# SUPERIOR COURT

(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-06-001123-211

DATE: October 12, 2021

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**PRESIDING: THE HONORABLE DONALD BISSON, J.S.C. (JB4644)**

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**MICHAEL HOMSY**
Plaintiff

v.

**GOOGLE LLC**
Defendant

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**JUDGMENT**

(On Application for Leave to File Evidence and to Examine Plaintiff (Art. 574 CCP)

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## 1. INTRODUCTION

[1] The Court is seized with a Motion by Defendant Google LLC for leave to file evidence and to examine plaintiff filed under Art. 574 of the *Code of Civil Procedure* ("CCP"). Google is the defendant party against an *Originating Application for Authorization to Institute a Class Action and to Obtain the Status of Representative* (the "Motion for Authorization") filed by Plaintiff Michael Homsy, who is seeking authorization of a Class Action for the following class:

> User Class: All individuals residing in the Province of Quebec, except for the Excluded Persons*, who used Google Photos and who had their facial biometric identifiers extracted, collected, captured, received, or otherwise obtained by Google from photos uploaded to Google Photos since October 28th, 2015 (the "Class Period");

> Non-User Class: All individuals residing in the Province of Quebec, except for the Excluded Persons, who did not use Google Photos and who had their facial biometric identifiers extracted, collected, captured, received, or otherwise obtained by Google from photos uploaded to Google Photos during the Class Period;
>
> *"Excluded Persons" means Google and its parent corporations, subsidiaries, affiliates, predecessors, successors and assigns; and their current or former officers, directors, and legal representatives";

[2] Google seeks authorization: 1) to adduce as relevant evidence the sworn statement of Ms. Yael Marzan, Product Manager Lead of Google Photos, and its Annexes A to C, dated September 3, 2021 (collectively, Exhibit G-1); and 2) to examine the Plaintiff Michael Homsy out of court and before the hearing of the Motion for Authorization, for a maximum of two hours, regarding the following subjects:

A0) The elements giving rise to the Plaintiff's own personal cause of action as against Google, including the circumstances surrounding:

i. Any representations that the Plaintiff would have seen and/or relied upon regarding Google Photos' services;

ii. The Plaintiff's acceptance of the Terms of Use and Privacy Policy;

iii. The Plaintiff's actual use of Google Photos;

iv. The Plaintiff's alleged damages, which are, according to Google, only vaguely described as inconveniences, anxiety and pecuniary damages; and

v. The Plaintiff's discovery of Google's alleged practices of January, 2021;

b) The Plaintiff's ability to properly represent the members of the proposed class, including the circumstances surrounding:

i. The manner in which he was called upon to act as an Plaintiff;

ii. The representativeness of his personal cause of action in relation to the proposed class members; and

iii. His personal capacity to properly represent the proposed class.

[3] Google argues that the sworn statement and the examination of the Plaintiff are relevant and necessary, serving to correct, clarify and complete certain incorrect, implausible, vague, and/or imprecise allegations in the Motion for Authorization. Google adds that this evidence and the examination will provide the Court with a true and complete factual matrix regarding the allegations advanced by the Plaintiff, and are thus essential for this Court in its analysis of the authorization criteria, and specifically in its

determination of whether the Plaintiff has established an arguable case pursuant to article 575(2) CCP and the Plaintiff's ability to properly represent the members of the proposed class (article 575(4) CCP).

[4] Plaintiff challenges all elements sought by Google, arguing that the proposed sworn statement contains matters for the merits and that the proposed examination does not meet any of the applicable criteria. Plaintiff has the subsidiary position of allowing a written examination.

[5] The present motion has to be decided in the context of the Motion for Authorization, which alleges that Google extracted, collected, stored, and used the "facial biometric identifiers" of the Plaintiff and the class members without providing any or adequate notice, without obtaining informed consent and without publishing biometric data retention policies (par. 2 and 4).

[6] More specifically, the Motion for Authorization alleges that whenever a photo is uploaded to Google Photos, facial biometric identifiers are extracted from any detected face image, without consideration for whether the face belonged to a Google Photo user or non-user (par. 30 and 31). It is alleged that Google used the class members' facial biometric data "for its own competitive advantage in the marketplaces for photo-sharing and other services integrated with Google Photos, which services Google has monetized, or may monetize, through data mining and targeted advertising" (par. 33).

[7] The Motion for Authorization further alleges that the facial biometric identifiers extracted and collected by Google through Google Photos are stored and remain accessible to Google, its personnel, and any third party that Google permits to access such data (par. 32).

[8] As a result thereof, the Motion for Authorization claims that Google (par. 6 to 8):

a) Violated class members' rights to inviolability and privacy pursuant to the *Charter of Human Rights and Freedoms*[1], CQLR c C-12;

b) Failed to meet its obligations under the *Civil Code of Quebec* ("C.C.Q.") and the *Act Respecting the Protection of Personal Information in the Private Sector*[2]; and

c) Made misleading representations to the users of Google Photos regarding its privacy practices and policies by omitting or being ambiguous about the fact that it collected and retained sensitive personal information in the form of facial biometric data, the whole in violation of the *Consumer Protection Act*[3].

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1 RLRQ, c. C-12.
2 RLRQ, c. P-39.1.
3 RLRQ, c. P-40.1.

[9] As a result, the Motion for Authorization alleges that the class members' inviolability and privacy rights were violated and that they each suffered damages, including inconveniences, anxiety and pecuniary damages (par .65 and 66).

## 2. THE APPLICABLE LAW

[10] In *Ward* c. *Procureur général du Canada*[4], this Court has summarized as follows all applicable principles under Art. 574 CCP for relevant evidence and examination at the class action authorization stage:

> [17] Les demandes de preuve appropriée à l'étape de l'autorisation sont prévues à l'article 574 Cpc. La jurisprudence de la Cour d'appel et de la Cour suprême du Canada nous enseigne quels sont les critères applicables :
>
> - le juge dispose d'un pouvoir discrétionnaire afin d'autoriser une preuve pertinente et appropriée ainsi que la tenue d'un interrogatoire du représentant, dans le cadre du processus d'autorisation;
>
> - une preuve n'est appropriée que si elle est pertinente et utile à la vérification des critères de l'article 575 Cpc. Le consentement de la partie demanderesse à une preuve suggérée par la défense ne suffit pas à en autoriser le dépôt;
>
> - la preuve documentaire et l'interrogatoire proposés doivent respecter les principes de la conduite raisonnable et de la proportionnalité posés aux articles 18 et 19 Cpc;
>
> - la vérification de la véracité des allégations de la demande relève du fond. Une partie défenderesse ne peut mettre en preuve des éléments qui relèvent de la nature d'un moyen de défense au mérite;
>
> - le tribunal doit analyser la demande soumise à la lumière des enseignements récents de la Cour suprême du Canada et de la Cour d'appel sur l'autorisation des actions collectives et qui favorisent une interprétation et une application libérales des critères d'autorisation;
>
> - à ce stade, la finalité de la demande se limite au seuil fixé par la Cour suprême du Canada, soit la démonstration d'une cause défendable. Le tribunal doit se garder d'autoriser une preuve qui inclut davantage que ce qui est strictement nécessaire pour atteindre ce seuil;
>
> - le tribunal doit se demander si la preuve requise l'aidera à déterminer si les critères d'autorisation sont respectés ou si elle permettra plutôt de déterminer si le recours est fondé; dans cette dernière hypothèse, la preuve n'est pas recevable à ce stade;

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4 2021 QCCS 109, par. 17 to 21.

- la prudence est de mise dans l'analyse d'une demande de permission de produire une preuve appropriée; il s'agit de choisir une voie mitoyenne entre la rigidité et la permissivité;

- il doit être démontré que la preuve demandée est appropriée et pertinente dans les circonstances spécifiques et les faits propres du dossier, notamment en regard des allégations et du contenu de la demande d'autorisation;

- le fardeau de convaincre le tribunal de l'utilité et du caractère approprié de la preuve repose sur la partie qui la demande;

- le tribunal ne doit pas laisser les parties produire une preuve volumineuse et ne doit en aucun cas examiner la preuve produite en profondeur comme s'il s'agissait d'évaluer le fond de l'affaire;

- le processus d'autorisation d'une action collective n'est pas, du point de vue de la preuve, une sorte de préenquête sur le fond. C'est un mécanisme de filtrage;

- l'admission de preuve appropriée doit être faite avec modération et être réservée à l'essentiel et l'indispensable. Or, l'essentiel et l'indispensable, du côté du demandeur, devraient normalement être assez sobres vu la présomption rattachée aux allégations de fait qu'énonce sa procédure. Il devrait en aller de même du côté de la défense, dont la preuve, vu la présomption attachée aux faits allégués, devrait être limitée à ce qui permet d'en établir sans conteste l'invraisemblance ou la fausseté. C'est là un « couloir étroit »;

- puisque le fardeau du demandeur à l'autorisation en est un de logique et non de preuve, il faut conséquemment éviter de laisser les parties passer de la logique à la preuve (prépondérante) et de faire ainsi un préprocès, ce qui n'est pas l'objet de la démarche d'autorisation;

- pour échapper à la perspective d'une action collective, la partie défenderesse souhaitera généralement présenter une preuve destinée à démontrer que l'action envisagée ne tient pas et, pour ce faire, elle pourrait bien forcer la note, sur le thème « abondance de biens ne nuit pas ». Le juge doit résister à cette propension, tout comme il doit se garder d'examiner sous toutes leurs coutures les éléments produits par l'une et l'autre des parties, au risque de transformer la nature d'un débat qui ne doit ni empiéter sur le fond, ni trancher celui-ci prématurément, ni porter sur les moyens de défense;

- à l'autorisation, le tribunal doit simplement porter un regard sommaire sur la preuve, qui devrait elle-même être d'une certaine frugalité;

- dans tous les cas, la preuve autorisée doit permettre d'évaluer les quatre critères que le juge de l'autorisation doit examiner et non le bien-fondé du dossier. Et si, par malheur, le juge de l'autorisation se retrouve devant des

faits contradictoires, il doit faire prévaloir le principe général qui est de tenir pour avérés ceux de la demande d'autorisation, sauf s'ils apparaissent invraisemblables ou manifestement inexacts;

- si l'on ne veut pas que les actions collectives accaparent une part indue des ressources judiciaires, ressources limitées, il serait donc utile, dans l'état actuel du droit, que l'on évite de faire au stade de l'autorisation ce qui, en réalité, appartient au fond.

[18] La Cour d'appel et la Cour suprême du Canada ajoutent que les seuls moyens de défense qui peuvent être tranchés par le juge d'autorisation sont ceux qui reposent sur une « pure question de droit au stade de l'autorisation si le sort de l'action collective projetée en dépend ».

[19] Dans l'arrêt Durand c. Subway Franchise Systems of Canada, la Cour d'appel vient d'ailleurs de rappeler ainsi ces critères :

> [50] Ces principes s'harmonisent d'ailleurs parfaitement avec les règles établies quant à la recevabilité et au poids à accorder à la preuve qui peut être déposée par la partie qui s'oppose à la demande d'autorisation, telle celle produite par les intimées en l'espèce.
>
> [51] Cette preuve doit en effet être essentielle, indispensable et limitée à ce qui permet de démontrer sans conteste que les faits allégués sont invraisemblables ou faux. Elle ne doit pas avoir pour effet de forcer la tenue d'un débat contradictoire sur une question de fond ou, dit autrement, entraîner la tenue d'un procès avant le procès.
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> [52] Si la preuve déposée est susceptible d'être éventuellement contredite par le requérant, le juge de l'autorisation doit faire preuve de prudence et ne pas tenir pour acquis qu'elle est vraie. Il doit se rappeler qu'il ne doit tenir pour avérés que les faits allégués par le requérant et non pas ceux allégués par l'intimé, même lorsque la preuve produite par ce dernier démontre *prima facie* l'existence de ces faits.
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> [53] À ce stade, le fardeau du requérant en étant un de logique (également qualifié de fardeau de démonstration) et non de preuve, il n'a d'ailleurs pas à offrir une preuve prépondérante de ce qu'il avance, mais bien, tout au plus, une « certaine preuve » et n'a pas l'obligation de contester la preuve que l'intimé dépose, ni d'y répondre. D'ailleurs, il n'est souvent pas en mesure de le faire puisqu'il n'a pas toujours toute la preuve en main, une bonne partie de celle-ci pouvant être en possession de l'intimé.
>
> [54] Bref, la preuve déposée par un intimé au soutien de sa contestation ne change pas le rôle du juge de l'autorisation qui peut, certes, trancher une pure question de droit et interpréter la loi pour déterminer si l'action collective projetée est frivole, mais qui ne peut, pour ce faire, apprécier la preuve comme s'il y avait eu un débat contradictoire ou encore présumer vraie celle déposée par l'intimé alors qu'elle est contestée ou simplement contestable.

[20] Enfin, il existe des décisions de la Cour supérieure qui autorisent le dépôt d'une preuve qui permet non seulement de démontrer le caractère invraisemblable ou faux de certaines allégations, mais également :

- de comprendre la nature des opérations de la partie défenderesse;
- de remplir un vide factuel laissé par la demande d'autorisation;
- de compléter, corriger ou contredire les allégations de la demande d'autorisation lorsqu'elle permet au tribunal d'avoir une meilleure compréhension du contexte factuel de la demande; ou
- d'être utile au débat d'autorisation.

[21] La Cour supérieure précise dans ces décisions que le poids de cette preuve sera décidé plus tard lors du débat sur l'autorisation.

[11] The Court must now apply these principles to the requests of Google.

## 3. APPLICATION OF THE PRINCIPLES

### 3.1 Sworn statement and exhibits

[12] The proposed sworn statement has 41 paragraphs over 7 pages, and it is completed by three exhibits (Annexes A, B and C) which take 18 pages.

#### 3.1.1 Arguments of Google

[13] Google's arguments are as follows.

[14] According to Google, the legal syllogism advanced by the Plaintiff to the effect that Google would have extracted, collected, stored, and used the "facial biometric identifiers" of class members for its own competitive advantage without their consent or knowledge is not only inaccurate, but is patently false and wholly untenable.

[15] Indeed, Google adds that the Motion for Authorization contains several vague, ambiguous and/or plainly false allegations with respect to the Google Photos service and Google's use of data associated with photographs uploaded to Google Photos. The sworn statement serves to complete and correct these allegations, which is essential for the Court's analysis of the criteria of 575 CCP, according to Google.

[16] More specifically, Google argues that :

a) Paragraphs 1-4 of the sworn statement are introductory (title and job description of Ms. Marzan);

b) Paragraphs 5-7 and 11 of the sworn statement serve to complete and correct the vague and erroneous allegations of the Motion for Authorization regarding the Google Photos service, providing this Court with an accurate and complete understanding of how Google Photos actually works[5];

c) Paragraphs 8 and 9 of the sworn statement serve to correct the Motion for Authorization's false allegation that the "facial biometric identifiers", as defined and described by the Plaintiff, are used for Google's own competitive advantage and for targeted advertising;

d) Paragraph 10 of the sworn statement serves to complete the vague allegation that "[t]he Google Photos application comes pre-installed on all Android Devices";

e) Paragraphs 12-13 of the sworn statement explain the different types of Google accounts (i.e. consumer versus business), thus completing the vague description of the Google Photos service and its use by the Plaintiff, and is also useful for determining the composition of the proposed class[6];

f) Paragraph 14 of the sworn statement serves to complete and correct the erroneous allegation in paragraph 23 of the Motion for Authorization by explaining that while the face grouping feature of Google Photos was launched in 2015 in Quebec, Google Photos was already available in Quebec at that time;

g) Paragraphs 15-18 of the sworn statement serve to explain that the face grouping feature (erroneously described by the Plaintiff as "facial biometrics") was evident and known to Plaintiff, contrary to the allegations advanced in the Motion for Authorization;

h) Paragraphs 19-20 of the sworn statement serve to clarify and correct the vague allegation of the Motion for Authorization that photographs are automatically uploaded to the cloud-based service;

i) Paragraphs 21-38 of the sworn statement serve to complete, clarify and correct the Motion for Authorization's vague, ambiguous and/or erroneous allegations regarding Google's alleged collection, storage and use of the data associated with photographs uploaded to Google Photos by explaining the functioning of face grouping feature and the use of the data related to the photographs uploaded to Google Photos;

j) Paragraphs 39-40 of the sworn statement serve to complete and correct the erroneous allegation of the Motion for Authorization that "facial biometric data", as

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5 Google cites *Pigeon* c. *Télébec*, 2020 QCCS 3166, par. 13 and 16-17.
6 Google cites *Leventakis* c. *Amazon.com inc.*, 2020 QCCS 289, par. 10.

described by the Plaintiff, is collected by Google and used for its own competitive advantage and for targeted advertising; and

k) Paragraph 41 of the sworn statement serves to complete and correct the erroneous allegation of the Motion for Authorization that "facial biometric identifiers", as described by the Plaintiff, are collected by Google and accessible to third-party developers.

[17] Google concludes by arguing that the sworn statement of Yael Marzan and its annexes A-C is incontrovertible, relevant evidence which is necessary for the Court to have a true and comprehensive picture of the facts required for its analysis of the authorization criteria under article 575 CCP, and specifically in order to properly assess whether the Plaintiff has made out an arguable case for each of the causes of action advanced and the damages sought in relation thereto.

### 3.1.2 Decision

[18] For the following reasons, the Court will dismiss in its entirety the application of Google for leave to file the sworn statement of Ms. Marzan and its Annexes A to C.

[19] According to Google, all paragraphs of the sworn statement are in order to correct, complete, explain or clarify the allegations of the Motion for Authorization. However, all these paragraphs are very detailed and of a technical nature, and need an intellectual gymnastic in order to conclude that the allegations of the Plaintiffs are false. As such, they are not « limitée à ce qui permet de démontrer sans conteste que les faits allégués sont invraisemblables ou faux ». This is not a case of « sans conteste »; on the contrary, it is the source of a debate.

[20] In addition, all paragraphs of the sworn statement have the effect of « forcer la tenue d'un débat contradictoire sur une question de fond ou, dit autrement, entraîner la tenue d'un procès avant le procès ». Indeed, in the Court's view, a reading of the sworn statement shows that it is a defence on the merits. It would be dangerous for the Court to accept such a sworn statement at the stage of authorization, as it clearly needs surrounding oral evidence, and potentially expert evidence, in order to it to be fully understood and applied to the facts of the case.

[21] Even the paragraphs that Google presents as being there to complete the allegations of Plaintiff or simply explain the context are, in the Court's view, a subtle attempt to actually contradict the allegations of the Plaintiff, in a complicated way. The Court cannot allow that, for the grounds mentioned above. The sworn statement here is not simply like providing the Court with a geographical plan of an area in an environmental matter or a missing contract in a contractual matter; it is extremely well drafted as to cover topics reserved to the merits. In addition, granting such a sworn statement would potentially make the Plaintiff ask for leave to examine Ms. Marzan, and thus getting into the merits of things. This is not possible at authorization.

[22] Finally, the sworn statement contains very broad factual allegations which are not totally tailored to the specific allegations of Plaintiff. This does not favour their reception into evidence.

[23] The possibility that all facts contained in the sworn statement of Google are ultimately true is not an argument in favour of accepting them at the stage of authorization of a class action. Also, the Court is well aware that the present decision might mean that it is virtually impossible for a defendant party to challenge technical facts at the stage of authorization. This challenge will be made on the merits.

[24] The Court does not need to address the arguments of Plaintiff that Google is making admissions in the sworn statement.

### 3.2 Examination of Plaintiff

[25] Google wants to examine the Plaintiff on the subjects identified above at paragraph 2, out of court and before the hearing of the Motion for Authorization, for a maximum of two hours.

#### 3.2.1 Argument of Google

[26] Google's arguments are as follows.

[27] Google argues that the proposed examination on the specific elements requested is useful and necessary for this Court to determine if the Plaintiff has an arguable case against it (575(2) CCP) and whether he has a personal interest in the case (575(4) CCP).

[28] Google adds that, as clearly appears from the Motion for Authorization, the allegations relating to the Plaintiff are general, vague and unsupported. Among other things, according to Google, the Plaintiff does not offer any details regarding his acceptance of the Terms of Use and Privacy Policy, which representations he saw or relied upon, his use of Google Photos, how he was "made aware of the Respondent's illegal storage and use of his facial biometric data during the month of January 2021", how he came to act as plaintiff or what damages, if any, he suffered as a result of Google's alleged fault.

[29] Google maintains that, although the Plaintiff's burden of proof may be a low one at the authorization stage, he must nonetheless satisfy the Court that his personal cause (or causes) of action is supported by sufficiently specific allegations of fact. Indeed, at the authorization stage, the Court must only consider the personal situation and recourse of the proposed class representative in order to determine whether the conditions of paragraphs 575 (2) and (4) CCP are met.

[30] Google argues that, in this regard, the Courts[7] have found that the examination of a plaintiff is permissible to complete vague or incomplete allegations so as to allow the Court to have a complete understanding of the legal syllogism advanced and to determine if the plaintiff has demonstrated an arguable case justifying the relief sought pursuant to article 575 (2) CCP.

[31] Google concludes that the examination sought by Google is limited only to what is relevant and essential to this Court's analysis of the criteria for authorization of the class action pursuant to article 575 CCP, and more specifically with regard to the appearance of right requirement (article 575 (2) CCP) and the Plaintiff's ability to properly represent the members of the proposed class (article 575 (4) CCP).

### 3.2.2 Decision

[32] For the following reasons, the Court will dismiss in its entirety the application of Google for leave to examine the Plaintiff.

[33] Google's argument is that the allegations of Plaintiff on which it wants to examine him are general, vague, incomplete or unsupported. However, as the Court wrote in *Li* c. *Equifax inc.*[8]:

> [86] Le demandeur vivra ou périra avec sa procédure telle que rédigée. Il n'appartient pas aux défenderesses de venir la compléter avec un interrogatoire. Si le demandeur a choisi de rédiger des allégations laconiques, ou vagues, ou incomplètes ou de la nature de l'opinion, alors il en subira les conséquences à l'autorisation.

[34] In the Court's view, this reasoning totally applies here and covers all topics sought by Google.

**FOR THESE REASONS, THE COURT:**

[35] **DISMISSES** the *Application for authorization to adduce relevant evidence and to examine the applicant*;

[36] **THE WHOLE**, with judicial costs.

THE HONORABLE DONALD BISSON, J.S.C.

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7 *Jutras* c. *Air Canada*, 2019 QCCS 5194, par. 24 and 27; *Seigneur* c. *Netflix International*, 2018 QCCS 1275, par. 27 and 34; *Letarte* c. *Bayer inc.*, 2018 QCCS 873 par. 9 and 21-23; *Mahmoud* v. *Société des casinos du Québec inc.*, 2017 QCCS 1691, par 10-13.

8 2018 QCCS 1892, par. 86.

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