

The Applicability of the *Personal Information Protection and Electronic Documents Act* to De-Indexing Internet Search Engine Results

JESSICA PUSHKA

I. INTRODUCTION

The internet provides a wide platform for self-expression and access to information, which leads to concerns that certain personal information is publicly accessible when it should not be. In 2014, the Court of Justice of the European Union recognized an individual's 'right to be forgotten' on the internet through requiring internet search engines to remove (de-index) "no longer necessary" or "inaccurate, inadequate, irrelevant, excessive, or out-of-date" search results pertaining to an individual's name.¹ Eight months after the decision, 175,000 individuals in Europe requested for Google Inc. ("Google") to remove 600,000 internet links and forty percent of the requests were approved by the search engine.² De-indexing does not remove a website or image. Rather, it removes a Uniform Resource Locator ("URL") from displaying in the search engine results revealed by a specific search.

Presently, Article 17 of the European Union's Regulation 2016/679, the General Data Protection Regulation ("GDPR") provides a more comprehensive right to be forgotten on the internet through de-indexing

¹ *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (May 13, 2014), Doc. C-131/12 (European Court of Justice (Grand Chamber)) at para 93 [*Google Spain*]; Michael Rosenstock, "Is There a 'Right to Be Forgotten' in Canada's Personal Information Protection and Electronic Documents Act (PIPEDA)?" (2016) 14 CJLT 131 [*Right to Be Forgotten*].

² *Right to be Forgotten*, *Ibid.*

internet search engine results.³ In Canada, the Office of the Privacy Commissioner filed a reference in October 2018 with the Federal Court to receive a determination on whether Canadian federal privacy law applies to Google's search engine service.⁴ Specifically, the inquiry revolves around whether the *Personal Information Protection and Electronic Documents Act (PIPEDA)*,⁵ is applicable to Google's operation of its search engine service in which it indexes web pages and presents search results in response to searches of an individual's name.⁶ If *PIPEDA* does apply to internet search operations, it follows that Canadians have a right to request a de-indexing of specific URLs that are disclosed by Google when their own name is searched. A finding of *PIPEDA* applicability to Google would also be relevant to competitors executing comparable internet search engine indexing operations. This paper will explore why existing Canadian privacy law under *PIPEDA* applies to internet search engine de-indexing, among other concerns resulting from such an application including inter-jurisdictional impacts, potential conflict with freedom of expression rights, and the implementation of a de-indexing right under *PIPEDA*.

II. PIPEDA APPLICABILITY TO INTERNET SEARCH ENGINE INDEXING

The substance of *PIPEDA* is essentially a compromise between two competing interests: an individual's right to privacy protection and the commercial desire of organizations to access and collect personal data.⁷ Personal data enables companies to better target individuals with advertisements, improve market offerings and customer support, or generate

³ EC, *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016*, [2016] OJ, L 119/1, online: < <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN> > [https://perma.cc/FCT2-PPJP]. The legislation became effective in Member States on May 25, 2018.

⁴ Office of the Privacy Commissioner of Canada, Announcement, "Privacy Commissioner Seeks Federal Court determination on key issue for Canadians' online reputation" (10 October 2018), online: <www.priv.gc.ca/en/opc-news/news-and-announcements/2018/an_181010/> [perma.cc/X26H-U5AL].

⁵ *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [PIPEDA].

⁶ *Supra* note 4.

⁷ Michael Geist, *Internet Law in Canada*, 3rd ed, (Captus Press, 2002) at 303.

revenue from selling it to third parties. Part 1 of *PIPEDA* pertains to the protection of personal information in the private sector. Its purpose is to establish rules to govern how an organization may collect, use, or disclose personal information in commercial activities, and even then, only for purposes that a reasonable person would consider appropriate in the circumstances.⁸ The term “organization” includes “an association, a partnership, a person and a trade union”, as well as corporations.⁹ “Personal information” pertains to information about an identifiable individual and does not have to be sensitive or particularly private in nature, which is a resultantly broad classification.¹⁰

Per the parameters set out in *PIPEDA*, for the Act to pertain to a right to de-index search results, an internet search engine organization must be engaged in “commercial activity”.¹¹ In *State Farm Mutual Automobile Insurance Company v Privacy Commissioner of Canada* (“*State Farm*”), the Federal Court analyzed the issue of whether the collection of evidence by an insurer for one of its insured was considered a “commercial activity” under *PIPEDA*.¹² Collection of evidence is not considered commercial activity, as it is not a particular transaction, act or conduct that is of a commercial character; however, the Privacy Commissioner submitted that as the defendant had previously paid the insurer to defend a claim, the collection of evidence assumed a commercial character. The Court concluded that if the specific primary activity, or conduct, at issue is not a commercial activity under the definition in *PIPEDA*, then the activity, or conduct, remains exempt from *PIPEDA*.¹³ Thus the enterprise of providing insurance, while itself is commercial in nature, was considered incidental to the primary activity of

⁸ *PIPEDA*, *supra* note 5 at ss 3, 5(3).

⁹ *Ibid* at s 2(1). Note: this part does not apply to any government institution to which the *Privacy Act*, RSC, 1985, c P21 applies to; Barry Sookman, *Computer, Internet and Electronic Commerce Law*, revised ed (Toronto: Thomson Reuters, 1988) at c 8.16 [*Computer, Internet and Electric Commerce Law*].

¹⁰ *Computer, Internet and Electric Commerce Law, Ibid*.

¹¹ *PIPEDA*, *supra* note 5 at ss 2(1), 4(1)(a). “Commercial activity” means a transaction, act or conduct that is of a commercial character, including selling, bartering or leasing of donor, membership or other fundraising lists.

¹² *State Farm Mutual Automobile Insurance company v Privacy Commissioner of Canada*, 2010 FC 736 [*State Farm*].

¹³ *Ibid* at para 106.

evidence collection that was at issue in *State Farm*. Collecting evidence prior to defending a civil tort action was held to not be of a commercial nature and resultantly was not covered by *PIPEDA*.

It has been argued that search indexing is also not a “commercial activity” because search results are typically provided at no cost to the user nor the sites being indexed.¹⁴ It has been asserted that the activity of indexing content, developing algorithms to identify relevant results, and the display of those results fall outside a conventional commercial transaction.¹⁵ Following this line of thought is that results or advertising displayed among search results is a *secondary* independent activity to the indexing, ranking, and display of links on the search engine, which thus indicates a lack of commercial activity in search indexing itself.¹⁶

However, it is arguable that search engine indexing is much more related to commercial activity than critics of *PIPEDA* applicability suggest. Other commentary has indicated such a view: search engine results are generated for *commercial purposes* and “operate under fundamentally privatised, economic drivers ... open to manipulation, to abuse, to blocking and censorship.”¹⁷ The argument of search engine results operating under fundamentally privatised, economic drivers appears to be supported by Google’s 2017 financial results. The bulk of the company’s revenue came from its advertising service, Google AdWords, which provides advertising next to search results.¹⁸ The facilitation of paid advertising on search engine results

¹⁴ Michael Geist, “Why a Canadian right to be forgotten creates more problems than it solves” (26 January 2018), online: *The Globe and Mail* < <https://www.theglobeandmail.com/report-on-business/rob-commentary/why-a-canadian-right-to-be-forgotten-creates-more-problems-than-it-solves/article37757704/> > [perma.cc/7X8G-G623]; David T.S. Fraser, “You’d better forget the right to be forgotten in Canada” (28 April 2016), *Canadian Privacy Law (blog)*, online: < <https://blog.privacylawyer.ca/2016/04/you-d-better-forget-right-to-be.html> > [perma.cc/7TGL-T7TJ].

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Christopher Berzins, “The Right to Be Forgotten after Google Spain: Is It Coming to Canada?” (2015) 28 *Can. J. Admin. L. & Prac.* 267 at 281. See also: Julia Powles, “Jimmy Wales is wrong: we do have a personal right to be forgotten” (8 August 2014), online: *The Guardian* < <https://www.theguardian.com/technology/2014/aug/08/jimmy-wales-right-to-be-forgotten-wikipedia> > [perma.cc/UP3U-VKXX].

¹⁸ Eric Rosenberg, “How Google Makes Money (GOOG)” (26 October 2018), online: *Investopedia* < <https://www.investopedia.com/articles/investing/020515/business->

through Google AdWords depends on the indexing, ranking, and display of relevant links. Both paid and unpaid search results are offered to search engine users simultaneously via algorithms. It follows that the relationship between indexing and advertising is too intertwined for the advertising business to be considered of a secondary nature to actions of indexing and displaying links. Consequently, the activity of search engine indexing should be deemed to be of a commercial nature and therefore covered underneath *PIPEDA*.

III. CONTROL OF INFORMATION AND THE JOURNALISTIC, ARTISTIC, OR LITERARY EXEMPTION UNDER *PIPEDA*

Under *PIPEDA*, an organization is responsible for personal information *under its control*.¹⁹ Search engine operators must therefore be considered as having control over the information they process. Furthermore, the Act states that it does not apply to the personal information which any organization collects, uses or discloses for no other purpose but for journalistic, artistic or literary purposes.²⁰ It must be considered whether search engine providers remain exempted from the legislation on the basis of not actually controlling information or from being a collector, user, or discloser of personal information for no other purpose but for journalistic, artistic or literary purposes.

Previously the Supreme Court of Canada (“SCC”) has provided an opinion on the publishing of hyperlinks to a website. For the majority in *Crookes v Wikimedia Foundation Inc.* (“*Crookes*”), Justice Abella states that “a hyperlink, by itself, should never be seen as a ‘publication’ of the content to which it refers.”²¹ Search results are comprised of links which are then clicked on by users to visit various web pages. Under the SCC’s classification in *Crookes*, a search engine provider is not a publisher of the displayed and ranked results it provides through its search engine.²² If a search engine provider is not a publisher, then it is difficult to make the connection that search engines have control of the information they index and that *PIPEDA* is applicable.

google.asp > [perma.cc/Z2WC-PZQH]; “How it Works”, online: Google Ads < https://ads.google.com/intl/en_ca/home/how-it-works/ > [perma.cc/4AE8-NFFS].

¹⁹ *PIPEDA*, *supra* note 5 at Schedule 1 s 4.1.

²⁰ *Ibid* at s 4(2)(c).

²¹ *Crookes v Wikimedia Foundation Inc.*, 2011 SCC 47 at paras 14, 47, 107.

²² *Right to Be Forgotten*, *supra* note 1 at 141.

However, more recently the court has held that Google internet search is not a passive information site.²³ There has also been strong academic critique against Google's assertion of presenting neutral reference to existing websites, as the internet in reality is a network of privately owned and controlled networks designed to benefit search engines and Internet service providers.²⁴ Search engines such as Google anticipate search requests and offer a menu of suggested potential search queries, and actively collect a wide range of information from users, including IP addresses, location, search terms, and "click-throughs".²⁵ Such findings indicate that companies like Google are not strictly passive in terms of the information they control and analyze.

In the instances in which a generation of search results does equate to either a journalistic, artistic, or literary purpose, search engines still do not appear to *exclusively* collect and disseminate information for a journalistic, artistic, or literary purpose due to the mass variety of the content that is indexed.²⁶ Exemption of PIPEDA's application to an organization can only occur when a journalistic, artistic, or literary purpose is the *only* purpose for the collection, use, or disclosure of the material.²⁷ "Journalistic" is undefined in PIPEDA, but the court has provided a framework to interpret whether content falls under "journalistic" and has held that certain websites do not.²⁸ Further, the court has noted that it is unreasonable to think that the legislature intended "journalistic" to be so broad that it encompasses all content considered to be within "freedom of opinion and expression."²⁹ As a result,

²³ *Equustek Solutions Inc. v Jack*, 2015 BCCA 265 at para 48 [*Equustek* BCCA].

²⁴ Julia Powles, "The Case that Won't Be Forgotten" (2015) 47:2 *Loy U Chicago LJ* 583 at 591 online: <<https://www.luc.edu/media/lucedu/law/students/publications/lj/pdfs/vol47/issue2/Powles.pdf>> [perma.cc/Q6AX-L7LZ]; Andrea Slane, "Search Engines and the Right to Be Forgotten: Squaring the Remedy with Canadian Values on Personal Information Flow" (2018) 55:2 *Osgoode Hall LJ* 349 at 368 online: <https://heinonline.org.uml.idm.oclc.org/HOL/Page?collection=journals&handle=hein.journals/ohlj55&id=335&men_tab=srchresults> [*Search Engines and the Right to be Forgotten*].

²⁵ *Equustek* BCCA, *supra* note 23 at paras 48-49.

²⁶ *Ibid* at para 72; *Right to Be Forgotten*, *supra* note 1 at 135.

²⁷ PIPEDA, *supra* note 5 at s 4(2)(c).

²⁸ *T.(A.) v Globe24h.com*, 2017 FC 114 at para 68 [*Globe24h.com*].

²⁹ *Ibid* at para 69.

the “journalistic” exception appears inapplicable to search engine indexing and the URLs it provides.³⁰

IV. ACCURACY AND CONSENT REQUIRED UNDER *PIPEDA*

If search engine indexing indeed fits under *PIPEDA*’s definition of being an organization engaging in a commercial activity, there are a range of obligations under the Act. Some notable obligations *PIPEDA* imposes is that the collection of personal information is “limited to that which is necessary for the purposes identified by the organization”, not collected “indiscriminately”, “retained only as long as necessary” and for it to be “accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used”.³¹

As a result, with a *PIPEDA* application to search engines, an individual can challenge the accuracy, completeness, or currency of search results pertaining to their name. If an individual can successfully demonstrate inaccuracy or incompleteness of personal information, the organization must amend the information where required.³² In the context of internet search de-indexing, an amendment of successfully challenged personal information should equate to the removal of URLs displayed in specific search results or a lowering of ranked results.

An important stipulation of note is that the extent which *PIPEDA* requires personal information to be accurate, complete, and current depends on the use of the information, and on the interests of the individual.³³ In applying this constraint to search engine results, a determination of whether a URL should be removed could first require consideration of the public’s interest in accessing that information and whether there is a material impact on the individual’s interests from the information.³⁴

³⁰ For a different perspective, see: Ryan Belbin, “When Google Becomes the Norm: The Case for Privacy and the Right to Be Forgotten” (2018) 26 Dalhousie J. Legal Stud. 17 at 26. The author asserts that *PIPEDA* could still be rendered inapplicable to de-indexing requests when specific websites fall under the journalistic exemption under *PIPEDA*.

³¹ *Right to Be Forgotten*, *supra* note 1 at 136; *PIPEDA*, *supra* note 5 at Schedule 1 ss 4.4, 4.5, 4.6.

³² *PIPEDA*, *ibid* at Schedule 1 s 4.9.5.

³³ *Ibid* at Schedule 1 s 4.6.1.

³⁴ Canada, Office of the Privacy Commissioner of Canada, *Draft OPC Position on Online Reputation*, (report), online: < https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/pos_or_201801/ > [perma.cc/977T-

PIPEDA also requires knowledge and consent of the individual prior to the collection, use, or disclosure of personal information, but there is a list of exceptions in which knowledge and consent of the individual are not required.³⁵ Consent is not required in several circumstances, including where the information is publicly available and specified by the regulations.³⁶ While the information that internet search engines lead to is publicly available, the information provided by search indexing is so broad that it does not exclusively fit into the regulations specified, and thus should not waive the requirement of consent imposed by *PIPEDA*. According to Google's Terms of Service, a person provides consent to the collection of their information upon use of the service, but the service contract does not waive the legal rights that consumers have in some countries.³⁷

A collection of consent prior to indexing all web pages containing personal information would not be practicable, and would be extremely burdensome, due to the immense volume of pages being indexed. To overcome this issue, Parliament may need to provide a clearer legislative exception to consent regarding search engine indexing where consent is not realistically achievable or when implied consent is not appropriate.³⁸

Implied consent may be sufficient in the event that information is less sensitive.³⁹ According to the SCC, the degree of sensitivity is contextually assessed based on related information already in the public domain, the

9HH2] [OPC Position on Online Reputation].

³⁵ *PIPEDA*, *supra* note 5 at s 7 and at Schedule 1 s 4.3.

³⁶ *Regulations Specifying Publicly Available Information*, SOR/2001-7, s 1. The *PIPEDA* specified regulations are: personal contact information in a publicly available telephone directory where subscriber can refuse to have the personal information appear in the directory; personal contact information in a publicly available professional or business directory, listing or notice, where the collection, use, and disclosure of the personal information relate directly to the purpose for which the information appears in the directory, listing or notice; personal information appearing in a registry under statutory authority and authorized by law; personal information appearing in a record or document of a judicial or quasi-judicial body; personal information that appears in a publication where the individual has provided the information.

³⁷ "Google Terms of Service" (25 October 2017), online: *Google Privacy & Terms* <<https://policies.google.com/terms>> [perma.cc/UEW3-4RL8].

³⁸ *Ibid.*

³⁹ *PIPEDA*, *supra* note 5 at Schedule 1 s 4.3.6.

purpose served by making the related information public, and the nature of the relationship between the affected parties.⁴⁰ Due to the non-legal drafting of certain sections of *PIPEDA*⁴¹, flexibility, common sense and pragmatism will best guide the Court in interpreting the legislation to balance the competing interests of privacy and use and disclosure of personal information by the private sector.⁴² The material contained within an internet search is vastly varied and includes both sensitive and non-sensitive information. There will be situations in which implied consent is applicable, but it will not be appropriate pertaining to a disclosure of more sensitive information. In short, the concept of implied consent cannot be applied broadly to an internet search index, so clear legislative guidance from Parliament pertaining to consent in the context of search indexing will be more appropriate. The sensitivity of the information is not irrelevant, however. Information sensitivity should be one factor to be considered in assessing the impact on the individual who requests to have a URL removed from search engine results.

V. APPROPRIATE PURPOSE REQUIREMENT UNDER *PIPEDA*

Under *PIPEDA*, an organization's collection, use and disclosure of personal information must be for purposes that a reasonable person would consider appropriate based on the circumstances.⁴³ When applied to internet search results, a reasonable person would presumably consider the indexing of URLs to websites with unlawful or significantly harmful content to an individual that greatly outweighs the public interest as being inappropriate.⁴⁴ It follows that unlawful content including that which contains defamatory information, violates intellectual property rights, interferes with a publication ban, or involves minors in an illegal way, should be removed automatically upon request.

⁴⁰ *Royal Bank of Canada v Trang*, 2016 SCC 50 at para 36.

⁴¹ *PIPEDA*, *supra* note 5 at Schedule 1.

⁴² *Englander v Telus Communications Inc.*, 2004 FCA 387 at para 46.

⁴³ *PIPEDA*, *supra* note 5 at s 5(3).

⁴⁴ OPC Position on Online Reputation, *supra* note 34.

VI. JURISDICTIONAL CONCERNS RELATED TO INTERNET SEARCH DE-INDEXING

PIPEDA does not discuss jurisdiction, which is a relevant consideration in the context of search engines as internet searches cross jurisdictional boundaries. The Act's definition of "organization" includes a corporation, but there is no requirement that the company be incorporated in Canada, or collect, use, or disclose personal information within Canada's borders.⁴⁵

Upon a Federal Court review in *Lawson v Accusearch Inc.*, the court interpreted *PIPEDA* as providing the Privacy Commissioner of Canada with the jurisdiction to investigate extraterritorially Canadian claims of privacy violations that fall within the Act's parameters.⁴⁶ *PIPEDA* applies to foreign-based organizations where there is a "real and substantial connection" between the organization's activities and Canada.⁴⁷ The SCC has provided relevant factors in assessing this connection.⁴⁸ In applying these factors to Google's search engine indexing services, the location of the target audience of Google's Canadian domain, Google.ca, is in Canada, which is comprised of search engine users and Canadian companies and individuals who pay Google for the ability to advertise. Google operates globally through different domain names⁴⁹, such as Google.ca, which are accessible in multiple countries. The source of the content accessible through Google includes website content around the world, while the location of Google's head office and host server is in the United States. When aggregating these factors, there appears to be a real and substantial connection between Google's activities and Canada. It is clear that there is a significant amount of use and business generated between

⁴⁵ *Right to Be Forgotten*, *supra* note 1 at 135.

⁴⁶ *Lawson v Accusearch Inc.*, 2007 FC 125 at para 43.

⁴⁷ *Ibid* at paras 38-43; *Globe24h.com*, *supra* note 28 at para 60.

⁴⁸ *Society of Composers, Authors & Music Publishers of Canada v Canadian Assn. of Internet Providers*, 2004 SCC 45 at para 61. These relevant factors include: the *situs* of the content provider, the host server, the intermediaries and the end user. The weight given to any particular factor varies based on the circumstances and the nature of the dispute.

⁴⁹ For example: Google.com, Google.fr, Google.it. These domains are accessible by multiple countries. Canadians can access content on all three of the previously existed domains of Google.com, Google.fr, and Google.it, in addition to others.

Google and the Canadians in Canada who use the Google search engine and pay for advertising services.

Recently case law pertaining specifically to Google has affirmed the ability of Canadian Courts to extend their jurisdictional authority to a party of a foreign jurisdiction such as Google. Furthermore, the ruling confirmed the ability for Canadian Courts to compel the de-indexing of search results internationally in the right circumstances. In the 2017 case of *Google Inc. v Equustek Solutions Inc.* (“*Equustek*”), the SCC upheld an interlocutory injunction for Google to globally de-index offending websites that were unlawfully selling the intellectual property of another company.⁵⁰ As Canadians can still access other country’s Google websites, a confinement of removing URLs on Google.ca was not enough to reduce the visibility of the offending websites. The Court held that there was Canadian court jurisdiction to grant an order against Google, an innocent intermediary and a company of a foreign jurisdiction, in the appropriate circumstances.⁵¹ Google carries on its advertising business in Canada, which provides courts in Canada with *in personam* jurisdiction over Google’s search services, as Google’s search and advertising services are interrelated.⁵²

Equustek discusses comity at length. It was acknowledged by all parties that most countries recognize intellectual property rights and view the selling of pirated products as a legal wrong,⁵³ resulting in diminished likelihood that Google would be put in the position of carrying out an order that contravened with a law in another jurisdiction. The British Columbia Court of Appeal, which the SCC in *Equustek* affirmed, noted: “courts should be very cautious in making orders that might place limits on expression in another country. Where there is a realistic possibility that an order with extraterritorial effect may offend another state’s core values, the order should not be made.”⁵⁴ In addition to comity considerations, respect for a nation’s acts, international duty, convenience and protection of a nation’s citizens all must be balanced as well.⁵⁵

50 *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 [*Equustek*].

51 *Ibid* at paras 28-29, 31-33, 38.

52 *Equustek* BCCA, *supra* note 23.

53 *Equustek*, *supra* note 50

54 *Equustek* BCCA, *supra* note 23 at para 92.

55 *Pro Swing Inc. v ELTA Golf Inc.*, 2006 SCC 52 at para 27.

De-indexing URLs may limit expression in another country if the URL was linked to a foreign website, so the current stance countries have on expression and privacy rights is relevant in determining whether de-indexing would violate core state values. In analyzing the stance of other nations around the world on the issue of de-indexing internet search results, it is clear that many countries already strongly support personal privacy on the internet. The GDPR regulation enactment and court rulings in Europe indicate an acceptance for search engine de-indexing or internet censorship in order to protect the privacy of individuals.⁵⁶ Furthermore, these courts have pronounced orders that have international effects as well.

However, judicial support to de-index search results is not a guarantee. In the 2018 English case of *NT 1 & NT 2 v Google LLC*, the court ruled against de-indexing links from Google search engine results for one of the claimants based on concerns that the information was in the interest of the public to know about.⁵⁷

In the United States, a priority of privacy protection rights is more obscure. American academic and legal affairs commentator Jeffrey Rosen has claimed a “right to be forgotten” providing the ability for content to be removed online would clash with embedded principles within US free-speech law of the unrestricted ability to publish truthful information.⁵⁸ Freedom of expression is referenced in the First Amendment of the United States Constitution, although Congress has addressed specific needs for information privacy and security through the enactment of several statutes.⁵⁹ The United States does not have an equivalent privacy legislation to *PIPEDA* and the United States Supreme Court has not yet explicitly recognized a right to information privacy, but the country does have a highly developed system of privacy protection

⁵⁶ See: *Google Spain; Mosley v Google*, 11/07970, Judgment (6 November 2013) (Tribunal de Grande Instance de Paris); *APC v Auchan Telecom*, 11/60013, Judgment (28 November 2013) (Tribunal de Grande Instance de Paris); *McKeogh v John Doe 1 and Ors* (Irish High Court, case no. 20121254P); *Cartier International AG v British Sky Broadcasting Ltd.* (2014), [2014] EWHC 3354, [2015] 1 All E.R. 949 (Eng. Ch. Div.).

⁵⁷ *NT 1 & NT 2 v Google LLC*, [2018] EWHC 799 (QB) (13 April 2018), online: BAILII <[http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2018/799.html&query=\(NT\)+AND+\(1\)+AND+\(Google\)#disp1](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2018/799.html&query=(NT)+AND+(1)+AND+(Google)#disp1)> [perma.cc/2EP3-HK82] [NT1 & NT2].

⁵⁸ Jeffrey Rosen, “The Right to Be Forgotten” (2012) 64 *Stan. L. Rev. Online* 88.

⁵⁹ John Dowdell, “An American Right to be Forgotten” (2017) 52 *Tulsa L Rev* 311 at 331-32 [American Right to Be Forgotten]; *Computer, Internet and Electric Commerce Law*, *supra* note 9 at c 8.7.

under tort law.⁶⁰ Pieces of legislation have also been enacted which protect internet search engine providers and block enforcement orders that infringe on the First Amendment right of free speech.⁶¹ This may suggest the potential for a violation of comity when liberal privacy laws in other countries impact companies who are incorporated and headquartered in the United States, a country with seemingly less rights pertaining to online privacy.

Further, the ruling in *Equustek* faced criticism for impeding on American free expression rights. An Intervener in the case stated that “the extraterritorial effects of mandatory worldwide injunctions that restrain free expression on the Internet are anathema to judicial comity.”⁶² In particular, it was stressed that the ruling infringed on freedom of expression rights protected in the United States.⁶³

Nonetheless, there appears to be an increasing acceptance of greater privacy rights, even within the United States. US courts are becoming more receptive to online privacy, even in the absence of domestic legislation.⁶⁴ The US Supreme Court has “recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public.”⁶⁵ Canadian courts have still granted injunctions against defendants who claimed exemption under the *US SPEECH Act*.⁶⁶ Related to this is the fact of acknowledgement by American courts that enforcement will usually be afforded to a judgment of a foreign court, “except in situations where the original claim is repugnant to foundational notions of what is decent and just in the State where enforcement is sought”.⁶⁷ Judicial indications of a shift in perspective of American courts towards accepting more

⁶⁰ American Right to Be Forgotten, *ibid*; US Const amend I.

⁶¹ *Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act*, 28 USC (2010), online: < <https://www.congress.gov/111/plaws/publ223/PLAW-111publ223.pdf> > [perma.cc/3TVN-F4YV]; Communications Decency Act of 1996, 47 USC §230 (1996), online: < <https://www.law.cornell.edu/uscode/text/47/230> > [perma.cc/6RQY-P44E].

⁶² *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 (Factum of the Intervener at para 3), online: Electronic Frontier Foundation < <https://www.eff.org/files/2016/10/05/equustekscocbrief.pdf> > [perma.cc/W7VL-FZL9].

⁶³ *Ibid*.

⁶⁴ *American Right to Be Forgotten*, *supra* note 58.

⁶⁵ *Ibid*.

⁶⁶ *Nazerali v Mitchell*, 2016 BCSC 810. Note: Leave to appeal was refused by the SCC.

⁶⁷ *Computer, Internet and Electric Commerce Law*, *supra* note 9, at c 11.8.

privacy rights are also coupled with a measured desire for increased online privacy rights by the American public.⁶⁸ Moreover, such perspectives hold great potential to influence lawmakers to legislate more explicitly in favour of privacy in the near future. It appears unlikely that greater privacy rights imposed by foreign jurisdictions impacting the United States will be viewed as repugnant and in violation of the principle of comity.

VII. CONSISTENCY WITH FREEDOM OF EXPRESSION UNDER THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

While it appears *PIPEDA* provides a right to de-index search results, there is still the issue of a conflict of freedom of expression rights resulting from published materials receiving less views online after being removed from search engine results. Google has argued that its reporting to users of the existence of publicly accessible websites is speech that should be protected under section 2(b) of the *Canadian Charter of Rights and Freedoms* (“*Charter*”).⁶⁹ While the websites for de-indexed links will remain in-tact, their accessibility and viewability will decrease as users will have to know the exact URL to find the webpage rather than performing a search. Thus, in considering de-indexing, the impact on the *Charter* protected right of freedom of expression must be analyzed.

It has been suggested that while privacy and self-expression are frequently observed as being in tension, the two rights are also complimentary and can operate in cohesion in an online context.⁷⁰ An assurance of privacy can lead to the sharing of information and greater self-expression between people.⁷¹ Thus a right to have a search engine result de-indexed may actually result in more freedom for individuals to express themselves with less worry that information related to them personally will be forever available online.

Freedom of speech and privacy are two rights of notable value in Canadian law and society. Privacy rights hold a “quasi-constitutional status”⁷² and the

⁶⁸ *American Right to Be Forgotten*, *supra* note 58 at 333.

⁶⁹ *Search Engines and the Right to be Forgotten*, *supra* note 24 at 379.

⁷⁰ Fiona Brimblecombe & Gavin Phillipson, “Regaining Digital Privacy: The New Right to be Forgotten and Online Expression” (2018) 4 Can J of Comparative & Contemporary L 1 at 18 [*Regaining Digital Privacy*].

⁷¹ *Ibid.*

⁷² *United Food and Commercial Workers, Local 401 v Alberta (Information and Privacy*

freedom of expression is enshrined in the *Charter*.⁷³ While there is no freestanding right to privacy in the *Charter*, the SCC has referred to specific sections as including a right to privacy.⁷⁴ Federal and provincial legislatures have also provided statutory provisions to protect privacy.⁷⁵

In *Alberta Privacy Commissioner v United Food and Commercial Workers, Local 401*, Alberta's *Personal Information Protection Act* received a suspended declaration of invalidity on the basis of being an overbroad and disproportionate infringement on section 2(b) of the *Charter* right of expression which could not be justified.⁷⁶ The SCC indicated that in striking an appropriate balance of two rights and determining infringement, the nature of the implicated privacy interest and the nature of the expression must both be considered.⁷⁷ In the context of online reputation, achieving a balance between expression and privacy can be done through considering whether the accessibility of personal information is in the public interest.⁷⁸ To be of public interest; "the subject matter 'must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached'".⁷⁹ It follows that de-indexing requests should be

Commissioner), 2013 SCC 62 [UFCW]; The Supreme Court of Canada has also recognized the great value of privacy in society on numerous occasions: *R. v O'Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235; Further, in *Computer, Internet and Electric Commerce Law*, *supra* note 90, at c 8.4, author Barry Sookman writes: "Although there may not be any universally accepted definition of privacy, there is a general consensus in Canada that privacy should be valued and protected."

⁷³ *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*]. Section 2(b) states that "everyone ... has the freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

⁷⁴ *Ibid* at ss 7, 8; *R. v Beare*, [1988] 2 SCR 387 at para 61, 55 DLR (4th) 481; *R. v Spencer*, 2014 SCC 43 at para 15; *Ladas v Apple Inc.*, 2014 BCSC 1821.

⁷⁵ Four of the Common Law provinces in Canada have legislated to create a statutory tort of invasion of privacy (Newfoundland and Labrador, Saskatchewan, Manitoba, and British Columbia), which are applicable to residents in the province in which the provincial laws apply.

⁷⁶ *UFCW*, *supra* note 70.

⁷⁷ *Ibid* at paras 37-38.

⁷⁸ *Grant v Torstar Corp.*, 2009 SCC 61 [*Torstar*].

⁷⁹ *Ibid* at para 105.

considered based on a balancing of privacy and expression interests, which includes consideration of the public interest in accessing certain information about a person through internet search results.

VIII. IMPLEMENTATION OF DE-INDEXING REQUESTS UNDER *PIPEDA*

Under *PIPEDA* individuals have a right to challenge an organization on the accuracy and completeness of that information.⁸⁰ If the content is unlawful it is already clear under *PIPEDA* that it is inappropriate, so it can be removed from search engine results without any further analysis.⁸¹

There are several specific considerations that should be made by a decision maker in evaluating a de-indexing request. If individuals challenge the accuracy, completeness, or how current the results are pertaining to a search of their name, the organization should consider the use of the information, the extent of the inaccuracy or incompleteness, the level of sensitivity, and the impact on the individual's interest, as required under *PIPEDA*.⁸² Following this determination, the impact of the de-indexing on freedom of expression should be considered. As previously mentioned, an assessment of expression rights in relation to privacy in the online context can be determined by analyzing whether access to the personal information is in the public interest.⁸³ The Office of the Privacy Commissioner ("OPC") has provided a helpful, non-exhaustive, list of factors to assist decision makers with whether de-indexing a specific individual's name from search engine results is in the public's best interests.⁸⁴ Such factors pointing towards a public interest in the information remaining accessible include: whether the individual concerned is a public figure and whether the information relates to a matter of public controversy or debate. Factors pointing away from a public interest in the information

⁸⁰ *PIPEDA*, *supra* note 5 at Schedule 1 s 4.9.

⁸¹ *Ibid* at s 5(3), which states that an organization's disclosure of personal information must be for purposes that a reasonable person would consider appropriate based on the circumstances. For example, unlawful content could involve: defamatory information, violates intellectual property rights, interferes with a publication ban, or something which illegally involves minors.

⁸² *Ibid* at Schedule 1 s 4.6.1.

⁸³ *Torstar*, *supra* note 78.

⁸⁴ OPC Position on Online Reputation, *supra* note 34.

remaining accessible are: the information relates to an individual's private life rather than their professional or working life, whether the information concerns a criminal offence for which the individual has received a discharge, pardon, or record suspension, and whether the information pertains to a minor.⁸⁵

Following PIPEDA requirements, the internet search engine operator, such as Google, would be responsible for the initial decision to remove a URL from the search results of an individual's name.⁸⁶ In Canada, there has been expressed concern about requiring a private company like Google to make an initial determination over how harmful or inappropriate online content is.⁸⁷ However, Google's process is more expeditious than one involving the courts wherein the reputational harm experienced by an individual seeking to remove damaging online content is exacerbated due to the length of court wait times and proceedings. Moreover, Google is already experienced in reviewing de-indexing requests in Europe, which the company receives from an online de-indexing request form.⁸⁸ A team within Google considers the requests and decides whether or not to de-index.⁸⁹ To ensure Google decision-making strikes an appropriate balance between freedom of expression and privacy, a confidential audit by a neutral authority of expertise in data protection and freedom of expression may be necessary.⁹⁰ An assembly of existing Agents of Parliament, as will be described shortly, could be potential candidates for such a role.

⁸⁵ *Ibid.*

⁸⁶ PIPEDA, *supra* note 5 at Schedule 1 s 4.1.

⁸⁷ *Supra* note 14.

⁸⁸ Thuy Ong, "Google has received 2.4 million URL removal requests under EU 'right to be forgotten' laws" (27 February 2018), online: *The Verge* <<https://www.theverge.com/2018/2/27/17057356/google-eu-url-removal-requests-right-to-be-forgotten-laws-europe>> [perma.cc/GJA4-QQPD]; "EU Privacy Removal: Personal Information Removal Request Form", online: Google <www.google.com> [perma.cc/V26B-RX2U].

⁸⁹ Gareth Corfield, "Here is how Google handles Right to be Forgotten requests" (19 March 2018), online: *The Register* <https://www.theregister.co.uk/2018/03/19/google_right_to_be_forgotten_request_process/> [perma.cc/7QFU-6BU6]. Google does not follow clear rules or criteria in evaluating de-indexing requests, although it does take into account multiple considerations for each individual request.

⁹⁰ *Search Engines and the Right to be Forgotten*, *supra* note 24 at 393.

An appeal process should also be considered for individuals and content providers. Currently Google provides webmasters with the ability to ask for re-review if a URL leading to their website has been de-indexed under a European privacy request.⁹¹ For the benefit of content providers, a similar system should also be available in Canada. For individuals whose requests to de-index a URL have been denied, an appeal should also be available in Canada. Legal scholar and Associate Professor Andrea Slane has recently proposed a “co-regulatory” model involving the creation of a neutral arbiter to deal with complaints pertaining to online content removal such as de-indexing.⁹² The job of the arbiter would be to operate in addition to Google’s review of de-indexing requests. This would ensure a balance of the interests of all categories of stakeholders (service providers, data subjects, content providers and users), while ensuring that both data protection and freedom of expression are respected.⁹³

A neutral arbiter could be of service to individuals who are unsatisfied with Google’s initial decision with respect to their de-indexing claims. While ideally Google would already be considering appropriate factors in its decision making, it is not something that could easily be monitored under Google’s current internal system of evaluating de-indexing requests, which operates on a basis of human judgment rather than rigid process.⁹⁴ Hence an arbiter could provide another review of a de-indexing submission upon request, using the aforementioned factors a decision maker should use in determining whether de-indexing results of an individual’s name from a search engine is in the public’s best interests compared to the individual’s interest.

In expanding on the “co-regulatory” model proposition, an assembly of various Agents of Parliament could form a suitable group to perform the role of arbiter. The OPC has expertise on privacy legislation and rights in Canada and has conducted lengthy investigations on online privacy.⁹⁵ To maintain neutrality in the arbiter role, it is necessary for other Commissioners to also be

⁹¹ “Transparency Report Help Center”, online: <<https://support.google.com/perma.cc/Z47R-85KS>>.

⁹² *Search Engines and the Right to be Forgotten*, *supra* note 24 at 394.

⁹³ *Ibid.*

⁹⁴ *Supra* note 14. Google currently has a group of people who scrutinize de-indexing requests, of which Google’s legal specialist Stephanie Caro has said “the process of dealing with each delisting request is not automated - it involves individual consideration of each request and involves human judgment.”

⁹⁵ **OPC Position on Online Reputation**, *supra* note 34.

involved. Such involvement of other offices would alleviate the risk of emphasis placed on privacy versus freedom of speech. These Agents of Parliament could include the Information Commissioner and the Commissioner of Lobbying. The Information Commissioner is experienced in providing expert advice on matters concerning information access.⁹⁶ The Commissioner of Lobbying could provide additional perspective relating to informational disclosure, which aligns with its mandate and expertise.⁹⁷

An alternative to the assembly of a group of existing Agents of Parliament is the creation of an entirely new group. It may be worthwhile for Parliament to create a new Agent of Parliament to chiefly perform the role of reviewing de-indexing submissions. The internet has many users in Canada, which may lead to extensive de-indexing requests in Canada as is occurring in Europe.

Using Agents of Parliament to perform investigations of de-indexing requests and to attain a court remedy if necessary is especially beneficial for individuals. The alternative for individuals whose de-indexing requests have been denied by Google is to seek a court ordered remedy on their own, which may be barred by the expense of civil judicial system participation. The combination of Google as a first-round decision maker and Agents of Parliament, either existing or specially created, as second-round reviewers and auditors if necessary, could ensure that de-indexing claims receive a proper evaluation in Canada.

In ensuring that Canada's decisions pertaining to privacy do not unnecessarily impact other jurisdictions and impinge on comity through globally de-indexing, the OPC has suggested the deployment of geofencing techniques.⁹⁸ Geofencing enables de-indexing to be limited to searches originating within Canada. The use of geofencing is a superior alternative to limiting de-indexing only to a domestic domain, such as Google.ca. Within Canada, Canadians can easily search for information on a variety of other

⁹⁶ Information Commissioner of Canada, "Statement on the Passage of Bill C-58", online: www.oic-ci.gc.ca/en [perma.cc/N2G4-E8MT].

⁹⁷ Office of the Commissioner of Lobbying of Canada, "Mandate" (February 16 2012) online: lobbycanada.gc.ca/eic/site/012.nsf/eng/h_000006.html [perma.cc/K9EN-W2Q7].

⁹⁸ **Ibid;** Techopedia, "Geofencing", online: <www.techopedia.com/definition/14937/geofencing> [perma.cc/AML5-LKZB]. Geofencing has been defined as: "Geofencing is a technology that defines a virtual boundary around a real-world geographical area. In doing so, a radius of interest is established that can trigger an action in a geo-enabled phone or other portable electronic device."

country-specific Google domains. The use of geofencing overcomes such an issue by de-indexing URLs on all Google domains from specific name searches that are performed in Canada.

IX. CONCLUSION

The topic of online privacy in Canada is not straightforward; however, upon reviewing *PIPEDA* and surrounding case law and academia, there is compelling indication that *PIPEDA* already protects the reputation of Canadians online by providing the right to request a search engine de-index. While there are jurisdictional implications of a support for privacy rights under *PIPEDA* pertaining to search engines, it is clear that courts are already willing to make orders against foreign internet intermediaries such as Google. Furthermore, an analysis of the law and sentiment in other countries indicates a growing support for individual privacy protection on the internet which eases comity concerns.

In evaluating requests made to de-index based on rights under *PIPEDA*, decision makers must find the appropriate balance between privacy and the *Charter* protected freedom of expression and related interest of the public. Not all de-indexing requests can, or should, be granted based on a balancing of privacy and freedom of expression rights. In the modern day of internet use, information can quickly be uploaded which can just as rapidly destroy a person's reputation. The removal of information that has no benefit to the public interest but can spare irreparable harm caused to a person deserves additional measures to ensure a removal process that is as swift as possible. A process that begins with an initial request to a search engine to de-index, along with the opportunity for a secondary review provided by an arbiter comprised of Agents of Parliament, will support Canadians in exercising their rights under *PIPEDA*.