



Court File No. VLC-S-S-1711066

No.  
Vancouver Registry

*In the Supreme Court of British Columbia*

Between

KIPLING WARNER

PLAINTIFF

and

GOOGLE LLC

DEFENDANT

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

### **NOTICE OF CIVIL CLAIM**

**This action has been started by the plaintiff for the relief set out in Part 2 below.**

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

**JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.**

#### **Time for response to civil claim**

A response to civil claim must be filed and served on the plaintiff,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

## **THE PLAINTIFF'S CLAIM**

### **Part 1: STATEMENT OF FACTS**

#### ***Overview***

1. In 2017, Google LLC (“**Google**”) began collecting location data from users of the Android mobile operating system (“**Android OS**”). Google collected the data from all users of all smartphones running the Android OS. Google collected the information even when users had not enabled or had disabled location services, and even when users’ smartphones did not contain a SIM card, and despite the fact that Google does not have a contractual relationship with users for the use of the Android OS. Google collects, uses, retains and commercialises the location data it takes from users, and profits from it. Google’s wrongful acts violated the *Privacy Act*, RSBC 1996, c 373 and unjustly enriched it at the expense of users. Through this suit, Canadian users seek to hold Google accountable for this unlawful conduct.

#### ***The Parties***

2. The defendant Google is a Delaware limited liability company with its principal place of business at 1600 Amphitheatre Parkway, Mountain View, California 94043, USA. Google carries on business worldwide, including in British Columbia and Canada. Google is a subsidiary of Alphabet Inc.

3. The Plaintiff, Kipling Warner, is a resident of Vancouver, British Columbia. He owns a Samsung Galaxy S4 smartphone that runs the Android OS. At material times, the Plaintiff’s smartphone had location services disabled.

4. The Plaintiff brings this claim on behalf of himself and users of the Android OS at issue in this claim (“**Class Members**”, to be defined in the Plaintiff’s application for class certification) who during the Class Period owned or used a smartphone running the Android OS.

## *Android OS*

5. Smartphones require software to operate. Google's Android OS is the mobile platform software employed by a majority of handset original equipment manufacturers ("OEMs") to provide an operating system and user interface. Smartphones made by OEMs including but not limited to Samsung, LG, Sony, HTC, Blackberry, and Google itself, all run the Android OS. A majority of smartphones in Canada run the Android OS.

6. Google develops and maintains the Android OS. Google retains control over and responsibility for the development and maintenance of the Android OS. However, the Android OS is distributed under a free (*libre*) and open-source license. Users acquire copies of the Android OS from their cellular carrier or handset OEM, and not from Google. OEMs or other intermediaries are free to make some modifications to the Android OS installed on a particular handset, although certain parts of the Android OS can be modified only by Google or with its permission.

7. Google does not have a direct contractual relationship with users of the Android OS covering the terms of use for that software. If users choose to run Google services on their smartphones, such as Gmail, the Google Play store, Google Maps, or other applications, the use of those services may be governed by Google's Terms of Service. The use of the Android OS itself by an end-user on a smartphone manufactured by a company other than Google is not covered by Google's Terms of Service or its Privacy Policy.

## *Unauthorised Collection of Location Data by Google*

8. In early 2017, Google began a program of mass user surveillance by collecting the addresses of nearby cellular towers from smartphone users using the Android OS and sending that data back to Google using a sophisticated communication protocol.

9. The data collected by Google enabled it to identify an individual user's locations and movements ("**Location Data**"). While information about a single cellular tower can only offer an approximation of where a mobile handset actually is, data from multiple towers can be used to triangulate a smartphone's location. Google collected Location Data about persons in British Columbia including the Plaintiff and Class Members.

10. The Location Data was collected when users were not using applications and even when location services were disabled on users' smartphones. Handsets with a cellular data or WIFI connection sent the Location Data to Google each time they came within range of a new cellular tower. When handsets were connected to a WIFI network, they would send the Location Data to Google even if they did not have SIM cards installed.

11. Google's decision to collect the Location Data was planned and deliberate, and was made knowing that users had not consented to, and were not aware of, its collection.

12. Consumers cannot disable the transmission of this information by their smartphones.

13. Google collected, retained, and used the data for its own benefit.

14. Consumers had no notice that Google was collecting, retaining, or using the Location Data.

15. The collection, retention, and use of Location Data by Google was unauthorised. Because Google does not have a direct contractual relationship with users of the Android OS for their use of the software itself, users have not given permission to Google to collect any data about them from the use of their smartphones acquired from third-party carriers and OEMs. Users have not consented to the collection, retention, or use of the Location Data by Google.

16. As a result of the unauthorised collection, retention, and use of the Location Data, the Plaintiff and Class Members have been deprived by:

- a. suffering a loss and violation of privacy;
- b. facilitation of surveillance by hackers or undesirable state actors; and
- c. in the case of persons for whom their location needs to be kept secret, such as victims of abuse, journalists meeting with confidential sources, or undercover police operatives, an increased risk of personal harm from disclosure.

17. As a result of the unauthorised collection, retention, and use of the Location Data, Google has been enriched by:

- a. selling advertising to third parties on the basis of the Location Data for display to users of the Android OS;
- b. selling the Location Data to third parties;
- c. selling customer profiles containing the Location Data to third parties;
- d. advancing its own research and development agenda, turning users into unwitting test subjects, to profit its own commercial interests; and
- e. permitting Google to track users who do not otherwise use Google services, or to track users who have disabled location services on other Google services that they use.

18. Collecting, retaining, and using the Location Data was in Google's economic interest, and provided it with a competitive advantage in the marketplace.

19. Google routinely shares information collected about users with government bodies, including U.S. government intelligence agencies.

20. Google has admitted collecting the Location Data.

21. Once its wrongdoing was uncovered, Google claimed that it would stop collecting the Location Data at the end of November 2017.

## **Part 2: RELIEF SOUGHT**

22. An order certifying this action as a class proceeding;

23. Statutory damages for breach of the *Privacy Act*;

24. Disgorgement of all benefits received by Google attributable to the unauthorised collection, retention, and use of the Location Data;

25. Aggravated and punitive damages;

26. Interest under the *Court Order Interest Act*, RSBC 1996, c 79; and

27. Such further and other relief as this Honourable Court may deem just.

### **Part 3: LEGAL BASIS**

#### ***Breach of the Privacy Act***

28. The *Privacy Act* creates a tort, actionable without proof of damage, where a person, willfully and without a claim of right, violates the privacy of another.

29. As set out above, Google has breached the *Privacy Act*. Google willfully and without a claim of right, violated users' privacy. Google's unauthorised collection, retention, and use of the Location Data was not reasonable in the circumstances, having regard to the lawful interests of the Plaintiff and Class Members in that information, and was in breach of s. 1 of the *Privacy Act*. To the extent that Google provided any of the Location Data to third parties and that information was linked to a user's name or identity, Google breached s. 3 of the *Privacy Act*.

30. The Plaintiff and Class Members are entitled to statutory damages as a result of Google's breaches of the *Privacy Act*.

#### ***Unjust Enrichment***

31. As set out above, Google has been enriched by the collection, retention, and use of the Location Data from the Plaintiff and Class Members. Google has profited from the commercialisation and use of the Location Data taken from the Plaintiff and Class Members. In particular, Google has been enriched by advertising sold on the basis of the Location Data, as well as the sale of Location Data to third parties. Google has also benefitted from the Location Data to advance its own research and development agenda.

32. As set out at paras. 8-16, the Plaintiff and Class Members have been deprived through the loss of their reasonable expectation of privacy, and the taking of data about them.

33. There is no juristic reason why Google should have received or should retain this benefit. The unauthorised collection, retention, and use by Google of the Location Data was in violation of the *Criminal Code of Canada*, RSC 1985, c 46, s. 193.1 and the *Privacy Act*.

34. In particular, Location Data falls within the definition of “radio-based telephone communication” under the *Criminal Code*, s. 183. The unauthorised collection, retention, and use by Google of the Location Data constitute use and disclosure within the meaning of the *Criminal Code*, s. 193.1.

35. To the extent that Google’s Terms & Conditions and Privacy Policy are applicable, which is denied, these violations make those Terms & Conditions and Google’s Privacy Policy void or unenforceable, and thereby negate any juristic reason why Google should have received or should retain the benefit of its wrongdoing.

36. As a result, Google has been unjustly enriched by the benefits it received from the Plaintiff and the Class Members. Justice and good conscience require that Google disgorge to the Plaintiff and Class Members an amount attributable to the value it received for or attributable to the collection, retention, and use of the Location Data.

#### ***Aggravated and Punitive Damages***

37. Google’s misconduct, as described above, was malicious, oppressive and high-handed, and departed to a marked degree from ordinary standards of decent behaviour. It violated the trust and security of users. Google’s actions are part of a pattern of willful disregard for users’ privacy and autonomy by Google and other technology companies. Google’s actions offend the moral standards of the community and warrant the condemnation of the Court such that an award of punitive damages should be made. Google’s harm to users also merits a compensatory award of aggravated damages for the intangible injuries suffered.

#### ***Service on Google***

38. The Plaintiff and Class Members have the right to serve this Notice of Civil Claim on Google pursuant to the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 10 (*CJPTA*), because there is a real and substantial connection between British Columbia and the facts on which this proceeding is based.

39. The Plaintiff and Class Members rely on the following grounds, in that this action concerns:

- a. restitutionary obligations that, to a substantial extent, arose in British Columbia (*CJPTA*, s 10(f));
- b. a tort committed in British Columbia (*CJPTA*, s 10(g)); and
- c. a business carried on in British Columbia (*CJPTA*, s 10(h)).

40. An action under the *Privacy Act* must be determined in the Supreme Court of British Columbia (*Privacy Act*, s 4).

Plaintiff's address for service:

**Klein Lawyers LLP**  
1385 W 8th Ave #400  
Vancouver, BC V6H 3V9

Place of trial: Vancouver, BC

The address of the registry is:

800 Smithe Street  
Vancouver, BC  
V6Z 2E1

Date: November 28, 2017



Signature of lawyer for plaintiff

**Mathew P. Good**

Co-Counsel for the  
Plaintiff

**Good Barristers**

**David A. Klein**

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Plaintiff

**Klein Lawyers LLP**



Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

## Appendix

*[The following information is provided for data collection purposes only and is of no legal effect.]*

### **Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

This is a claim for damages and disgorgement at common law for unjust enrichment arising out of the Defendant's breaches of privacy through unauthorised collection of location data from smartphone users.

### **Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:**

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

**Part 3: THIS CLAIM INVOLVES:**

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

**Part 4:**

*Criminal Code of Canada*, RSC 1985, c C-46

*Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28

*Court Order Interest Act*, RSBC 1996, c 79

*Privacy Act*, RSBC 1996, c 373