

CANADA

SUPERIOR COURT
(Class Action Chambers)

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SERGIO LIMA

Applicant

No.: 500-06-000941-183

v.

GOOGLE LLC

Defendant

JOINT APPLICATION TO TEMPORARILY STAY THE CLASS ACTION
(Articles 18, 49 and 577 of the *Code of Civil Procedure* (“CCP”)
and Article 3137 of the *Civil Code of Quebec* (“CCQ”))

**TO THE HONOURABLE JUSTICE CHANTAL CHATELAIN, J.S.C., COORDINATING
JUDGE FOR THE CLASS ACTION DIVISION, THE PARTIES JOINTLY AND
RESPECTFULLY SUBMIT THE FOLLOWING:**

I. INTRODUCTION

1. The parties jointly seek a stay of the *Application for Authorization to Institute a Class Action and to Obtain the Status of Representative* which was filed on August 15, 2018 (the “**Quebec Action**”) for a period ending sixty (60) days after the final certification judgment on the putative class action before the British Columbia Supreme Court, in *Warner v. Google LLC*, court docket number VLC-S-S-1711066 (the “**BC Action**”).
2. This joint application for a stay is predicated upon the existence of a parallel class action filed in British Columbia which raises the same issues and which would include the members of the Quebec Action, and thus seeks to avoid the possibility of contradictory judgments and to ensure a sound and efficient use of judicial resources, all the while protecting the interests of the putative class members who are Quebec residents.
3. For the reasons further detailed below, the parties submit that it is in the interests of justice and consistent with the principles of proportionality and judicial economy that

the overlapping issues raised in the Quebec Action and the BC Action be adjudicated by a single court, which the parties propose to be the Supreme Court of British Columbia.

II. THE PARALLEL CLASS ACTIONS

A. The Quebec Action

4. The Quebec Applicant, Sergio Lima, seeks to represent the following class in the Quebec Action:

“All persons residing in Québec who owned or used a smartphone running the Android operating system in 2017, or any other group to be determined by the Court.”

5. The Quebec Action asserts that the Defendant misled consumers and improperly collected location data from users of the Android mobile operating system (“**Android OS**”), when users had not enabled or had disabled location services or where smartphones did not contain a SIM card, in violation of the putative class members’ privacy rights, causing compensatory damages, moral damages and/or punitive damages.
6. These allegations are refuted by the Defendant.

B. The BC Action

7. The BC Action, filed on November 28, 2017, proposes the following putative class:

“Users of the Android OS at issue in this claim (“Class Members”, to be defined in the Plaintiffs’ application for class certification) who during the Class Period owned or used a smartphone running the Android OS.”

As appears from a copy of the *Notice of Civil Claim* communicated herewith as **Exhibit P-1**.

8. As appears from the foregoing, the proposed class in the Quebec Action would be included in the proposed class in the BC Action and relates to the same Defendant.
9. Moreover, the BC Action is in relation to the same allegations of fault and similar causes of action, namely that the Defendant misled consumers and improperly collected location data from Android OS users in violation of the putative class members’ privacy rights.
10. The defences to those allegations will also be similar.

C. The Ontario Action

11. One other putative class action is pending in Canada in *Emond and MacQueen v. Google LLC*, court file number CV-18-590521-00CP, which was filed on January 22, 2018 before the Ontario Superior Court of Justice (the “**Ontario Action**”). The Ontario Action proposes the following putative class:

“All users of the Android OS at issue in this claim (“Class Members”, to be defined in the Plaintiffs’ application for class certification) who during the Class Period owned or used a smartphone running the Android OS, in Canada.”

As appears from a copy of the *Statement of Claim* communicated herewith as **Exhibit P-2**.

12. While otherwise drafted in similar terms to the Quebec Action and the BC Action, the parties to the Ontario Action have not taken any steps to move the case forward since the filing of the class action and have in fact agreed to hold the Ontario Action in abeyance in favour of the BC Action.

D. Status of the Parallel Class Actions

a. The Quebec Action

13. The Quebec Action, which was filed almost 9 months after the BC Action and almost 7 months after the Ontario Action, has not yet been assigned to a specific judge and no procedural steps have been taken since the Application for Authorization was filed on August 15, 2018.

b. The Ontario Action

14. As for the Ontario Action, since the filing of the putative class action, the parties have not taken any active steps to have a case management judge appointed and have agreed to hold the action in abeyance in favour of the BC Action.

c. The BC Action

15. The BC Action, which was filed months before the Quebec Action and the Ontario Action is considerably further advanced. Indeed, Justice Peter Voith has been appointed to case manage the BC Action, counsel have mandated three separate experts and filed affidavits from them for the purposes of the certification hearing, motion materials for the certification hearing have been served by the Plaintiff and the Defendant, and the certification hearing has been scheduled to be heard on December 3, 4 and 5, 2018.

16. Moreover, all of the parties and their counsel, including Quebec counsel, have since agreed to participate in a mediation which will take place on November 30, 2018.
17. If the mediation is not successful, the certification hearing will proceed as scheduled on December 3, 4 and 5, 2018.
18. Quebec counsel for the Plaintiff will attend the mediation and, the case permitting, will also attend the certification hearing in order to ensure that the putative Quebec class members' rights and interests are taken into account and protected.

III. LIS PENDENS AND STAY OF PROCEEDINGS

19. It is trite law that this Court has inherent jurisdiction to stay any action brought before it if such a stay is consistent with the principles of proportionality and judicial economy, or when there is a risk of contradictory judgments in related matters before different courts.
20. Article 3137 CCQ also specifically provides that this Court may stay its ruling on an action brought before it if there is a situation of "international" *lis pendens*, namely "if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Quebec".

A. Lis Pendens

a. Same Parties

21. There is also juridical identity of the parties by representation. The class membership in the BC Action would include the class members in the Quebec Action, whereas the Quebec Action proposes a provincial class composed of Quebec residents only.

b. Same Cause

22. The Quebec Action and the BC Action are based on the same key allegations of fact and assert the same causes of action, namely that the Defendant misled consumers and unlawfully collected location data from Android OS users, who had not enabled or had disabled location services or where smartphones did not contain a SIM card, resulting the violation of the putative class members privacy rights. The Defendant refutes these allegations in both jurisdictions.

c. Same Object

23. The object of the Quebec Action and the BC Action is the same: both seek the recovery of damages, both compensatory and punitive, allegedly suffered as a result of the Defendant's impugned conduct. This object is being denied in both jurisdictions.

B. Stay of Proceedings

24. The parties herein jointly seek a stay of the Quebec Action for a period ending sixty (60) days after the final certification judgment to be rendered in the BC Action.
25. The stay sought is consistent with the principles of proportionality and judicial economy. It serves to avoid a multiplicity of parallel proceedings progressing at once, which would result in significant and avoidable costs for all parties involved, and be unnecessarily demanding on limited judicial resources.
26. It is also consistent with the "spirit of mutual comity" between courts of different provinces recognized by the Supreme Court of Canada in the landmark decision *Canada Post Corp. v. Lépine*, 2009 1 SCR 549, at para. 57.
27. In fact, by using a single proceeding, Quebec residents will benefit from judicial economy and their counsel will not expend time and costs simultaneously in more than one jurisdiction.
28. In light of the foregoing, the parties herein respectfully submit that this Court should use its discretion to stay the Quebec Action, as it is in the interest of justice and of the putative class members.

IV. THE RIGHTS AND INTERESTS OF QUEBEC CLASS MEMBERS IN THE CONTEXT OF A TEMPORARY STAY

29. The temporary stay of the Quebec Action in favour of the BC Action would serve the rights and interests of Québec residents, in accordance with article 577 CCP.
30. Indeed, the causes of action asserted in the BC Action address causes of action asserted in the Quebec Action, such that the rights of the putative class members in the Quebec Action will be asserted in a similar fashion in the BC Action.
31. The Courts of British Columbia will protect the rights and interests of Quebec putative class members in the same fashion as a Quebec Court would, given the experience of the class action bench in both jurisdictions. Moreover, Quebec residents will benefit from judicial economy and will save time and legal costs by having British Columbia counsel pursue the certification stage in British Columbia.

32. The parties are represented by the same counsel in British Columbia and Quebec. In the context of the stay requested herein, counsel for the Applicants and for the Defendant, both in British Columbia and Quebec, have agreed to cooperate to ensure an efficient conduct of the proceedings and the coordination of the Quebec and the BC Action. As previously mentioned, Plaintiff's Quebec counsel will attend the mediation and, the case permitting, will also attend the certification hearing in order to ensure that the putative Quebec class members' rights and interests are taken into account and protected.
33. Moreover, the Applicant agrees that the Quebec Action should be temporarily stayed in favour of the BC Action.

V. CONCLUSION

34. For the reasons stated above, the parties jointly seek a stay of the Quebec Action pending a final judgment in the BC Action.
35. If a stay is granted by this Court, the parties undertake to provide this Court with an update on the status of the BC Action on a semi-annual basis, and to advise this Court within 30 days of any significant development in the BC Action that may affect the course of the Quebec Action.
36. The parties agree this joint application and statements herein are not intended to be used and will not be used in any motion to certify or authorize any other class proceeding, including the BC Action, as evidence that the authorization or certification criteria are or are not satisfied.

WHEREFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the *Joint Application to Temporarily Stay the Quebec Action*;

STAY any and all proceedings related to the *Application for Authorization to Institute a Class Action and to Obtain the Status of Representative* for a period ending sixty (60) days after the final certification judgment to be rendered in the BC Action (court docket number VLC-S-S-1711066);

PRAY ACT of the parties' undertaking to provide this Court with an update on the status of the BC Action on a semiannual basis, and to advise this Court within 30 days of any significant development in the BC Action that may affect the course of the Quebec Action, and **ORDER** the parties to comply with said undertaking;

THE WHOLE, without costs.

Montreal, November 9, 2018

(sgd) *Klein Avocats Plaideurs Inc.*

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Montreal, November 9, 2018

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Counsel for the Defendant

AFFIDAVIT

I, the undersigned, Careen Hannouche, lawyer, having my professional domicile at 500, Place d'Armes, suite 1800, in the city and district of Montréal, solemnly declare the following:

1. I am counsel for the applicant for the present *Joint Application to Temporarily Stay the Class Action*;
2. All the facts alleged in the present application are true;

And I have signed:

(sgd) *Careen Hannouche*

Careen Hannouche

Solemnly declared before me
in Montreal, on this 9th day of November 2018

(sgd) *Fatima Naam, avocate, 258235-0*

Commissioner for the taking of oaths
for the province of Quebec

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LIST OF EXHIBITS

EXHIBIT P-1: Notice of Civil Claim filed in *Warner v. Google LLC*, court file number VLC-S-S-1711066;

EXHIBIT P-2: Statement of Claim filed in *Emond and MacQueen v. Google LLC*, court file number CV-18-590521-00CP.

Montreal, November 9, 2018
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**JOINT APPLICATION TO TEMPORARILY
STAY THE CLASS ACTION
LIST OF EXHIBITS AND EXHIBITS P-1 and P-2**

COPY FOR THE COURT

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