Translated from the original French

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| Option Consommateurs c. Google | | | 2022 QCCS 2308 |
| SUPERIOR COURT | | | |
| Class Action Division | | | |
| CANADA | | | |
| PROVINCE OF QUEBEC | | | |
| DISTRICT OF MONTREAL | | | |
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| No.: | | 500-06-001079-207 | |
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| DATE: | June 28, 2022 | | |
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| PRESIDING: THE HONOURABLE DONALD BISSON, J.s.C. | | | (JB4644) |
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| OPTION CONSOMMATEURS | | | |
| Plaintiff | | | |
| v. | | | |
| GOOGLE LLC | | | |
| Defendant | | | |
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| **JUDGMENT**  (on an Application for Authorization to Institute a Class Action) | | | |
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| Table of Contents | | | |

1. Introduction: Background 2

2. Analysis and discussion 4

2.1 Criteria of article 575 CCP 4

2.2 Colour of right – 575(2) CCP. 5

2.2.1 Clarifications on the state of the law 5

2.2.2 Analysis of the plaintiff’s allegations 7

2.2.3 Analysis of the various statutory violations alleged 19

2.2.3.1 Violation of federal and provincial legislation as the source of extracontractual liability within the meaning of article 1457 CCQ 19

2.2.3.2 *Charter of human rights and freedoms* 28

2.2.3.3 *Consumer Protection Act* 31

2.2.3.4 *Competition Act*  35

2.2.4 Conclusion on the colour of right 38

2.3 Identical, similar or related issues – 575(1) CCP 38

2.4 Composition of the class – 575(3) CCP 39

2.5 Representative plaintiff – 575(4) CCP 40

2.6 Other elements 42

2.6.1 Definition of the class 42

2.6.2 Recovery 44

2.6.3 Judicial district 44

2.6.4 Opting-out period and notice to members 44

2.6.5 Legal costs 45

FOR THESE REASONS, THE COURT: 45

## Introduction: background

The Court has before it an Amended Application for Authorization to Institute a Class Action (the “Amended Application”) dated January 27, 2021, in which the plaintiff Option Consommateurs seeks authorization to institute a class action against the defendant Google LLC on behalf of the following class:

[translation]

All persons residing in Quebec who used a service provided by GOOGLE that does not require a Google account to be created, such as Google Search or Google Maps, or who browsed a website using one of the tools provided by GOOGLE, such as Google Analytics, Google Ad Manager, or the “Sign in with Google” button.

Anne-Sophie Letellier is the person designated by the plaintiff pursuant to article 571 of the *Code of Civil Procedure* (“CCP”).[[1]](#footnote-1)

According to the plaintiff, Google does not obtain sufficient consent from class members to collect their personal information when they use its services that do not require a Google account to be created (“Google Services”) or when they browse a website using one of the advertising or analytics tools it provides (“Google Tools”). More specifically, the plaintiff claims that Google refuses and/or fails to obtain sufficient consent from class members because it:

* Does not ask for such consent in its terms of service and/or obtain such consent in its unnecessarily long, complex, and convoluted privacy policy;
* Knowingly disregards the express requests by members of the proposed class who notify it that they refuse such collection through the “Do Not Track” setting in their browser; and
* Falsely represents to the members of the proposed class that they can control the personal information it collects, notably by stating that they can use private browsing mode to browse the web privately.

According to the plaintiff, Google is therefore violating two federal laws[[2]](#footnote-2) and one provincial law[[3]](#footnote-3) on personal information, thereby committing an extracontractual fault under article 1457 of the *Civil Code of Québec* (“CCQ”), in addition to violating the members’ rights guaranteed by the Quebec *Charter of human rights and freedoms,*[[4]](#footnote-4)the *Consumer Protection Act*[[5]](#footnote-5) and the *Competition Act.*[[6]](#footnote-6) According to the plaintiff, these violations give rise to damages, and it claims that Google should:

* Pay class members an amount equal to the value of the personal information collected by Google without consent;
* Pay class members $50 million in punitive damages;
* Pay the costs incurred for any investigation required to establish Google’s liability in this case, including counsels’ fees and disbursements, which includes expert fees.

The plaintiff seeks collective recovery of these amounts.

The plaintiff filed 17 exhibits in support of the Amended Application, Exhibits R-1 to R-17.

Google contests and argues that the plaintiff has simply not met its burden of establishing any violation of the laws cited or any fault, that there is no evidence establishing its allegations, that there are insufficient allegations of fact about the designated person, and that no presumption of fact may be drawn from the evidence filed. Google adds that the plaintiff has not established any compensatory damages or punitive damages. Finally, Google argues that the proposed class is vague and overly broad and has no temporal scope.

Google was not allowed to submit evidence[[7]](#footnote-7) under article 574 CCP.

## AnalysIS AND discussion

1. Let us begin with the criteria of article 575 CCP.

### Criteria of article 575 CCP

1. Authorization to institute a class action is granted if each of the four criteria of article 575 CCP is met. This article reads as follows:

**575.** The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that

(1) the claims of the members of the class raise identical, similar or related issues of law or fact;

(2) the facts alleged appear to justify the conclusions sought;

(3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and

(4)  the class member appointed as representative plaintiff is in a position to properly represent the class members.

1. In *Infineon*,[[8]](#footnote-8) *Vivendi*,[[9]](#footnote-9) *Oratoire Saint-Joseph*,[[10]](#footnote-10) and *Asselin*,[[11]](#footnote-11) the Supreme Court of Canada established the following principles:

* The threshold for authorizing a class action in Quebec is low;
* Once the four conditions set out in article 575 CCP are met, the authorization judge must authorize the class action; the judge has no residual discretion to deny authorization on the pretext that, despite the fact that the four conditions are met, a class action is not “the most appropriate” vehicle;
* The purpose of the class action authorization stage is to filter out frivolous claims, and nothing more. The Court plays a screening role to ensure that there is an arguable case. The conditions of article 575 CCP must be applied in a flexible, liberal, and generous manner that favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation. Any doubt should weigh in favour of authorization;
* As for the colour of right, the applicant has only a burden of demonstration and not of proof. It must establish a “good colour of right” or an “arguable case”;
* There is no requirement in Quebec that the common questions predominate over the individual ones. On the contrary, a single common question is enough if it advances the litigation in a not insignificant manner. It is not necessary that the common question be determinative of the outcome of the case;
* At this stage, the Court must not deal with the merits of the case, and the facts must be assumed to be true unless they seem implausible or clearly wrong. The Court must pay particular attention to not only the alleged facts but also any inferences or presumptions of fact or law that may stem from them and can serve to establish the existence of an “arguable case”.

1. The Court must bear in mind that prior to the authorization judgment, the action does not exist on a collective basis.[[12]](#footnote-12) The colour of right will therefore be determined in light of the individual action of the person designated by the plaintiff; the other three conditions must be met by the plaintiff.[[13]](#footnote-13)
2. The Court will return later to certain other applicable principles.
3. Let us now analyze the allegations in this case regarding the four authorization criteria, beginning with colour of right.

### Colour of right – 575(2) CCP

#### Clarifications on the state of the law

1. The Court will begin by clarifying the scope of the case law on the colour of right.
2. Not all allegations of fact can be assumed to be true. Unsupported hypotheses, opinions, speculation, and inferences are not assumed to be true. In addition, general allegations of fact concerning a defendant’s conduct cannot be assumed to be true without evidence. As the Supreme Court of Canada established, when the allegations in the application are general and imprecise, they are insufficient to meet the threshold requirement of an arguable case; they must be accompanied by some evidence to form an arguable case.[[14]](#footnote-14) The Supreme Court of Canada wrote the following in *Oratoire Saint-Joseph*:[[15]](#footnote-15)

[59] Furthermore, at the authorization stage, the facts alleged in the application are assumed to be true, so long as the allegations of fact are sufficiently precise: *Sibiga*, at para. 52; *Infineon*, at para. 67; *Harmegnies*, at para. 44; *Regroupement des citoyens contre la pollution v. Alex Couture inc.,* 2007 QCCA 565, [2007] R.J.Q. 859, at para. 32; *Charles*, at para. 43; *Toure*, at para. 38; *Fortier*, at para. 69. Where allegations of fact are “vague”, “general” or “imprecise”, they are necessarily more akin to opinion or speculation, and it may therefore be difficult to assume them to be true, in which case they must absolutely “be accompanied by some evidence to form an arguable case”: *Infineon*, at para. 134. It is in fact strongly suggested in *Infineon*, at para. 134(if not explicitly, then at least implicitly), that “bare allegations”, although “insufficient to meet the threshold requirement of an arguable case” (emphasis added), can be *supplemented*by “some evidence” that — “limited though it may be” — must accompany the application in order “to form an arguable case”.

1. In *Infineon*,[[16]](#footnote-16) the Supreme Court of Canada explained this requirement in relation to a factual allegation of conspiracy between the defendants:

[134] On their own, these bare allegations would be insufficient to meet the threshold requirement of an arguable case.  Although that threshold is a relatively low bar, mere assertions are insufficient without some form of factual underpinning. As we mentioned above, an applicant’s allegations of fact are assumed to be true. But they must be accompanied by some evidence to form an arguable case. The respondent has provided evidence, limited though it may be, in support of its assertions, namely the exhibits attesting to the existence of a price-fixing conspiracy and to the international impact of that conspiracy, which had been felt in the United States and Europe. At the authorization stage, the apparent international impact of the appellants’ alleged anti-competitive conduct is sufficient to support an inference that the members of the group did, arguably, suffer the alleged injury.

1. In other words, without any evidence, the following allegation cannot be assumed to be true: [translation] “the defendants conspired to raise the price of this product”.
2. The Court of Appeal also summarized this requirement as follows:[[17]](#footnote-17)

[40] Although the applicant only has a burden of demonstration at this stage, he must allege the facts that are relevant to his case and file the supporting evidence.

1. The Court thus summarizes the scope of the case law:

* General allegations concerning a defendant’s conduct cannot be assumed to be true without some evidence by the plaintiff. Not every fact, however, must be supported by evidence because the Court[[18]](#footnote-18) may draw inferences or make presumptions of fact or of law that may stem from it and can serve to establish the existence of an arguable case. The classic example is causation;
* An allegation relating to a fact specific to a plaintiff is assumed to be true unless it is implausible. For instance, the allegation [translation] “The kettle I bought does not work” must be assumed to be true. The allegation [translation] “I was kidnapped by aliens” cannot be assumed to be true because it is implausible. The allegation [translation] “My kettle does not work because the manufacturer deliberately installed a defective heating element” cannot be assumed to be true without evidence.

1. Here, the Court need not study the impact of the evidence filed by the defendant because there is none. In addition, in the recent case *Charbonneau* *c*. *Location Claireview*,[[19]](#footnote-19) the Court of Appeal specified, concerning the composition of the class, that the plaintiff is not required to show that the application has a sufficient basis in fact because the plaintiff need only establish a mere possibility of succeeding on the merits, not even a realistic or reasonable possibility. The Court of Appeal concluded that the plaintiff is not required to adduce evidence as to the composition of the class, as the allegations of fact are sufficient in this regard. According to the Court, it is not clear whether this statement by the Court of Appeal also concerns the colour of right. If this were the case, it would seem to conflict with what the Supreme Court of Canada established and what the Court discussed in the preceding paragraphs. For now, the Court will follow what the Supreme Court of Canada established. Moreover, both parties agree with the Court’s position in this regard.
2. Let us turn to the allegations in this case. Are they sufficient? Is there evidence where required?

#### Analysis of the plaintiff’s allegations

Recall here that, according to the Amended Application and the exhibits, Google provides a wide range of online services, some of which are available without class members having to create a Google account. These are the **Google Services**, which include, *inter alia*, online searches (Google Search and Images), maps and route guidance (Google Maps), current events (Google News), and translation (Google Translate). The Amended Application concerns Google Services that do not require a Google account to be created.

The Amended Application also concerns **Google Tools**, which are advertising or analytics tools provided by Google when class members browse websites that use these tools. According to Exhibit R-7, 89.37% of websites use Google Analytics. The Court will return to this later.

1. The colour of right must be analyzed based on the case of the designated person, Anne-Sophie Letellier. Below are the allegations in the Amended Application that concern her directly:

[translation]

EXAMPLE OF THE DESIGNATED PERSON

71. The plaintiff’s designated person, Anne-Sophie Letellier, is a doctoral candidate in communications at Université du Québec à Montréal (“UQAM”). She is a lecturer at the UQAM École des médias and the computer department and a research assistant with the Groupe de recherche sur l’information et la surveillance au quotidien (GRISQ), the Canada Research Chair in Media Literacy and Human Rights, and the Centre de recherche interuniversitaire sur la communication, l'information et la société (CRICIS).

72. At all times relevant to this case, Ms. Letellier used Google Services, in particular Google Search and Google Maps, and browsed third-party websites that use Google Analytics and Google Ad Manager. Ms. Letellier frequently used the “Do Not Track” setting and private browsing mode when browsing such sites.

73. While doing so, GOOGLE collected and used Ms. Letellier’s personal information for commercial purposes.

Google claims that the plaintiff has not alleged specific facts dealing with the specific case of the designated person establishing, for instance, the specific violation she may have suffered or the personal information collected by Google during the visits specified by the designated person to Google Services and/or third-party websites that use Google Tools. The Court disagrees and is of the opinion that paragraphs 72 and 73 are sufficient allegations of fact since they state that the designated person is a class member and is therefore covered by the rest of the allegations. Indeed, the Court need only refer to paragraphs 14, 15, and 19 of the Amended Application, which encompass the designated person and therefore provide sufficient allegations of fact in her regard:

[translation]

14. GOOGLE uses, for commercial purposes, the personal information it collects and the profiles it generates about the members of the proposed class by offering its advertising clients online interest-based advertising services.

15. Indeed, with in-depth knowledge of the virtual habits of the members of the proposed class, GOOGLE can provide its advertising clients with advertising services that target members likely to be interested in their products. Thus, after shopping for a flight to a holiday destination, a member of the proposed class is likely to be exposed to advertising for a seaside hotel room, while someone who is searching for a new car will very likely see offers from car dealerships during subsequent browsing sessions.

19. GOOGLE collects and uses, for commercial purposes, the personal information of the members of the proposed class namelythrough (i) the services it provides to the members of the proposed class, and (ii) the advertising or analytics tools it provides to operators of the websites they visit.

In the Court’s opinion, these allegations are sufficient to ground the case of the designated person. However, are these allegations, along with the others, when considered with the exhibits, sufficient to establish a colour of right? Google says no, and the plaintiff says yes. For the reasons below, the Court is of the opinion that the plaintiff has established a colour of right.

The Court considers that Google’s own documents published online, that is, Exhibits R-10 to R-13, when analyzed on their own and/or in light of the study by Professor Douglas C. Schmidt of Vanderbilt University, titled “Google Data Collection”, dated August 15, 2018 (Exhibit R-2), establish that Google does not obtain prior consent from class members before collecting personal information and that Google makes false representations and fails to make full disclosure. Google’s arguments are based on the fact that it collects information that is not “personal information” within the meaning of the applicable statutes. In the Court’s opinion, this reasoning requires very close scrutiny of every word used and its context, which can be done only on the merits, with detailed evidence. Conversely, simply reading the plaintiff’s allegations and exhibits establishes a colour of right. Google also minimizes the significance of Professor Schmidt’s study (Exhibit R-2). In these circumstances, and as set out in the following paragraphs, the plaintiff has established its colour of right.

Below is the Court’s reasoning based on the plaintiff’s allegations and exhibits. In summary, the Court notes that Google itself states that it collects various information, which the Court will characterize as personal information. Google does not, however, ask for prior consent.

**Concerning Google Services:** Google posts Terms of Service (Exhibit R-10) and a Privacy Policy (Exhibit R-11) on Google Services. However, Google does not expressly inform class members of these documents when they are preparing to use or use Google Services. Class members must in fact click on a hyperlink at the bottom of the service’s home page to view them.[[20]](#footnote-20) Thus, there is no prior warning or request for consent.

**Concerning Google Tools:** People who visit websites that use Google Tools have no clearly perceptible link to Google, and Google does not ask for their consent to collect various information about them.[[21]](#footnote-21) In fact, class members are not warned that Google Analytics is active on 89.37% of websites and collecting personal information.[[22]](#footnote-22) The Court will return to this collection later.

In its Privacy Policy (Exhibit R-11),[[23]](#footnote-23) Google discusses its information collection. Google opted to provide the public with a Privacy Policy that is common to all of its Services and Tools and does not distinguish between the information it collects through each one. The Policy describes the “services” it covers as including “Google apps, sites and devices”, “the Chrome browser and Android operating system”, and “products that are integrated into third-party apps and sites”.[[24]](#footnote-24)

The first sentence of the Privacy Policy (Exhibit R-11) reads: “When you use our services, you’re trusting us with your information.” In the Court’s opinion, even without being simplistic or reductionist, Google voluntarily states on the very first line that it collects personal information. However, it is not mandatory to read this policy before using the Services or Tools, and there is no prior consent. If the information collected is personal information within the meaning of the applicable legislation, then Google is violating these laws. The Court will return to this.

1. Let us continue to review the Google documents. In the section of the Privacy Policy (Exhibit R-11) entitled “Information Google collects”, Google indicates that it collects the following information:[[25]](#footnote-25)

… which language you speak; which ads you’ll find most useful; the people who matter most to you online; which YouTube videos you might like.

**Things you create or provide to us:** The content you create, upload, or receive from others when using our services. This includes things like email you write and receive, photos and videos you save, docs and spreadsheets you create, and comments you make on YouTube videos.

**Information we collect as you use our services:**The apps, browsers and devices you use to access Google services; the information we collect includes:

unique identifiers;

browser type and settings;

device type and settings;

operating system;

mobile network information including carrier name and phone number, and application version number;

the interaction of your apps, browsers, and devices with our services, including

IP address;

crash reports;

system activity;

the date;

the time; and

the referrer URL of your request.

**Your activity:**We collect information about your activity in our services. The activity information we collect may include:

Terms you search for;

Videos you watch;

Views and interactions with content and ads;

Voice and audio information when you use audio features;

Purchase activity; people with whom you communicate or share content;

**Your location information:** We collect information about your location when you use our services. Your location can be determined with varying degrees of accuracy by:

GPS;

IP address;

Sensor data from your device;

Information about things near your device, such as Wi-Fi access points, cell towers, and Bluetooth-enabled devices.

[Emphasis added.]

Google very summarily states how it collects the information:[[26]](#footnote-26)

We use various technologies to collect and store information, including cookies, pixel tags, local storage, such as browser web storage or application data caches, databases, and server logs.

Google provides a certain amount of information on the cookies it uses and briefly defines some of the other technologies listed[[27]](#footnote-27) but never indicates how and whether it is possible to opt out of them.

Google describes how it uses the information collected in very general terms.[[28]](#footnote-28) These very general terms are sometimes explained using examples when the reader clicks on them.[[29]](#footnote-29) Google also states that it uses the information for the following purposes:[[30]](#footnote-30)

We use the information we collect to customize our services for you, including providing recommendations, personalized content, and customized search results. …

Depending on your settings, we may also show you personalized ads based on your interests. For example, if you search for “mountain bikes,” you may see an ad for sports equipment when you’re browsing a site that shows ads served by Google. You can control what information we use to show you ads by visiting your ad settings.

We don’t show you personalized ads based on sensitive categories, such as race, religion, sexual orientation, or health.

We don’t share information that personally identifies you with advertisers, such as your name or email, unless you ask us to.

[Emphasis added.]

Google’s openly stated purpose is therefore to offer its users **personalized content**, which includes personalized advertising content. Logically, however, in the Court’s opinion, Google obviously cannot offer this personalized content if it cannot identify and recognize its users, which it does, in particular by using “unique identifiers”,[[31]](#footnote-31) so that it can connect each piece of information listed above around a single hub.

As part of its Privacy Policy, Google provides its own definitions of what constitutes personal information:[[32]](#footnote-32)

**Non-personally identifiable information** This is information that is recorded about users so that it no longer reflects or references an individually-identifiable user.

**Personal information** This is information that you provide to us which personally identifies you, such as your name, email address, or billing information, or other data that can be reasonably linked to such information by Google, such as information we associate with your Google Account.

[Emphasis added.]

Based on this very narrow definition of personal information, Google can state that it does not share any personal information with third parties for targeted advertising purposes:[[33]](#footnote-33)

We may share non-personally identifiable information publicly and with our partners — like publishers, advertisers, developers, or rights holders. For example, we share information publicly to show trends about the general use of our services. We also allow specific partners to collect information from your browser or device for advertising and measurement purposes using their own cookies or similar technologies.

[Emphasis added.]

The nature of the information that Google “allows” its “specific partners” to collect for advertising purposes is not specified, however.

As for Google Tools, the Court notes from Exhibit R-8[[34]](#footnote-34) that Google appears to admit that it collects and uses the class members’ personal information for commercial purposes when they visit third-party websites using any of the Google Tools:[[35]](#footnote-35)

HOW GOOGLE USES INFORMATION FROM SITES OR APPS THAT USE OUR SERVICES

Many websites and apps use Google services to improve their content and keep it free. When they integrate our services, these sites and apps share information with Google.

For example, when you visit a website that uses advertising services like AdSense, including analytics tools such as Google Analytics, or embeds video content from YouTube, your web browser automatically sends certain information to Google. This includes the URL of the page that you’re visiting and your IP address. We may also set cookies on your browser or read cookies that are already there. Apps that use Google advertising services also share information with Google, such as the name of the app and a unique identifier for advertising.

Google uses the information shared by sites and apps to deliver our services, maintain and improve them, develop new services, measure the effectiveness of advertising, protect against fraud and abuse and personalise content and ads you see on Google and on our partners’ sites and apps. See our Privacy Policy to learn more about how we process data for each of these purposes, and our Advertising page for more about Google ads, how your information is used in the context of advertising, and how long Google stores this information.

[Emphasis added.]

Again, Google does not obtain anyone’s prior consent or require anyone to read this information.

The Court therefore finds, simply from reading the Google documents, that Google collects the following information and shares it with third parties (hereinafter the “LIST”):

* Unspecified and undefined personal information;
* Language spoken;
* Ads that members find the most useful;
* People members are most interested in online;
* YouTube videos that may interest members;
* Unique identifiers;
* Browser type and settings;
* Device type and settings;
* Operating system;
* Mobile network information, including carrier name, phone number, and application version number;
* Interaction between apps, browsers, and devices with Google services, including, in particular, IP address, crash reports, system activity, date, time, and referrer URL of the request (in other words, the site visited);
* Members’ activities, including terms searched, videos watched, pages viewed and interactions with content and ads, voice and audio information when using audio features, purchase activity, and people with whom members communicate or share content;
* Location information, including GPS, IP address, sensor data from the device, and information about things near the device, such as Wi-Fi access points, cell towers, and Bluetooth-enabled devices.

Even though Google states that it does not share information that personally identifies members, such as their name or email address, in the Court’s opinion, Google collects and shares a significant amount of information, as the above list demonstrates.

Therefore, based solely on the Google documents, the Court concludes that the plaintiff has established that Google collects an impressive amount of information about members and shares it with third parties, all without obtaining prior consent. The Court even wonders why Google publishes such policies and terms without first requiring that users read them and provide consent.

But there is more. Professor Douglas C. Schmidt of Vanderbilt University in the United States conducted a study titled “Google Data Collection”, dated August 15, 2018 (Exhibit R-2). It is true that this study was conducted in the United States, but all the allegations in the Amended Application and Google’s allegations (Exhibits R-10 to R-13) concern Google in general and Google products available in Canada, which includes google.com, google.ca, and youtube.com. It is also true that the list of Google products covered by the study is not exhaustive or fully up to date; however, the main products are covered, such as Google Search, Google Maps, and Google Analytics. The final list will be provided on the merits.

The Court is of the opinion that, at the authorization stage, the content of this study supports the demonstration of the plaintiff’s colour of right. Fine distinctions will be made at trial. The Court notes that Google does not address this study in its plan of argument.

Below are excerpts from this study, Exhibit R-2:

At p. 2: Google utilizes the tremendous reach of its products to collect detailed information about people’s online and real-world behaviors, which it then uses to target them with paid advertising. Google’s revenues increase significantly as the targeting technology and data are refined. …

Less obvious ways for Google to collect data are “passive” means, whereby an application is instrumented to gather information while it’s running, possibly without the user’s knowledge. Google’s passive data gathering methods arise from platforms (e.g. Android and Chrome), applications (e.g. Search, YouTube, Maps), publisher tools (e.g. Google Analytics, AdSense) and advertiser tools (e.g. AdMob, AdWords).

At p. 4: While using an iOS device, if a user decides to forgo the use of any Google product (i.e. no Android, no Chrome, no Google applications), and visits only non-Google webpages, the number of times data is communicated to Google servers still remains surprisingly high. This communication is driven purely by advertiser/publisher services.

At p. 17: GA [Google Analytics] uses short pieces of tracking code (called “page tags”) embedded in a website’s HTML code. After a webpage loads per a user’s request, the GA code calls an “analytics.js” file residing on Google’s servers. This program transfers a “default” snapshot of user data at that moment, which includes visited webpage address, page title, browser information, current location (derived from IP address), and user language settings. GA scripts use cookies to track user behavior.

At pp. 17–18: While a GA cookie is specific to the particular domain of the website that user visits (called a “1st-party cookie”), a DoubleClick cookie is typically associated with a common 3rd-party domain (such as doubleclick.net). Google uses such cookies to track user interaction across multiple 3rd-party websites. When a user interacts with an advertisement on a website, DoubleClick’s conversion tracking tools (e.g. Floodlight) places cookies on a user’s computer and generates a unique client ID. Thereafter, if the user visits the advertised website, the stored cookie information gets accessed by the DoubleClick server, thereby recording the visit as a valid conversion.

At p. 18: AdSense collects information about whether an ad was displayed on the publisher’s webpage. It also collects how the user interacted with the ad, such as clicking an ad or tracking the curser [*sic*] movement over an ad. AdWords enables advertisers to serve search ads on Google Search, display ads on publisher pages, and overlay ads on YouTube videos. To track user click-through and conversion rates, AdWords ads place a cookie on users’ browsers to identify the same user if they later visit the advertiser’s website or complete a purchase.

At p. 26: Google Search is the most popular web search engine in the world, with over 11 billion search queries per month in the United States alone. In addition to serving ranked webpage results in response to users’ general queries, Google operates other search-based tools, such as Google Finance, Flights, News, Scholar, Patents, Books, Images, Videos, and Hotels. Google uses its search products to collect data related to search queries, browsing history, and ad-click/purchase activity. For example, Google Finance collects information on the type of stocks users may be tracking, whereas Google Flights tracks users’ travel bookings and search requests.

Whenever Search is used, Google collects location data via various means of assessing locations on mobile or desktop devices, as discussed in previous sections.

At p. 27: YouTube can be accessed by users via desktops (web browser), mobile devices (app and/or web browser), and Google Home (through a paid subscription service called YouTube Red). Google collects and stores search history, watch history, playlists, subscriptions, and comments on videos. All this information is marked with a date and time stamp of when the activity took place.

At p. 28: Maps is Google’s flagship navigation app. Google Maps can ascertain user’s travel routes, speed, and places that a user visits frequently (e.g. home, work, restaurants, and businesses). This information provides Google with a window into a user’s interests (e.g. food and shopping preferences), movement, and behavior.

Maps uses IP address, GPS, cell signal, and Wi-Fi access point data to calculate a device’s location. The latter two are collected from the device through which Maps is used and sent to Google for location assessment through its Location API. This API provides rich details about a user, including geographic coordinates, whether the user is stationary or moving, speed, and probabilistic determination of user’s mode of transport (e.g. bike, car, train, etc.).

At p. 29: The accuracy of location information captured by navigation applications enables Google to not only target ad audiences, but also helps deliver ads to users as they approach stores. In addition, Google Maps uses this information to generate real-time traffic updates.

At p. 36: Google counts a large percentage of the world’s population as its direct customers, with multiple products leading their markets globally and many surpassing 1 billion monthly active users. These products are able to collect user data through a variety of techniques that may not be easily graspable by a general user. A major part of Google’s data collection occurs while a user is not directly engaged with any of its products. The magnitude of such collection is significant, especially on Android mobile devices. And while such information is typically collected without identifying a unique user, Google distinctively possesses the ability to utilize data collected from other sources to de-anonymize such a collection.

The Court therefore notes that this study reveals that Google, be it through the Services or the Tools, collects information about the members without their prior authorization and often even without their knowledge, for which Google’s openly stated purpose is to provide users with personalized content, which includes personalized advertising content.

The Court further notes the following two other points, which contribute to establishing the plaintiff’s colour of right.

**First:** In the section “Turn “Do Not Track” on or off” on the Google Chrome Help Center (Exhibit R-12), Google explains that the “Do Not Track” setting allows class members to “send a request to websites not to collect or track [their] browsing data”. It is therefore suggested that by turning on this setting, members could choose and expressly tell Google that they do not consent to the collection and use of their information for commercial purposes. In the same document (Exhibit R-12), however, it is stated that “[m]ost websites and web services, including Google’s, don’t change their behavior when they receive a Do Not Track request”. In other words, in the Court’s view, not only does Google not request prior consent from the members to collect information, in the end Google does not respect the members’ choice not to have their information collected by Google.

**Second:** In the section “Search & browse privately” (Exhibit R-13), Google states that users can use private browsing mode to browse the web privately. According to paragraphs 68 and 69 of the Amended Application, however, the reality is quite different. Contrary to its own representations, Google collects and uses, for commercial purposes, the information of class members who use private browsing mode when they use Google Services or browse websites that use Google Tools. Below are paragraphs 68 and 69 and the evidence presented:

[translation]

68. For example, an analysis of the toolbox on the tribunaux.qc.ca website clearly shows that, even in incognito mode (Chrome’s private browsing mode), Google Analytics is activated as soon as the browser visits the site:

Une image contenant capture d’écran, noir, moniteur, écran

Description générée automatiquement

69. Conversely, the Firefox browser, developed by the not-for-profit foundation Mozilla, blocks the execution of code associated with Google Analytics:

Une image contenant capture d’écran, ordinateur, moniteur, portable

Description générée automatiquement

In short, the allegations in the Amended Application and the exhibits analyzed above clearly establish that Google collects the class members’ information without prior authorization when they use Google Services or browse websites that use any of the Google Tools. They also establish that Google shares such information with third parties, without the class members’ prior authorization.

On the merits, the Court will analyze in detail each word of every exhibit with complete evidence. That is when Google’s arguments may be considered. At this stage, they are premature and ultimately concern the merits.

But is the information collected without prior consent “personal information” within the meaning of the applicable legislation? Is the legislation raised by the plaintiff being violated? Which laws apply?

#### Analysis of the various statutory violations alleged

Let us begin with the CCQ, which is ultimately a debate on the Federal Act, Canada’s anti-spam legislation, and the Provincial Act.

##### Violation of federal and provincial legislation as the source of extracontractual liability within the meaning of article 1457 CCQ

The plaintiff invokes the Federal Act, Canada’s anti-spam legislation, and the Provincial Act, as defined in footnotes 2 and 3.

The plaintiff claims that Google violated these three statutes, thereby committing an extracontractual fault. The plaintiff submits that the class members suffered an injury as a result, hence Google’s extracontractual liability under article 1457 CCQ.

Google contests and argues that there is no fault since there is no collection of personal information within the meaning of these statutes. Google adds that, in any case, only the Provincial Act applies. Finally, Google claims that the plaintiff has not established that the class members suffered an injury that is validly recognized in Quebec law. Therefore, according to Google, even if information was collected without prior consent, and even if this information was personal according to the statutes, there is no colour of right because there is no injury. What to conclude?

The Court finds that, to hold Google extracontractually liable, there must be fault (violation of one of the applicable statutes), injury, and a causal connection. Let us begin with fault, which requires an analysis of the statutes in question.

**Provincial Act:** It should be recalled that the Provincial Act is the *Act respecting the protection of personal information in the private sector*, CQLR, c. P-39.1.

Section 2 of the Provincial Act reads as follows:

2. Personal information is any information which relates to a natural person and allows that person to be identified.

The Court finds that the information collected by Google and set out in the LIST drawn up above by the Court is personal information within the meaning of this provision. As explained earlier, it clearly identifies the natural person who is a class member, and its purpose is to show the class member personalized ads.

The obligations to obtain prior consent and not to share the information with third parties are set out in sections 6, 8, 13, and 14 of the Provincial Act:

**6.** Any person collecting personal information relating to another person may collect such information only from the person concerned, unless the latter consents to collection from third persons.

However, he may, without the consent of the person concerned, collect such information from a third person if the law so authorizes.

He may also do so if he has a serious and legitimate reason and either of the following conditions is fulfilled:

(1) the information is collected in the interest of the person concerned and cannot be collected from him in due time;

(2) collection from a third person is necessary to ensure the accuracy of the information.

**8.** A person who collects personal information from the person concerned must, when establishing a file on that person, inform him:

(1) of the object of the file;

(2) of the use which will be made of the information and the categories of persons who will have access to it within the enterprise;

(3) of the place where the file will be kept and of the rights of access and rectification.

**13.** No person may communicate to a third person the personal information contained in a file he holds on another person, or use it for purposes not relevant to the object of the file, unless the person concerned consents thereto or such communication or use is provided for by this Act.

**14.** Consent to the collection, communication or use of personal information must be manifest, free, and enlightened, and must be given for specific purposes. Such consent is valid only for the length of time needed to achieve the purposes for which it was requested.

Consent given otherwise than in accordance with the first paragraph is without effect.

In the Court’s opinion, Google breaches these provisions when it:

* Collects the class members’ personal information without prior authorization when they use Google Services or browse websites that use any of the Google Tools.
* Shares this personal information with third parties, without the class members’ prior authorization.

Google argues that under the Provincial Act, consent (prior or not) is not required from the class members, but the Court disagrees. The Court is of the opinion that the above legislative provisions require prior consent otherwise their existence would be meaningless. At worst, even if the consent required is not prior, Google does not even specifically and individually request it according to what we have seen above. In any event, this issue will be reviewed in considerable detail on the merits, with all the evidence on what constitutes personal information collected.[[36]](#footnote-36) For now, the Court finds that the plaintiff has established that Google is at fault for breaching the Provincial Act. Let us now turn to the Federal Act.

**Federal Act:** It should be recalled that the Federal Act is the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, often referred to as “PIPEDA”.

Google argues that the Federal Act does not apply and that if it does apply, the information collected is not “personal information” and that, in any case, it has not violated the provisions of the Act. The plaintiff claims that the Federal Act does apply and, citing the policy positions and decisions of the Office of the Privacy Commissioner of Canada, that Google has violated this Act.

To interpret the Federal Act, the plaintiff cites the following policy positions, guidelines, investigations, and decisions of the Office of the Privacy Commissioner of Canada:

* Policy position on online behavioural advertising, December 2015 (revised August 13, 2021);
* Guidelines for obtaining meaningful consent, May 2018 (revised August 13, 2021);
* PIPEDA Findings #2021‐001, February 2, 2021;
* PIPEDA Report of Findings #2014‐001, January 14, 2014;
* PIPEDA Report of Findings #2015‐001, April 7, 2015;
* PIPEDA Report of Findings #2019‐002, April 25, 2019;
* PIPEDA Report of Findings #2009‐008, July 16, 2009;
* PIPEDA Report of Findings #2012‐001, February 18, 2013;
* PIPEDA Report of Findings #2014‐011, October 7, 2014;
* PIPEDA Report of Findings #2019‐004, November 26, 2019;
* PIPEDA Report of Findings #2013‐017, November 20, 2013;
* PIPEDA Report of Findings #2013‐003, July 11, 2013; and
* Joint investigation into location tracking by the Tim Hortons App, June 1, 2022.

The plaintiff cites these documents in its plan of argument but does not allege them in the Amended Application or file them as exhibits. It argues that it is commentary issued by the organization responsible for interpreting the Federal Act, of which the Court can take notice.

The Court disagrees with the plaintiff’s position. The Court cannot consider these documents because they are factual elements that are not part of the evidence attached to or alleged in the Amended Application. Indeed, facts cannot come from a plaintiff’s plan of argument, but must be formally alleged in an application for authorization to institute a class action.[[37]](#footnote-37) These decisions, guidelines, and policies are not mere commentary, but factual elements that must be alleged.

Thus, does the Federal Act apply to Google?

Section 2 of the Federal Act defines “personal information” as “information about an identifiable individual”. The Court is of the opinion that the information Google collects from the class members (see the LIST) is personal information within the meaning of this definition. It allows a class member to be identified.

However, is there an exemption from the application of the Federal Act given the existence of the Provincial Act in Quebec? Section 26(2)(b) of the Federal Act reads as follows:

**26.** (1) The Governor in Council may make regulations for carrying out the purposes and provisions of this Part, including regulations:

…

(2) The Governor in Council may, by order,

…

(b) if satisfied that legislation of a province that is substantially similar to this Part applies to an organization, a class of organizations, an activity or a class of activities, exempt the organization, activity or class from the application of this Part in respect of the collection, use or disclosure of personal information that occurs within that province; and

…

Section 1 of the *Organizations in the Province of Quebec Exemption Order*[[38]](#footnote-38) reads as follows:

1. Any organization, other than a federal work, undertaking or business, that carries on an enterprise within the meaning of section 1525 of the *Civil Code of Québec* and to which *An Act respecting the protection of personal information in the private sector*, R.S.Q., c. P-39.1, applies is exempt from the application of Part 1 of the *Personal Information Protection and Electronic Documents Act* in respect of the collection, use and disclosure of personal information that occurs within the Province of Quebec.

The Court is of the opinion that, while it is possible that personal information was collected “within the Province of Quebec” with regard to class members, it seems clear that the plaintiff has established that Google discloses such information to third parties, who can be anywhere in the world.[[39]](#footnote-39) The Court therefore finds that there is “use” and “disclosure of personal information that occurs” outside the Province of Quebec. Thus, the *Organizations in the Province of Quebec Exemption Order* does not apply here, and the Federal Act applies. Is it being violated?

The Court is of the view that the failure to obtain prior consent from the class members constitutes a violation of the Federal Act.

Section 5 of the Federal Act provides that every organization shall comply with the obligations set out in Schedule 1. The following sections of Schedule 1 set out the need for prior consent, which Google does not obtain from class members:

4.3 Principle 3 — Consent

The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

…

4.3.1

Consent is required for the collection of personal information and the subsequent use or disclosure of this information. Typically, an organization will seek consent for the use or disclosure of the information at the time of collection. In certain circumstances, consent with respect to use or disclosure may be sought after the information has been collected but before use (for example, when an organization wants to use information for a purpose not previously identified).

4.3.2

The principle requires “knowledge and consent”. Organizations shall make a reasonable effort to ensure that the individual is advised of the purposes for which the information will be used. To make the consent meaningful, the purposes must be stated in such a manner that the individual can reasonably understand how the information will be used or disclosed.

4.3.5

In obtaining consent, the reasonable expectations of the individual are also relevant. For example, an individual buying a subscription to a magazine should reasonably expect that the organization, in addition to using the individual’s name and address for mailing and billing purposes, would also contact the person to solicit the renewal of the subscription. In this case, the organization can assume that the individual’s request constitutes consent for specific purposes. On the other hand, an individual would not reasonably expect that personal information given to a health-care professional would be given to a company selling health-care products, unless consent were obtained. Consent shall not be obtained through deception.

4.3.6

The way in which an organization seeks consent may vary, depending on the circumstances and the type of information collected. An organization should generally seek express consent when the information is likely to be considered sensitive. Implied consent would generally be appropriate when the information is less sensitive. Consent can also be given by an authorized representative (such as a legal guardian or a person having power of attorney).

[Emphasis added.]

In the Court’s opinion, Google breaches these provisions when it:

* Collects personal information from the class members without prior authorization when they use Google Services or browse websites that use one of the Google Tools;
* Shares this personal information with third parties, without prior authorization of the class members.

The Court finds that the plaintiff has established that Google is at fault by breaching the Federal Act. Let us turn to Canada’s anti-spam legislation.

**Canada’s anti-spam legislation**: It should be recalled that this is the *Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, S.C. 2010, c. 23.

The plaintiff argues that Google is breaching its obligations under Canada’s anti-spam legislation by installing computer programs (cookies and other similar technology) on the class members’ computers without their consent. Google denies this and states that section 47 and following of this legislation dealing with the private right of action are not in force, which bars any action, and that, in any case, the presumption set out in section 10(8) of this legislation means that Google is not breaching it. Let us consider this.

For the reasons that follow, the Court is of the opinion that the plaintiff has established that Google is breaching Canada’s anti-spam legislation.

First, in the Court’s opinion, the fact that section 47 and following of Canada’s anti-spam legislation are not in force changes nothing. The class members are entitled to raise a breach of this legislation as an extracontractual fault under article 1457 CCQ. They do not benefit, however, from the rules and advantages provided for in section 47 and following, but this does not affect the availability of an action under article 1457 CCQ.

Second, the prohibition on installing computer programs (cookies and other similar technology) is set out in section 8 of Canada’s anti-spam legislation:

**8.** (1) A person must not, in the course of a commercial activity, install or cause to be installed a computer program on any other person’s computer system or, having so installed or caused to be installed a computer program, cause an electronic message to be sent from that computer system, unless

(a) the person has obtained the express consent of the owner or an authorized user of the computer system and complies with subsection 11(5); or

(b) the person is acting in accordance with a court order.

Google is also prohibited from doing so through a third party:

**9.** It is prohibited to aid, induce, procure or cause to be procured the doing of any act contrary to any of sections 6 to 8.

Third, exceptions to the requirement to obtain express consent are set out in section 10(8) if (1) the computer program is a cookie, HTML code, Java Script, or an operating system, and (2) the person’s conduct is such that it is reasonable to believe that they consent to the program’s installation. In the Court’s opinion, however, none of these exceptions applies here because a second category of exceptions provides that, where the function the person who seeks consent knows and intends will cause the computer system to operate in a manner that is contrary to the reasonable expectations of the other person by collecting personal information stored on the computer system,[[40]](#footnote-40) this person must describe the program’s material elements that perform the function or functions and bring them to the attention of the other person, in the prescribed manner, clearly and prominently, and separately and apart from the licence agreement.[[41]](#footnote-41) Google does not do this.

In addition, section 5 of the *Electronic Commerce Protection Regulations**(CRTC)*[[42]](#footnote-42) contains an additional constraint in that the person seeking consent must obtain “an acknowledgement in writing from the person from whom consent is being sought that they understand and agree that the program performs the specified functions”. Google does not do this.

Thus, according to the Court, Canada’s anti-spam legislation therefore establishes that a computer program that transmits personal information stored on a computer automatically operates in a manner that is contrary to the reasonable expectations of the person from whom consent is being sought, which defeats the application of the presumptions in section 10(8).

Fourth and last, the Court notes that, where they do apply, in the event of a conflict between a provision of Canada’s anti-spam legislation and a provision of Part 1 of the Federal Act, the provision of Canada’s anti-spam legislation operates despite the provision of that Part, to the extent of the conflict, as provided for in section 2 of Canada’s anti-spam legislation.

In summary, the Court finds that the plaintiff has established that Google is at fault by breaching Canada’s anti-spam legislation.

Let us turn to injury and causation, required under article 1457 CCQ.

**Injury and causation:** The plaintiff must establish that the three faults alleged caused injury to the class members. These three faults are the violations of the three statutes described above.

For Google, there is simply no injury that can be compensated in Quebec law under article 1611 CCQ. Google rejects the plaintiff’s analogies. What to decide?

The plaintiff alleges the following in the Amended Application:

[translation]

76. Therefore, GOOGLE is liable to all members of the proposed class and each member is entitled to claim from GOOGLE payment of an amount equal to the value of the personal information collected by GOOGLE while they were using Google Services or browsing the Web.

The plaintiff further alleges:

[translation]

10. Not only do its services include the most popular search engine in the world (Google Search), GOOGLE is also the world leader in digital advertising, as appears from the article by Professor Douglas C. Schmidt of Vanderbilt University titled “Google Data Collection” dated August 15, 2018, a copy of which is attached herewith in support of this application as Exhibit R-2.

18. Moreover, in 2019, online advertising revenue of ALPHABET INC., GOOGLE’s parent company, totalled US$134,811 billion, more than 83% of its total revenue, as appears from the 2019 Annual Report of ALPHABET INC., Exhibit R-1.

Therefore, according to the plaintiff’s allegations, which are assumed to be true, Google appropriates the class members’ personal information without right and uses it to create user profiles that allow it to be the world leader in targeted advertising and to generate revenue in 2019 of US$134,811 billion from online advertising.

In these circumstances, the Court accepts the plaintiff’s analogy regarding injury. Indeed, there are few examples in the case law where the fact that property stolen by a person does not necessarily deprive its original possessor of the possibility of its enjoyment. The Court therefore accepts the plaintiff’s suggestion that the most helpful parallel is the right to one’s image. When a person sees his or her image used for commercial purposes without his or her authorization, the person is not necessarily deprived of the possibility to use that image for commercial purposes. The courts recognize, however, that a person who usurps an image must compensate the victim for the lost profit due to that person’s fault, in accordance with article 1611 CCQ. This line of authority therefore recognizes the existence of an injury in this situation.

In *Laoun* *c*. *Malo*,[[43]](#footnote-43) the Court of Appeal recognized that an actress was entitled to the equivalent of the fee she had originally received for associating her image with a brand of glasses after the promotional photos were reused without right:

[translation]

[87] The appellant adds that, in any case, the respondent had already been paid a fee by *Silhouette* and could not receive a second fee from it. This argument makes no sense. The respondent was paid a fee for the *Silhouette* advertisement, not for any advertising use of her image by the appellant. The appellant’s use of the respondent’s image was completely outside the scope of the contract between *Silhouette* and the respondent. The fee granted by the first judge was therefore to compensate the respondent for the reuse of her image, which would have required a second contract to be signed.

…

[91] For these reasons, although the respondent’s position in this regard is somewhat paradoxical in that she claims compensation in the form of a fee while stating that she would never have agreed to advertise in *Afropage*, I am of the opinion that the trial judge did not err in awarding her compensation of $10,000 based on the fee she received from *Silhouette*.

While it is true that this assessment is relatively easy when the victim is accustomed to using his or her commercial image and there is a known market to determine its value, the method remains the same when the victim is anonymous in the eyes of the public as evidenced by this excerpt from *Aubry* *v*. *Éditions Vice-Versa inc*.[[44]](#footnote-44) of the Supreme Court of Canada:

[74] With respect to the patrimonial aspect of the invasion of privacy, we are of the view that the commercial or promotional exploitation of an image, whether of a well‑known person or a private individual, can cause the victim material prejudice. The compensation must, then, be calculated on the basis of the loss actually sustained and the lost profit (art. 1073 *C.C.L.C*.). … Neither the trial judge nor the judges of the Court of Appeal discussed the patrimonial aspect of the damages. The respondent was, however, entitled to claim an amount in exchange for the use of her image. The respondent argued that there was commercial exploitation and adduced evidence in support of her claim for damages in respect thereof. The testimony of Gilbert Duclos disclosed that he usually has to pay between $30 and $40 an hour for the services of a model, generally for a period of two to four hours. Thus, the respondent would ordinarily have been entitled to a sum of money. In the present case, this was the only evidence available to this Court for calculating these damages. In other circumstances, where the evidence so permits, it is not impossible to compensate for patrimonial damages through profit‑sharing based on the principles of profit lost and loss sustained.

In the Court’s view, at this stage, these judgments establish: (1) the existence of injury in this case; and (2) a simple and straightforward method to assess the material injury associated with the commercial use without right of the class members’ personal information.

In these circumstances, the Court is of the opinion that it is not unreasonable to infer”[[45]](#footnote-45) that the members suffered injury equal to the value of the personal information collected by Google when they used Google Services or browsed the Web. The amount or quantum need not be specified at this stage.

Finally, with regard to the causal connection between the fault and the injury, the Court is of the view that it must be presumed here, as a presumption of fact based on the allegations of fact in the Amended Application. It can be presumed that the injury equals the value of the personal information collected by Google caused by Google’s illegal collection of personal information.

The Court therefore finds that the plaintiff has established all the elements required to find Google extracontractually liable under article 1457 CCQ. Let us turn to the *Charter of human rights and freedoms*.

##### *Charter of human rights and freedoms*

The plaintiff relies on sections 5 and 49 of the *Charter of human rights and freedoms* (the “*Charter*”) to claim compensatory damages and punitive damages:

**5.** Every person has a right to respect for his private life.

**49.** Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

The plaintiff claims compensatory damages for violation of the right to privacy in paragraphs 74 to 76 of the Amended Application.[[46]](#footnote-46) Its reasoning is the same as for compensatory damages under article 1457 CCQ.

The Court is of the opinion that the plaintiff has established its claim for compensatory damages under the *Charter*. In paragraph 74 of the Amended Application, it alleges a violation of the members’ right to privacy. The Court is of the view that Google’s collection without consent of the personal information on the LIST constitutes a violation of the members’ right to privacy.

Even though the right to privacy is a difficult concept to define, in *R*. *v*. *Spencer*,[[47]](#footnote-47) the Supreme Court of Canada had the opportunity to determine the scope of the right to privacy and stated that the right to privacy includes at least three conceptually distinct although overlapping understandings of what privacy is: privacy as secrecy, privacy as control, and privacy as anonymity.[[48]](#footnote-48) The Supreme Court of Canada recalled the following on the subject of control:[[49]](#footnote-49)

[40] Privacy also includes the related but wider notion of control over, access to and use of information, that is, “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”: A. F. Westin, *Privacy and Freedom* (1970), at p. 7, cited in *Tessling*, at para. 23. La Forest J. made this point in *Dyment*. The understanding of informational privacy as control “derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit” (*Dyment*, at p. 429, quoting from *Privacy and Computers*,the Report of the Task Force established by the Department of Communications/Department of Justice (1972), at p. 13). …

...

[47]  In my view, the identity of a person linked to their use of the Internet must be recognized as giving rise to a privacy interest beyond that inherent in the person’s name, address and telephone number found in the subscriber information. …

[Emphasis added.]

The right to privacy is thus violated, which constitutes a civil fault. The Court finds that the plaintiff also established compensatory damages and causation under the first paragraph of section 49 of the *Charter* for the same reasons as those stated above for article 1457 CCQ. In fact, an action under the *Charter* follows the same logic as an action under the CCQ:[[50]](#footnote-50) if an infringement of a *Charter*-protected right is established, there is a civil fault, after which injury and a causal connection must be established.

Unlawful and intentional interference with the right to privacy may give rise to punitive damages. Has it been proved here?

The plaintiff claims punitive damages in paragraph 77 of the Amended Application:

[translation]

77. Considering GOOGLE’s false representations and the unlawful and intentional interference with the private life of the members of the proposed class, the members are also entitled to claim from GOOGLE payment of an amount of $50 million in punitive damages, subject to adjustment.

1. In *Quebec (Public Curator) v*. *Syndicat national des employés de l'hôpital St- Ferdinand*,[[51]](#footnote-51) Claire L’Heureux-Dubé J., on behalf of the Supreme Court of Canada, defined the meaning of the terms “unlawful and intentional interference” in section 49 of the *Charter*:

[121] Consequently, there will be unlawful and intentional interference within the meaning of the second paragraph of s.49 of the *Charter* when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause. This test is not as strict as specific intent, but it does go beyond simple negligence. Thus, an individual’s recklessness, however wild and foolhardy, as to the consequences of his or her wrongful acts will not in itself satisfy this test.

1. In *Union des consommateurs c*. *Bell Mobilité Inc.*,[[52]](#footnote-52) the Court of Appeal set out the test to follow to authorize requests for punitive damages:

[translation]

[42] While it is true that the authorization judge must ensure that the application for authorization sets out the facts that justify the conclusions sought, the fact remains that the judge must do so bearing in mind the criterion established by the Supreme Court in *Vivendi*, that is, the low burden of establishing the existence of an arguable case. The judge must therefore be satisfied that the pleading contains sufficient factual allegations to give rise to the conclusions sought for punitive damages. In the circumstances, the allegations of a *CPA* breach detailed in the motion are likely to give rise to a claim for punitive damages and it was not up to the authorization judge to dismiss them at that stage. The judge will be able to assess the respondent’s conduct (before and after the alleged violation) only after the evidence has been heard, as the Supreme Court noted in *Richard* *v.* *Time Inc.*:

[Italics in original; emphasis added.]

Consequently, does the Amended Application contain sufficient factual allegations to give rise to the conclusions sought for punitive damages? The Court is of the opinion that it does. Paragraph 77 of the Amended Application is insufficient if taken on its own. However, when considered with the rest of the allegations in the Amended Application, the Court finds that Google clearly acted with full knowledge of the immediate and natural, or at least extremely probable, consequences of failing to ask for the class members’ prior consent when it collects their personal information when they use Google Services or browse websites that use one of the Google Tools or when it shares this personal information with third parties.

The example of Google Tools speaks for itself. When the members browse 89.37% of websites, they are not even aware that Google is collecting their personal information and sharing it with third parties. This is easily characterized as unlawful and intentional interference.

At this stage, the Court need not specify the quantum of punitive damages claimed; this will be done on the merits.

The Court therefore finds that the plaintiff has established its cause of action for compensatory and punitive damages under the *Charter*.

##### *Consumer Protection Act*

The plaintiff’s action is based both on section 41 and on sections 219 and 228 of the *Consumer Protection Act* (the “*CPA*”):

**41.** The goods or services provided must conform to the statements or advertisements regarding them made by the merchant or the manufacturer. The statements or advertisements are binding on that merchant or that manufacturer.

**219.** No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

**228.** No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

The applicable test to determine whether or not a representation constitutes a prohibited practice is found in section 218 *CPA*:

**218.** To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.

The plaintiff seeks compensatory damages and punitive damages under section 272 *CPA.* It argues that Google violates these *CPA* provisions in the following three ways:

1. Google does not respect the choice of members who activate the “Do not track” setting;
2. In the section “Search & browse privately” (Exhibit R-13), Google states that users can use private browsing mode to browse the web privately. However, this is false;
3. False representations include the mechanism whereby Google, through generalities, imprecisions, and innocuous examples, fails to convey information that is useful and necessary for consent on the extent of the information it collects and shares with its “partners”.

Google argues that it has not violated the *CPA* provisions and that there can be no punitive damages.

**First alleged violation of the *CPA* – “Do not track”:** The Court finds that Google did not make false representations because in the section “Turn “Do Not Track” on or off” on the Google Chrome Help Center (Exhibit R-12), Google specifically states that it does not respect the choice of members who do not want their information collected. Therefore, in the Court’s view, it is fully disclosed in advance and there cannot be any violation of the *CPA* provisions cited.

**Second alleged violation of the *CPA* – private mode:** The Court has already decided that the plaintiff has established that even though Google states that users can use private browsing mode to browse the web privately (Exhibit R-13), this is in fact false. In the circumstances, it is a false representation within the meaning of *Richard* *v.* *Time Inc.*[[53]](#footnote-53) of the Supreme Court of Canada. However, this does not mean that the plaintiff has an action under sections 219 and 228 CPA. In fact, contrary to what the Supreme Court of Canada requires, the plaintiff is not alleging and has not established a causal connection between the CPA breach and the compensatory damages claimed. The Court cannot deduce a causal connection by presumption of fact. As the Supreme Court of Canada stated in *Richard* *v.* *Time Inc.*:

124. This absolute presumption of prejudice presupposes a rational connection between the prohibited practice and the contractual relationship governed by the Act. It is therefore important to define the requirements that must be met for the presumption to apply in cases in which a prohibited practice has been used. In our opinion, a consumer who wishes to benefit from the presumption must prove the following: (1) that the merchant or manufacturer failed to fulfil one of the obligations imposed by Title II of the Act; (2) that the consumer saw the representation that constituted a prohibited practice; (3) that the consumer’s seeing that representation resulted in the formation, amendment or performance of a consumer contract; and (4) that a sufficient nexus existed between the content of the representation and the goods or services covered by the contract. This last requirement means that the prohibited practice must be one that was capable of influencing a consumer’s behaviour with respect to the formation, amendment or performance of the contract. Where these four requirements are met, the court can conclude that the prohibited practice is deemed to have had a fraudulent effect on the consumer. In such a case, the contract so formed, amended or performed constitutes, in itself, a prejudice suffered by the consumer. This presumption thus enables the consumer to demand, in the manner described above, one of the contractual remedies provided for in s. 272 *C.P.A.*

[Emphasis added.]

The plaintiff has failed to meet conditions 3 and 4 for sections 219 and 228 *CPA*.[[54]](#footnote-54) There are no allegations in this regard.

However, the Court finds that section 41 *CPA* has been violated because Google does not respect the statements it makes in Exhibit R-13.

**Third alleged violation of the *CPA* – omissions in general:** The plaintiff invokes Google’s failure to inform members that it collects and shares personal information with third parties. The plaintiff also notes that the Terms of Service (Exhibit R-10) specifically mention that the Privacy Policy (Exhibit R-11) is not part of the terms.

Here again, however, the plaintiff fails to meet the Supreme Court of Canada’s conditions 3 and 4 regarding sections 219 and 228 *CPA.* There are no allegations in this regard. Therefore, the Court need not continue its analysis or decide whether there are in fact any false representations.

As for section 41 *CPA*, the Court is of the opinion that Google in fact does what it describes in Exhibits R-10 and R-11. Although it may ultimately be unlawful within the meaning of the legislation considered in sections 2.2.3.1 and 2.2.3.2, that does not mean that the “services provided” do not “conform to the statements or advertisements regarding them made by the merchant or the manufacturer.”

The Court finds that the plaintiff has not established a violation of the three aspects invoked, except for section 41 *CPA* solely with respect to private browsing.

During oral arguments, the plaintiff also raised Google’s violation of paragraphs (d) and (e) of section 54.4 *CPA*, which read:

**54.4.** Before a distance contract is entered into, the merchant must disclose the following information to the consumer:

…

(d) a detailed description of goods or services that are to be the object of the contract, including characteristics and technical specifications;

…

(e) an itemized list of the prices of the goods or services that are to be the object of the contract, including associated costs charged to the consumer and any additional charges payable under an Act;

With respect, the Court fails to see how Google violates these provisions in the context of the allegations in this case. Let us turn to damages.

1. Section 272 *CPA* applies and reads:

272. If the merchant or the manufacturer fails to fulfil an obligation imposed on him by this Act, by the regulations or by a voluntary undertaking made under section 314 or whose application has been extended by an order under section 315.1, the consumer may demand, as the case may be, subject to the other recourses provided by this Act:

(a) the specific performance of the obligation;

(b) the authorization to execute it at the merchant’s or manufacturer’s expense;

(c) that his obligations be reduced;

(d) that the contract be rescinded;

(e) that the contract be set aside; or

(f) that the contract be annulled,

without prejudice to his claim in damages, in all cases. He may also claim punitive damages.

With respect to compensatory damages, the Court refers to what it previously decided at the end of section 2.2.3.1. The Court is of the view that it is not unreasonable to find that the members suffered damage equal to the value of the personal information collected by Google when they use Google Services or browse the Web in private browsing mode. However, these compensatory damages are probably already included in the damages under the CCQ. This will be decided on the merits.

The criteria for awarding punitive damages under the *CPA* are similar to punitive damages under the *Charter*, as the Supreme Court of Canada decided in *Richard* *v.* *Time Inc.*[[55]](#footnote-55) Violations by merchants or manufacturers that are intentional, malicious, or vexatious, and conduct on their part that displays ignorance, carelessness, or serious negligence with respect to their obligations and consumers’ rights under the *CPA* may result in awards of punitive damages. However, before awarding such damages, the Court must consider the whole of the merchant’s conduct at the time of and after the violation.

Here, for the same reasons as in section 2.2.3.2, the Court is of the opinion that the plaintiff has established Google’s intentional violation while members are using private browsing. Again, these punitive damages are probably already included in the punitive damages under the *Charter*. This will be decided on the merits.

Therefore, the Court finds that the plaintiff has established its cause of action for compensatory and punitive damages under section 41 *CPA* solely with respect to private browsing. All the other allegations concerning the *CPA* are dismissed because they have not been established. Let us now deal with the final statute at issue.

##### *Competition Act*

The plaintiff invokes sections 52 and 36 of the *Competition Act*, which read:

**36.** (1) Any person who has suffered loss or damage as a result of:

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

(4) No action may be brought under subsection (1):

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from:

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the later; and

(b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

(i) a day on which the order of the Tribunal or court was contravened, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of, whichever is the later.

**52.** (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that

(a) any person was deceived or misled;

(b) any member of the public to whom the representation was made was within Canada; or

(c) the representation was made in a place to which the public had access.

(1.2) For greater certainty, in this section and in sections 52.01, 52.1, 74.01, 74.011 and 74.02, the making or sending of a representation includes permitting a representation to be made or sent.

(2) For the purpose of this section, a representation that is:

(a) expressed on an article offered or displayed for sale or its wrapper or container,

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store or door-to-door selling to a person as ultimate user, or by communicating orally by any means of telecommunication to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

(2.1) Where a person referred to in subsection (2) is outside Canada, a representation described in paragraph (2)(a), (b), (c) or (e) is, for the purposes of subsection (1), deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

(3) Subject to subsection (2), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) is deemed to have made that representation to the public.

(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

(5) Any person who contravenes subsection (1) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

(6) Nothing in Part VII.1 shall be read as excluding the application of this section to a representation that constitutes reviewable conduct within the meaning of that Part.

(7) No proceedings may be commenced under this section against a person against whom an order is sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this section.

The plaintiff claims compensatory damages for false representation and reimbursement of the costs incurred for any investigation required to establish Google’s liability in this case, including counsels’ fees and disbursements, which includes expert fees.

Google contests and argues that it did not make any false representation.

The Court cites the plaintiff’s plan of argument concerning the *Competition Act*:

[translation]

The false representations alleged are essentially the same as those alleged with respect to the action under the *Consumer Protection Act*. The legal bases of false representations as defined in both these statutes are so similar that these causes of action are regularly authorized together in class actions.

Footnote: See in particular: *Gauthier* *c.* *Johnson & Johnson Inc.*, 2020 QCCS 690 (application for leave to appeal dismissed: 2020 QCCA 1666); *Option Consommateurs* *c.* *Samsung Electronics Canada inc.*, 2018 QCCS 1751.

The Court agrees. In the circumstances, and for the reasons described in section 2.2.3.3, the Court also finds that the plaintiff has established its cause of action for compensatory damages under the *Competition Act* solely with respect to private browsing. However, these compensatory damages are probably already included in the damages under the CCQ. This will be decided on the merits. There is, however, one particularity: section 36(1) of the *Competition Act* allows the plaintiff to claim reimbursement of the costs incurred for any investigation required to establish Google’s liability in this case, including counsels’ fees and disbursements, which includes expert fees. The Court authorizes this conclusion and specifies that expert fees may also be claimed as legal costs on the merits.

All the other allegations regarding the *Competition Act* are dismissed because they have not been established.

#### Conclusion on the colour of right

The plaintiff has therefore established the colour of right of its action:

1. For extracontractual liability against Google under article 1457 CCQ for violation of the Provincial Act, the Federal Act, and Canada’s anti-spam legislation concerning all the Google practices alleged in the Amended Application;
2. For compensatory and punitive damages for violation of the right to privacy guaranteed by the *Charter*;
3. For compensatory and punitive damages under section 41 *CPA* solely with respect to the issue of private browsing;
4. For compensatory damages under the *Competition Act* solely with respect to the issue of private browsing, also including a claim for reimbursement of the costs incurred for any investigation required to establish Google’s liability in this case, including counsels’ fees and disbursements, which includes expert fees.

It is understood that the compensatory and punitive damages that may be claimed are potentially the same in the four categories, but this will be decided on the merits.

The Court is also of the view that the conclusions sought by the plaintiff must be authorized because they encompass all the authorized causes of action, and any distinctions that must be made may be made later during the case on the merits. It is also unadvisable to prepare a list of conclusions, which would be endless and incomprehensible.

Let us turn to the next criterion.

### Identical, similar or related issues – 575(1) CCP

Below are the issues proposed by the plaintiff in paragraph 79 of the Amended Application:

[translation]

1. Does the defendant collect and/or use, for commercial purposes, the class members’ personal information by means of Google Services and/or Google Tools?
2. Does the defendant collect and/or use personal information, for commercial purposes, by means of Google Services and/or Google Tools, without sufficient consent from the class members? If so, does this constitute a fault?
3. In the course of commercial activities, has the defendant installed or caused to be installed a computer program on the computers of the class members without their consent?
4. What is the value of the personal information collected and/or used for commercial purposes by the defendant without sufficient consent from the class members?
5. If applicable, have the class members suffered damage arising from the defendant’s collection and/or use for commercial purposes of their personal information without their consent?
6. Are the class members entitled to reimbursement by the defendant of the amounts incurred for these proceedings and for any investigation in connection with this matter?
7. Should the defendant be condemned to pay punitive damages to the class members and, if so, what is the value of the punitive damages the defendant should be condemned to pay to fulfil their preventive purpose?

Google does not contest, and the Court is of the opinion, that these issues are identical, similar, or related within the meaning of article 575(1) CCP. The Court also need not amend these issues given its conclusions on the limited scope of the conclusions under the *CPA* and the *Competition Act*. Fewer elements are authorized relating to the *CPA* and the *Competition Act*, and they are included in the general issues. It is also inadvisable to prepare a list of issues, which would be endless and incomprehensible. The Court is confident that the plaintiff will clearly categorize all of its causes of action in the originating application for a class action on the merits.

### Composition of the class – 575(3) CCP

1. The factors generally considered in analyzing this condition of article 575 CCP are as follows:[[56]](#footnote-56)

* The probable number of members;
* The geographic location of the members; and
* The legal and practical constraints inherent in using a mandate or consolidating parties compared to a class action.

Recently, in *Charbonneau* *c*. *Location Claireview,*[[57]](#footnote-57) the Court of Appeal stated, with respect to the class composition, that plaintiffs need not establish that their application has a sufficient basis in fact because plaintiffs need establish only a mere possibility of succeeding on the merits, as not even a realistic or reasonable possibility is required. The Court of Appeal found that plaintiffs do not have to adduce evidence on the composition of the class since the allegations of fact are sufficient.

This is what the plaintiff alleges in the Amended Application:

[translation]

81. GOOGLE is the largest digital advertising company in the world. Millions of users and website operators use Google Services and Tools daily, as appears from the 2019 Annual Report of ALPHABET INC., Exhibit R-1.

82. The plaintiff does not know the exact number of members in the proposed class, but estimates it to be several million people, given in particular the high number of users and website operators that use Google Services and Tools, in addition to the intrinsic nature of the case.

83. It is difficult, if not impossible, to identify or locate all the members of the proposed class involved in this class action and to contact them to obtain a mandate to take part in judicial proceedings on behalf of others or to consolidate proceedings.

1. Google does not contest that a class exists but argues that the proposed class is vague and overly broad and has no temporal scope. The Court will return to this later in section 2.6.1. For now, the Court states that the criterion of article 573(3) CCP is met.

### Representative plaintiff – 575(4) CCP

1. The Court of Appeal reiterated the criteria to consider when deciding on the capacity of the representative plaintiff under paragraph 4 of article 575 CCP:[[58]](#footnote-58)

[translation]

[30] … this condition requires the demonstration that [the plaintiff] has the interest to act, the authority to do so, and finally, that the plaintiff has no conflict with the class members.

This is what the plaintiff alleges in the Amended Application:

[translation]

84. The plaintiff asks to be appointed representative plaintiff for the proposed class.

85. The plaintiff is a consumer association constituted under the *Cooperatives Act* (R.S.Q. c. C-67), and its main purpose is to protect consumer interests.

86. In accordance with article 571 of the *Code of Civil Procedure*, the plaintiff has designated one of its members, Anne-Sophie Letellier, who is also a member of the proposed class.

87. The interest of the person designated in this class action is related to the purposes for which the plaintiff was constituted.

88. The plaintiff is in a position to properly represent the members of the proposed class. Furthermore, it has the capacity and interest to represent all the members of the proposed class.

89. For over 30 years, the plaintiff has been representing consumer interests and actively protecting their rights by directly supporting consumers and, where necessary, intervening before government bodies and the courts, as appears more fully from the plaintiff’s 2019–2020 Annual Report filed in support hereof as Exhibit R-14.

90. The plaintiff has twice received the Office de la protection du consommateur award. This award is presented once a year to highlight the commitment and contribution of individuals and organizations working to promote and protect the rights of Quebec consumers, as appears from two press releases of the Office de la protection du consommateur filed *en liasse* in support hereof as Exhibit R-15.

91. The plaintiff also received the 2018 Solidaires Empowerment award presented by Centraide Montreal to a community organization that stands out for helping vulnerable people enhance their potential so that they can take charge of their lives and improve their living conditions, as appears from a letter from Centraide Montreal dated December 8, 2017, filed in support hereof as Exhibit R-16.

92. The plaintiff takes a keen interest in consumer privacy protection in the digital environment. In recent years, it has produced several research reports on the issues raised by new business models based on the mass collection of digital data and has published several information tools for the general public. The plaintiff’s expertise in this area is often solicited by the media to comment on current events. It recently participated in consultations on two draft bills to modernize the legal framework governing digital data and credit agencies.

93. The plaintiff would like to manage this class action in the interests of the members of the proposed class and is determined to complete this case for the benefit of all the members of the proposed class and to devote the necessary time to it, both before the Superior Court and the Class Action Assistance Fund, if applicable, and to work with its counsel.

94. The plaintiff employs lawyers with a solid knowledge of class actions.

95. The plaintiff is interested in class action proceedings and has developed expertise in the area by producing, with the financial support of Industry Canada’s Office of Consumer Affairs, various research reports on the problems related to class actions, as appears under the “Publications” heading on the plaintiff’s website, extracted on January 26, 2021, and filed in support hereof as Exhibit R‑17.

96. The plaintiff will also devote the time needed to work with the members of the proposed class who come forward and will keep them informed.

97. In this regard, the plaintiff’s lawyers have set up a web page where members of the proposed class can learn more about this case and sign up for an electronic newsletter on future developments in this case.

98. Similarly, the plaintiff and its lawyers have also set up a telephone service to answer any questions the members of the proposed group may have. For this purpose, staff at the plaintiff’s law firm have been trained to properly answer future questions from members of the proposed class. In addition, lawyers from the plaintiff’s law firm will answer questions from members of the proposed class from time to time as needed.

99. The plaintiff has mandated its lawyers to obtain all the information relevant to this case and will stay informed of developments.

100. The plaintiff is in good faith and is instituting a class action for the sole purpose of having the rights of the members of the proposed class recognized and putting an end to the defendant’s illegal practices.

1. Apart from the argument that the designated person has no cause of action, which the Court has already rejected, Google does not contest that the plaintiff has the required representation. The Court is of the opinion that the criterion of article 574(4) CCP is met.

### Other elements

#### Definition of the class

The definition of the class must be based on an objective criterion that must have a rational basis, cannot be circular or imprecise, and cannot be dependent on elements to be decided on the merits in the final judgment.[[59]](#footnote-59) It also cannot be vague or overly broad. As for the temporal parameters, there should generally be a start date for the class, but not necessarily an end date, depending on the case. What is the situation here?

Google[[60]](#footnote-60) argues that the proposed class is vague and overly broad, making it impossible to identify who is in the class and what Google products are covered; it has no temporal scope and no start or end date, such that the class action cannot be authorized and the definition of the class cannot be reworded. The plaintiff argues that the proposed class meets all the applicable criteria.

The Court again reproduces the description of the class proposed by the plaintiff:

[translation]

All persons residing in Quebec who used a service provided by GOOGLE that does not require a Google account to be created, such as Google Search or Google Maps, or who browsed a website using one of the tools provided by GOOGLE, such as Google Analytics, Google Ad Manager, or the “Sign in with Google” button.

Let us address Google’s arguments.

**Size and precision of the class:** The Court is of the view that the size of the class and the plaintiff’s proposed description are not problematic and comply with the tests set out in the case law above. Indeed, the class size possibly includes every Quebec resident who is old enough to use a computer, laptop, tablet, smart TV, or cell phone, but this is due to Google’s pervasiveness in the computer world. Moreover, the description of services is adequate. There is no need to provide an exhaustive list of every Google program, site, or application possibly covered as this is totally pointless for the members and ultimately for everyone. Moreover, the services provided by Google may vary over time. The Court is of the view that the members know what it refers to. The words “Google Search or Google Maps” and “browsed a website using one of the tools provided by GOOGLE” are amply sufficient and precise.

**Temporal scope:** The usual practice in the case law was to limit the class with a starting point and an end point. The very recent case law, however,[[61]](#footnote-61) does not temporally close a class when a situation persists, so that the maximum number of members may be included. In such a case, the class is generally closed during the conduct of the case on the merits, during the trial on the merits, or at the time of the final judgment. Here, Google’s practices persist, and the Court is therefore of the view that there is no need to temporally close the class at this time.

However, the class must have a starting point. In oral arguments, the plaintiff submitted that neither the members, the designated person, nor the plaintiff know how long Google has been collecting personal information without asking for prior consent, such that for now, there should not be any starting point. The Court notes, however, that in the Amended Application, there is no allegation on any impossibility to act or on a suspension or interruption of prescription. In these circumstances, the normal rules must apply.[[62]](#footnote-62)

Therefore, in the absence of allegations by the plaintiff on the starting point, the Court has decided that the start date is June 22, 2017, three years before the action was instituted.[[63]](#footnote-63) Indeed, the action authorized by the Court in this judgment is a cause of action based on article 1457 CCQ, the *Charter*, the *CPA*, and the *Competition Act*. Actions based on article 1457 CCQ, the *Charter*, and the *CPA* are prescribed by three years under article 2925 CCQ, while an action under the *Competition Act* is prescribed by two years under section 36(4) of the *Act*. The three-year period therefore prevails and includes the shorter two-year period.

The Court therefore redefines the class as follows (the Court’s additions are underlined):

[translation]

All persons residing in Quebec who, since June 22, 2017, used a service provided by GOOGLE that does not require a Google account to be created, such as Google Search or Google Maps, or who, since June 22, 2017, browsed a website using one of the tools provided by GOOGLE, such as Google Analytics, Google Ad Manager, or the “Sign in with Google” button.

Let us address the last items to be decided.

#### Recovery

In the suggested conclusions, the plaintiff seeks collective recovery of the amounts claimed. Google made no comments in this regard. The Court grants it in the conclusions, it being understood, of course, that this issue will be debated on the merits for each potential award of damages and decided in the final judgment.

#### Judicial district

Pursuant to article 576 CCP, the Court has decided that the judicial district will be Montreal, given the plaintiff’s allegation in the Amended Application:

[translation]

101. The plaintiff proposes that the class action be instituted before the Superior Court sitting in the judicial district of Montreal because that is where many members of the proposed class and the undersigned counsel are domiciled.

Google did not make any submissions in this regard.

#### Opting-out period and notice to members

In the Amended Application, the plaintiff asks that class members be granted 30 days to opt out after the date the notice to class members is published. The plaintiff asks that a notice to class members be published within 60 days of this judgment, on a weekday, in LA PRESSE+, LE SOLEIL, and THE GAZETTE, as well as in any other media or by any other means that it may please the Court to determine.

By mutual agreement, it was agreed to deal with these issues on the merits, after this judgment.

#### Legal costs

The Court awards legal costs to the plaintiff, who was successful. Given that the publication of notices has not yet been debated, the Court states that for the moment, legal costs do not include the cost of publishing the notices.

## FOR THESE REASONS, THE COURT:

**GRANTS** the Amended Application for Authorization to Institute a Class Action dated January 27, 2021;

**AUTHORIZES** a class action against the defendant on behalf of the following class:

[translation]

All persons residing in Quebec who, since June 22, 2017, used a service provided by GOOGLE that does not require a Google account to be created, such as Google Search or Google Maps, or who, since June 22, 2017, browsed a website using one of the tools provided by GOOGLE, such as Google Analytics, Google Ad Manager, or the “Sign in with Google” button.

**APPOINTS** the plaintiff Option Consommateurs as representative plaintiff for the purpose of instituting the class action on behalf of this class;

**IDENTIFIES** the principal issues of fact and of law to be dealt with collectively as follows:

1. Does the defendant collect and/or use, for commercial purposes, the class members’ personal information by means of Google Services and/or Google Tools?
2. Does the defendant collect and/or use personal information, for commercial purposes, by means of Google Services and/or Google Tools, without sufficient consent from the class members? If so, does this constitute a fault?
3. In the course of commercial activities, has the defendant installed or caused to be installed a computer program on the computers of the class members without their consent?
4. What is the value of the personal information collected and/or used for commercial purposes by the defendant without sufficient consent from the class members?
5. If applicable, have the class members suffered damage arising from the defendant’s collection and/or use for commercial purposes of their personal information without their consent?
6. Are the class members entitled to reimbursement by the defendant of the amounts incurred for these proceedings and for any investigation in connection with this matter?
7. Should the defendant be condemned to pay punitive damages to the class members and, if so, what is the value of the punitive damages the defendant should be condemned to pay to fulfil their preventive purpose?

**IDENTIFIES** the conclusions sought as follows:

1. **GRANT** the plaintiff’s class action against the defendant;
2. **CONDEMN** the defendant to pay the class members an amount equal to the value of the personal information collected without consent by the defendant, and Order the collective recovery thereof;
3. **CONDEMN** the defendant to pay the class members $50 million in punitive damages, subject to adjustment, and **Order** the collective recovery of this amount;
4. **CONDEMN** the defendant to pay the costs incurred for any investigation required to establish its liability in this case, including counsels’ fees and disbursements, which includes expert fees, and **Order** the collective recovery of these amounts;
5. **CONDEMN** the defendant to pay legal interest on all the above amounts as well as the additional indemnity set out in the *Civil Code of Québec* as of the date of service of the Application for Authorization to Institute a Class Action;
6. **ORDER** the defendant to deposit with the Court office all of the above amounts, as well as the interest and the additional indemnity;
7. **ORDER** that the claim of each class member be liquidated individually or, if this procedure is inefficient or impracticable, **ORDER** the defendant to pay an amount equal to the amounts of the collective recovery orders to be used to introduce measures that will benefit the class members and whose nature will be determined by the Court, in accordance with the provisions of article 597 of the *Code of Civil Procedure*;
8. **THE WHOLE** with costs, including expert fees and notices.

**DECLARES** that class members, unless they have opted out, will be bound by any judgment to be rendered on the class action in the manner provided by law;

**POSTPONES** the debate and decision on the publication of notices to class members and the time limit for opting out by class members;

**STATES** that this class action will be instituted in the judicial district of Montreal;

**THE WHOLE**, with legal costs in favour of the plaintiff, excluding for the moment the cost of publishing notices.

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|  | | THE HONOURABLE DONALD BISSON, j.S.c. |
| Mtre Maxime Nasr, Mtre Violette Leblanc, Mtre Jean-Philippe Lincourt, and Mtre Marjorie Boyer  Belleau Lapointe, s.e.n.c.r.l.  Counsel for the plaintiff  MtreKarine Chênevert and Mtre Antoine Gamache  Borden Ladner Gervais llp  Counsel for the defendant | | |
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|  | | |
| Date of hearing: | June 7, 2022 | |

1. See paras. 86 and 87 of the Amended Application. [↑](#footnote-ref-1)
2. The *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (the “Federal Act”), and the *Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, S.C. 2010, c. 23 (“Canada’s anti-spam legislation”). [↑](#footnote-ref-2)
3. *Act respecting the protection of personal information in the private sector*, CQLR, c. P-39.1 (the “Provincial Act”). [↑](#footnote-ref-3)
4. CQLR, c. C-12. [↑](#footnote-ref-4)
5. CQLR, c. P-40.1. [↑](#footnote-ref-5)
6. R.S.C. (1985), c. C-34. [↑](#footnote-ref-6)
7. *Option Consommateurs* *c*. *Google*, 2021 QCCS 4516. [↑](#footnote-ref-7)
8. *Infineon Technologies AG* *v*. *Option consommateurs*, 2013 SCC 59. [↑](#footnote-ref-8)
9. *Vivendi* *Canada Inc*. *v*. *Dell’Aniello*, 2014 SCC 1. [↑](#footnote-ref-9)
10. *L’Oratoire Saint-Joseph du Mont-Royal* *v*. *J.J*., 2019 SCC 35. [↑](#footnote-ref-10)
11. *Desjardins Financial Services Firm Inc.* *v*. *Asselin*, 2020 SCC 30. [↑](#footnote-ref-11)
12. *Bouchard c*. *Agropur Coopérative*, 2006 QCCA 1342 at para. 109. [↑](#footnote-ref-12)
13. *Sofio c*. *Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820 at para. 10. [↑](#footnote-ref-13)
14. At para. 134. [↑](#footnote-ref-14)
15. *Supra* note 10 at para. 59. [↑](#footnote-ref-15)
16. *Supra* note 8 at para. 134. [↑](#footnote-ref-16)
17. *Ehouzou* *c*. *Manufacturers Life Insurance Company*, 2021 QCCA 1214 at para. 40. [↑](#footnote-ref-17)
18. See e.g., *Morfonios (Succession de Sarlis)* *c*. *Vigi Santé ltée*, 2021 QCCS 2489 at para. 67 and authorities cited. [↑](#footnote-ref-18)
19. 2022 QCCA 659 at paras. 10 to 13. [↑](#footnote-ref-19)
20. Amended Application at para. 44. [↑](#footnote-ref-20)
21. Amended Application at para. 46. [↑](#footnote-ref-21)
22. In fact, users are generally unaware of this. [↑](#footnote-ref-22)
23. Amended Application at para. 47. [↑](#footnote-ref-23)
24. Google Privacy Policyin English and French *(en liasse)*, Exhibit R-11 (1) at 1. [↑](#footnote-ref-24)
25. This list excludes the information that Google states it collects from Google account holders or devices operating with an Android operating system.Google Privacy Policyin English and French *(en liasse)*, Exhibit R-11 (1), at 2 to 4. See also the article by Professor Douglas C. Schmidt of Vanderbilt University, entitled *“*Google Data Collection*”,* dated August 15, 2018, Exhibit R-2, at 15 to 19 for Google Tools and at 25 to 29 for Google Services. [↑](#footnote-ref-25)
26. Google Privacy Policyin English and French *(en liasse)*, Exhibit R-11 (1) at 4. [↑](#footnote-ref-26)
27. *“*Types of cookies used by Google*”* in French and English *(en liasse)*, Exhibit R-9; Google Privacy Policyin French and English *(en liasse)*, Exhibit R-11 (1), at 20 to 23. [↑](#footnote-ref-27)
28. “to build better services”, “to deliver our services”, “to ensure our services are working as intended”, “to make improvements to our services”, “to understand how our services are used”, to “communicate with you”, “to help improve the safety and reliability of our services”: Google’s Privacy Policyin French and English (*en liasse*), Exhibit R-11 (1) at 5 to 6. [↑](#footnote-ref-28)
29. Google Privacy Policyin French and English (*en liasse*), Exhibit R-11 (1) at 23 to 32. [↑](#footnote-ref-29)
30. Google Privacy Policyin French and English (*en liasse*), Exhibit R-11 (1) at 5 and 6. [↑](#footnote-ref-30)
31. Google Privacy Policyin French and English (*en liasse*), Exhibit R-11 (1) at 2. [↑](#footnote-ref-31)
32. Google Privacy Policyin French and English (*en liasse*), Exhibit R-11 (1) at 25–26. [↑](#footnote-ref-32)
33. Google Privacy Policyin French and English (*en liasse*), Exhibit R-11 (1) at 12 to 14. [↑](#footnote-ref-33)
34. “How Google uses information from sites or apps that use our services” from the “Privacy Policy and Terms of Service” posted online by Google. [↑](#footnote-ref-34)
35. It should be recalled that according to Exhibit R-7, 89.37% of websites use Google Analytics. [↑](#footnote-ref-35)
36. The Court will also review article 37 CCQ concerning the consent required to communicate personal information to third persons. [↑](#footnote-ref-36)
37. *Homsy* *c*. *Google*, 2022 QCCS 722 at para. 43 and case law cited (on appeal, C.A. 500-09-029982-220). [↑](#footnote-ref-37)
38. SOR/2003-374. [↑](#footnote-ref-38)
39. In fact, 89.37% of websites use Google Analytics. [↑](#footnote-ref-39)
40. Canada’s anti-spam legislation, s. 10(5). [↑](#footnote-ref-40)
41. Section 10(4). [↑](#footnote-ref-41)
42. SOR/2012-36. [↑](#footnote-ref-42)
43. *Laoun* *c*. *Malo*, 2003 CanLII 24556 (C.A.) at paras. 87 to 91. [↑](#footnote-ref-43)
44. *Aubry* *v.* *Éditions Vice-Versa inc*., [1998] 1 S.C.R. 591 at para. 74. [↑](#footnote-ref-44)
45. To quote the Supreme Court of Canada in *Infineon*, *supra* note 8 at para. 92. [↑](#footnote-ref-45)
46. There is a specific reference to the violation of the right to privacy in paragraph 74 of the Amended Application. [↑](#footnote-ref-46)
47. *R*. *v*. *Spencer*, 2014 SCC 43 at paras. 37 to 47. [↑](#footnote-ref-47)
48. At para. 38. [↑](#footnote-ref-48)
49. At para. 40. See also para. 46 on the risk of loss of control over personal information on the Internet. [↑](#footnote-ref-49)
50. See *Aubry* *v*. *Éditions Vice-Versa inc.*, *supra* note 44 at para. 49. [↑](#footnote-ref-50)
51. [1996] 3 S.C.R. 211 at para. 121. [↑](#footnote-ref-51)
52. 2017 QCCA 504 at para. 42. See to the same effect, *Charbonneau* *c*. *Location Claireview*, 2022 QCCA 659 at para. 24. [↑](#footnote-ref-52)
53. *Richard* *v.* *Time Inc.*, 2012 SCC 8 at paras. 47 to 50. [↑](#footnote-ref-53)
54. As was also the case, for example, in *Karras* *c*. *Société des loteries du Québec*, 2019 QCCA 813 at paras. 46 and 47. [↑](#footnote-ref-54)
55. *Supra* note 53 at para. 180. [↑](#footnote-ref-55)
56. Yves Lauzon, *Le recours collectif* (Cowansville, Qc: Yvon Blais, 2001) at 38; *Brière c*. *Rogers Communications*, 2012 QCCS 2733 at para. 72. [↑](#footnote-ref-56)
57. 2022 QCCA 659 at paras. 10 to 13. [↑](#footnote-ref-57)
58. *Tenzer* *c*. *Huawei Technologies Canada Co. Ltd*., 2020 QCCA 633. [↑](#footnote-ref-58)
59. *George* *c.* *Québec (Procureur général)*, 2006 QCCA 1204 at para. 40*; Levy* *c.* *Nissan Canada inc.*, 2021 QCCA 682 at paras. 39 and 40; *Boudreau* *c*. *Procureur général du Québec*, 2022 QCCA 655 at paras. 21 and 22. [↑](#footnote-ref-59)
60. Citing *Beaulieu* *c*. *Facebook inc*., 2021 QCCS 3206 at paras. 56 and 57. [↑](#footnote-ref-60)
61. See e.g., *Morfonios (Succession de Sarlis)* *c.* *Vigi Santé ltée*, *supra* note 18 at para. 108. [↑](#footnote-ref-61)
62. As the Superior Court decided in a similar situation in *9085-4886 Québec inc.* *c*. *Bank of Montreal*, 2018 QCCS 3730 at paras. 121 to 127, appeal allowed in part, but not on this issue: *9085-4886 Québec inc.* *c*. *Bank of Montreal*, 2019 QCCA 1301. [↑](#footnote-ref-62)
63. According to the court ledger, the Application for Authorization to Institute a Class Action was initially filed on June 22, 2020. [↑](#footnote-ref-63)