

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Class action)

No.: 500-06-001079-207

OPTION CONSOMMATEURS

Plaintiff

v.

GOOGLE LLC

Defendant

**APPLICATION BY DEFENDANT GOOGLE LLC FOR LEAVE TO
ADDUCE EVIDENCE
(Art. 574 and 575 C.C.P.)**

**TO THE HONOURABLE JUSTICE DONALD BISSON, S.C.J., THE DEFENDANT
GOOGLE LLC RESPECTFULLY SUBMITS AS FOLLOWS:**

I. INTRODUCTION

1. On June 22, 2020, the originating plaintiff, Louis-Alexandre Leclaire, filed a *Demande pour autorisation d'exercer une action collective* (the "**Leclaire Action**") representing a class of members limited to individuals in Quebec who have browsed on a website using Google's private browser feature also called incognito mode;
2. On January 27, 2021, Plaintiff's counsel filed a *Demande de bene esse pour autorisation de modifier la Demande pour autorisation d'exercer une action collective* (the "**Amendment**"), which was not opposed by Google under reserve, *inter alia*, of the possibility to present certain preliminary applications, and which has been granted by the Court in its judgment dated March 18, 2021, as appears from the court record;
3. By its *Demande modifiée pour autorisation d'exercer une action collective* (the "**Application**"), *Option Consommateurs* was substituted as the representative Plaintiff, seeking to institute a class action on behalf of the following members (the "**Proposed Class**"):

Toute personne domiciliée au Québec ayant utilisé un service offert par GOOGLE qui ne nécessite pas la création d'un compte Google, tels que Google Search ou Google Maps, ou ayant navigué sur un site Web utilisant un des outils offerts par GOOGLE tels que Google

Analytics, Google Ad Manager ou le bouton d'ouverture de session « Sign in with Google ».

4. Plaintiff seeks leave to institute a class action against Google, making an overly broad and vague variety of claims related to the alleged collection by Google of personal information regarding the Proposed Class members without obtaining their consent;
5. Essentially, the *Option Consommateurs* Action appears to relate to any personal information collected by any Google service (the “**Google Services**”) not requiring a Google account and to any personal information collected by any Google tool (the “**Google Tools**”) when someone is browsing on a website even if not using a Google product to do so. Specific allegations are made in the Application only with respect to a few specific Google Services, such as those regarding Google Chrome and its “private browsing” feature;
6. Plaintiff suggests the following issues of fact and law to be dealt with collectively for the purposes of the proposed class action, as appears from paragraph 79 of the Application:
 - a) Does the Defendant collect and/or use personal information of class members for commercial purposes through Google Services and/or Google Tools?
 - b) Is collection and/or use for commercial purposes of personal information through the Google Services and/or Google Tools carried out by the Defendant without the sufficient consent of class members? If so, does this constitute a fault?
 - c) Did the Defendant, in the course of commercial activities, install or cause to be installed a computer program on the computers of class members without their consent?
 - d) What is the value of the personal information collected and/or used for commercial purposes by the Defendant without the sufficient consent of class members?
 - e) Where applicable, did the class members suffer damages resulting from the collection and/or use for commercial purposes by the Defendant of their personal information without their consent?
 - f) Are class members entitled to reimbursement from the Defendant for the costs of these proceedings and any investigation in connection with this matter?
 - g) Should the Defendant be ordered to pay punitive damages to class members and, if so, what is the value of the punitive damages to which the

Defendant should be ordered to pay in order to ensure their preventative function?

II. THE EVIDENCE GOOGLE SEEKS LEAVE TO ADDUCE

7. The facts alleged in the Plaintiff's Application and supporting exhibits are incomplete, and on certain aspects are also misleading, as hereinafter more fully detailed;
8. As a result, additional exhibits from Google are required in order to assist the Court in determining whether the authorization criteria of article 575 of the *Code of Civil Procedure* ("**CCP**") are met and, in particular, whether Plaintiff has shown an arguable case (para. 575 (2) CCP);

A. Evidence Regarding Google Analytics

9. The Plaintiff alleges that Google collects personal information from the Proposed Class members while they visit websites operated by third parties using Google Tools, such as Google Analytics, without obtaining proper consent;
10. The Plaintiff however fails to add as an exhibit Google Analytics' Terms of Service, which not only help to complete the relevant documentation for the purposes of the authorization hearing, but further provide in plain language that third party websites must not provide Google with any personally identifiable information, as appears from Google Analytics' Terms of Service, communicated herewith as **Exhibit G-1**;
11. Google Analytics' Terms of Service (Exhibit G-1) also require that third party websites disclose to the Proposed Class members the use of cookies, and also disclose the use of Google Analytics, and how it collects and processes data;
12. In order to use Google Analytics, third party websites are required to abide by the Google Analytics' Terms of Service (Exhibit G-1), by the Google Analytics' Privacy Disclosures Policy, communicated herewith as **Exhibit G-2** and by the Google Analytics' Upload Data Use Policy communicated herewith as **Exhibit G-3**;
13. The Google Analytics' Privacy Disclosures Policy (Exhibit G-2) also clearly requires Google Analytics customers (i.e. third party websites) to disclose that they are using Google Analytics and how data are processed and collected;
14. The Google Analytics' Upload Data Use Policy (Exhibit G-3) further provides that customers must not upload any data that could allow Google to personally identify an individual (such as names, social security numbers, email addresses, or any similar data), or data that permanently identifies a particular device (such as a mobile phone's unique device identifier if such an identifier cannot be reset), even in hashed form;
15. Google submits that the documentation it seeks leave to adduce as Exhibits G-1 to G-3 will assist the Court in determining whether the authorization criteria of

article 575 CCP are met and, in particular, whether Plaintiffs have shown an arguable case (para. 575 (2) CCP) as it will:

- (a) Clarify the relationship between Google and its Google Analytics customers (i.e. the third-party websites);
- (b) Demonstrate that the Proposed Class members must be duly advised by third party websites that data may be collected when they visit said websites; and
- (c) Demonstrate that Google Analytics customers (i.e. the third-party websites) must not provide Google with any personally identifiable information;

B. Evidence Regarding Cookies and Private Browsing

i. Cookies

16. The Plaintiff, at paragraphs 34 and following of the Application, alleges that Google uses “cookies” in the context of both the use of the Google Tools and the Google Services and adds as Exhibit R-9 the section "Types of cookies used by Google" of the website "Privacy Policy and Terms of Service";
17. According to Plaintiff, as a result, Google is therefore able to determine, as they conduct their online activities, what putative class members are looking for, where they are, what they are doing and more;
18. Plaintiff however fails to add as an exhibit the Google website extract entitled “Clear, enable, and manage cookies in Chrome”, which, *inter alia*, explains what cookies are, how to clear all cookies and how to change cookie settings, as appears from the Google website extract entitled “Clear, enable, and manage cookies in Chrome”, communicated herewith as **Exhibit G-4**;
19. The Plaintiff also fails to add as an exhibit the Google website extract entitled “Choose your privacy setting”, which, *inter alia*, explains how Chrome handles cookies and tracking and how to manage safe browsing and protection, including when opening a private browsing session, as appears from the “Choose your privacy setting extract”, communicated herewith as **Exhibit G-5**;

ii. Private Browsing

20. Contrary to what the Plaintiff alleges at paragraphs 64 to 67 of the Application, Google does not make any false representations to the Proposed Class members regarding how private browsing operates. Every time a Chrome user opens a private browsing session, a notice will appear, as appears from the notice communicated herewith as **Exhibit G-6**;
21. The notice, Exhibit G-6, indicates to the Chrome user not only which information Chrome won't save (such as the browsing history, cookies and site data) but also

where the activity might still be visible (such as to websites visited by the user or to the user's internet service provider);

22. If the user wants to know more about private browsing, when the notice appears, he or she can click on a link on the notice which will lead to more details on private browsing, as appears from Exhibit G-6;
23. The user will then be directed to a web page of the Google Chrome Help Center entitled "How Chrome Incognito keeps your browsing private" communicated herewith as **Exhibit G-7**;
24. The user can also access from the web page entitled "How Chrome Incognito keeps your browsing private" (Exhibit G-7) to another web page entitled "How private browsing works in Chrome" filed herewith as **Exhibit G-8**;
25. Together, these two web pages provide information to the putative class members as to how Google Chrome's Incognito Mode operates and demonstrate that Google makes no misleading or false representations whatsoever to the Proposed Class members;

iii. The "Do Not Track" Feature

26. Google also makes no false representations to the Proposed Class members with respect to the "Do Not Track" feature. The functioning of this feature is clearly disclosed to the user when he or she turns it on. Every time the feature is activated, a notice is given, as appears from the notice communicated herewith as **Exhibit G-9**;
27. The notice, Exhibit G-9, clearly explains that many websites will still collect the user's browsing data to improve security, provide content, services, ads and recommendations on their websites, and generate reporting statistics;
28. If the user wants to know more about the "Do Not Track" feature, when the notice, Exhibit G-9, appears, he or she can click on a link that will lead to Exhibit R-12 filed by the Plaintiff in support of its Application, as appears from Exhibit G-9;
29. Google submits that the documentation it seeks leave to adduce as Exhibits G-4 to G-9 will assist the Court in determining whether the authorization criteria of article 575 CCP are met and, in particular, whether Plaintiffs have shown an arguable case (para. 575 (2) CCP) as it will:
 - (a) Assist the Court in understanding how the Proposed class members can allow, block and clears cookies, thus providing consent when they allow cookies; and
 - (b) Demonstrate that no false representations are being made by Google to the Proposed Class members as to how private browsing and the "Do Not Track" feature operate;

III. CONCLUSION

30. These facts are crucial to assist the Court in determining whether the authorization criteria of article 575 CCP are met, and, in particular whether Plaintiffs have shown an arguable case;
31. The exhibits for which Google seeks leave to adduce are therefore relevant within the meaning of article 574 CCP.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

- A. **GRANT** the present application for leave to adduce evidence;
- B. **AUTHORIZE** the Defendant Google LLC to file Exhibits G-1 to G-9 into the Court record;
- C. **THE WHOLE** without legal costs, save in case of contestation.

Montréal, September 3rd, 2021.



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NOTICE OF PRESENTATION

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Lawyers for Applicant Option Consommateurs

TAKE NOTICE that the Google LLC's *Application for Leave to Adduce Evidence* will be presented will be presented for hearing and adjudication before the Honourable justice Donald Bisson of the Superior Court, on October 15, 2021 at 9:30 a.m. in a room to be determined by the Honourable Justice Donald Bisson.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

Montréal, September 3rd, 2021.



Borden Ladner Gervais LLP
Lawyers for Defendant Google LLC

AFFIDAVIT

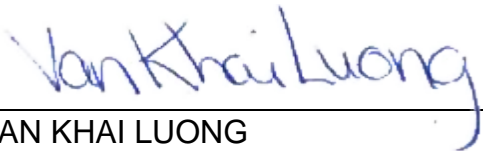
I, the undersigned, Van Khai Luong, practising my profession as a paralegal, at Borden Ladner Gervais LLP, at 1000, de la Gauchetière Street West, suite 900, city of Montreal, province of Quebec, H3B 5H4, declare under oath that:

1. I have personal knowledge of the facts to which I testify;
2. I reviewed the *Application by Defendant Goggle LLC for Leave to Adduce Evidence* (the “Application”);
3. On September 2, 2021, I have accessed Google Analytics’ Terms of Service website (https://www.google.com/analytics/terms/?hl=en_US) and I have clicked on the link to obtain the English US and French copies of the Google Analytics’ Terms of Service referred to at paragraph 10 of the *Application by Defendant Google LLC for leave to Adduce Evidence* as **Exhibit G-1**;
4. Then, I accessed the English and French version of the Privacy Disclosures Policy section of Google Analytics’ website (<https://support.google.com/analytics/answer/7318509?hl=en> / <https://support.google.com/analytics/answer/7318509?hl=fr>) referred to at paragraph 12 of the *Application by Defendant Google LLC for Leave to Adduce Evidence* as **Exhibit G-2**;
5. I have also accessed the English and French version of the Upload Data Use Policy section of Google Analytics’ website (<https://support.google.com/analytics/answer/2838984?hl=en> / <https://support.google.com/analytics/answer/2838984?hl=fr>) referred to at paragraph 12 of the *Application by Defendant Google LLC for leave to Adduce Evidence* as **Exhibit G-3**;
6. I accessed the English and French webpage of Google’s website entitled “Choose your privacy settings” (https://support.google.com/chrome/answer/114836?hl=en&ref_topic=9845306 / https://support.google.com/chrome/answer/114836?hl=fr&ref_topic=9845306) referred to at paragraph 19 of the *Application by Defendant Google LLC for leave to Adduce Evidence* as **Exhibit G-5**;
7. On September 3, 2021, I accessed the English and French webpage of Google’s website entitled “Clear, enable, and manage cookies in Chrome” (<https://support.google.com/chrome/answer/95647?hl=en#zippy=%2Callow-or-block-cookies> / <https://support.google.com/chrome/answer/95647?hl=fr#zippy=%2Callow-or-block-cookies>) referred to at paragraph 18 of the *Application by Defendant Google LLC for leave to Adduce Evidence* as **Exhibit G-4**;
8. On September 3, 2021, I also opened a private browsing session and the notice described at paragraph 20 of the *Application by Defendant Google LLC for leave to Adduce Evidence* as **Exhibit G-6** appeared.
9. I then clicked on “Learn More” and accessed two documents in the Google Chrome Help Centre entitled “How Chrome Incognito keeps your browsing private” and

“How private browsing works in Chrome” described at paragraphs 23 and 24 within the *Application by Defendant Google LLC for leave to Adduce Evidence as Exhibits G-7 and G-8*.

10. Finally, on September 3, 2021, I activated the “Do Not Track” feature of Google Chrome and the notice mentioned at paragraph 26 of the *Application by Defendant Google LLC for leave to Adduce Evidence as Exhibit G-9* appeared.
11. All facts herein are true.

AND I HAVE SIGNED in Sainte-Marthe-sur-le-lac, QC, on September 3, 2021:



VAN KHAI LUONG

Declared under oath remotely before me by
technological means
in Sainte-Julie, on September 3, 2021




Nathalie Angers
Commissioner for Oaths for Québec # 137 908

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Class action)

No.: 500-06-001079-207

OPTION CONSOMMATEURS

Applicant

v.

GOOGLE LLC

Defendant

**LIST OF THE EXHIBITS COMMUNICATED WITH THE APPLICATION
BY DEFENDANT GOOGLE LLC FOR LEAVE TO ADDUCE EVIDENCE
(Art. 247 C.C.P.)**

- Exhibit G-1:** In a bundle, extracts of the Terms of Service, in English and in French, of Google Analytics' website;
- Exhibit G-2:** In a bundle, extracts of the Privacy Disclosures Policy, in English and in French, of Google Analytics' website;
- Exhibit G-3:** In a bundle, extracts of the Upload Data Use Policy, in English and in French, of Google Analytics' website;
- Exhibit G-4:** In a bundle, extracts of the "Clear, enable, and manage cookies in Chrome" section, in English and in French, of Google' website;
- Exhibit G-5:** In a bundle, extracts of the "Choose your privacy settings" section, in English and in French, of Google' website;
- Exhibit G-6:** In a bundle, extracts of the disclosure when opening a private browsing session, in English and in French, on Google Chrome's website;
- Exhibit G-7:** In a bundle, extracts of the "How Chrome Incognito keeps your browsing private" section, in English and in French, of Google Chrome Help Center webpage;
- Exhibit G-8:** In a bundle, extracts of the "How private browsing works in Chrome" section, in English and in French, of Google Chrome Help Center webpage;

Exhibit G-9: In a bundle, extracts of the disclosure when activating the “Do Not Track” feature, in English and in French, on Google Chrome’s website;

A copy of these exhibits is notified and/or served herewith.

Montréal, September 3rd, 2021.



Borden Ladner Gervais LLP
Lawyers for Defendant Google LLC

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Envoyé: September 3, 2021 4:02 PM
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Objet: NOTIFICATION : 500-06-001079-207 / Option Consommateur c. Google LLC
/Application by Defendant Google LLC for Leave to Adduce Evidence and Exhibits G-1
to G-9
Pièces jointes: Google Exhibits G-1 to G-9.zip; 2021-09-03 - Google's Application for Leave to Adduce
Relevant Evidence(123912335.7) (002).pdf

BORDEREAU DE NOTIFICATION PAR COURRIER ÉLECTRONIQUE (ARTICLE 134 C.P.C.)

DATE :

Montréal, le 3 septembre 2021

EXPÉDITEUR :

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Votre dossier : 2002-097

NUMÉRO DE DOSSIER DE COUR ET NATURE DU DOCUMENT NOTIFIÉ :

Numéro de dossier : 500-06-001079-207
Parties : Option Consommateur c. Google LLC

Nature du document : Application by Defendant Google LLC for leave to adduce evidence and Exhibits G-1 to G-9

Nombre de pages : -12- excluding exhibits
(pièces jointes seulement)



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SUPERIOR COURT
(Class action)

DISTRICT OF MONTRÉAL
No.: 500-06-001079-207

OPTION CONSOMMATEURS

Plaintiff

v.

GOOGLE LLC

Defendant

**APPLICATION BY DEFENDANT GOOGLE
LLC FOR LEAVE TO ADDUCE EVIDENCE
(Art. 574 and 575 C.C.P.)**

ORIGINAL

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