young women because they are disproportionately likely to be negatively affected by such behaviour. These issues will be of fundamental importance as technological developments facilitate increasingly invasive, pervasive and surreptitious mechanisms for watching and recording others.

PART IV– COSTS

20. CIPPIC will not seek costs in this matter and asks that costs not be awarded against it in this motion or in the appeal if leave to intervene is granted.

PART V– ORDER SOUGHT

21. CIPPIC respectfully requests an Order from this Court:

(i) granting CIPPIC leave to intervene in this appeal;
(ii) permitting CIPPIC to file a factum of no greater length than 10 pages;
(iii) permitting CIPPIC to present 10 minutes of oral argument at the hearing of this appeal; and

(iv) such further or other Order as deemed appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of February, 2018.

[original signed]

David Fewer
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PART VI– TABLE OF AUTHORITIES

Authority		*Reference in Argument*
	Cases	
1	*R. v. Jarvis*, 2017 ONCA 778 (CanLII), <http://canlii.ca/t/h6lql>	15
2	*Reference re Workers' Compensation Act, 1983 (Nfld.) (Application to intervene)*, [1989] 2 SCR 335, 1989 CanLII 23 (SCC), <http://canlii.ca/t/1ft35>	9, 11
3	*R. v. Finta*, [1993] 1 SCR 1138, 1993 CanLII 132 (SCC), <http://canlii.ca/t/1fs3t>	9
	Legislation	
4	*Rules of the Supreme Court of Canada*, SOR/2002-156, ss 55, 57(2) <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-156/page-9.html#h-69>	##