

CANADA / JUDGMENT

## Reid v. Google LLC

2022 BCSC 158

### COURT

Supreme Court of British Columbia

### DECIDED

1 February 2022

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2022 BCSC 158 Reid v. Google LLC

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Reid v. Google LLC,

2022 BCSC 158

Date: 20220201

Docket: S207444

Registry: Vancouver

Between:

Brian Reid

Plaintiff

And

Google LLC

Defendant

- and -

Docket: S208705

Registry: Vancouver

Between:

Harondel J. Sibble

Plaintiff

And

Google LLC, Google Canada Corporation, and

Alphabet Inc.

Defendants

- and -

Docket: S188927

Registry: Vancouver

Between:

Ryan Kett

Plaintiff

And

Google LLC

Defendant

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

Corrected Judgment: The text of this judgment was corrected at paragraphs 113, 115, and 153 on February 7, 2022.

Before: The Honourable Madam Justice Tucker

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Place and Date of Hearing:

Vancouver, B.C.

June 24, 25 and 28, 2021

Place and Date of Judgment:

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February 1, 2022

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## I. INTRODUCTION

[1] This decision addresses two applications regarding three actions against Google LLC ("Google") under the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA].

[2] The actions are:

Ryan Kett v. Google LLC ("Kett Action" or "Kett");

Brian Reid v. Google LLC ("Reid Action" or "Reid"); and,

Harondel Sibble v. Google LLC, Google Canada Corporation, and Alphabet Inc. ("Sibble Action" or "Sibble").

[3] I am the assigned case management judge for all three actions.

[4] Counsel in the Sibble Action apply for carriage of the claims set out in the Reid Action.

- [5] Google applies to stay all but one of the three actions pending a determination on certification in respect of the action that proceeds.

## II. THE CLASS ACTIONS

- [6] I will begin with an outline of the three actions.

### A. The Sibble Action

- [7] Sibble was filed on August 17, 2020 by a group of law firms - Branch McMaster LLP, Camp Fiorante Matthews Mogerman LLP, Foreman and Company, Greg McMullen Law, and David Loukidelis QC Law Corporation ("Sibble Counsel"). Three defendants are named: Google, Google Canada Corporation (Google's subsidiary), and Alphabet Inc. (Google's parent corporation).
- [8] Sibble Counsel describe Google's primary business as the sale and placement of targeted advertising, and allege the targeting is made possible by Google's collection, retention, aggregation, and use of personal information without consent. Sibble Counsel describe their claim as designed to grapple with a wrongful business model.
- [9] Sibble's claim period is November 1, 2008 through to the date of judgment.
- [10] Sibble asserts that Google collects information when people use "Google Services" (e.g., when they browse the internet using Google Chrome as a search engine), and when they access (using any search engine, e.g., Bing) a third party website that itself uses Google Services (e.g., Google Analytics or Google Ads).
- [11] Sibble defines "Google Services" as including Android, Chrome, Search, Maps, Gmail, and "other services". The information collected is asserted to include (without limitation), IP addresses, physical address, location, search terms, and web browsing history ("Sibble Data"). It is asserted that this multi-sourced data is then aggregated to create user profiles, and that Sibble Data and user profiles are then used in Google's targeted marketing business.
- [12] Sibble is advanced on behalf of users of all devices (including Android and Apple iOS smartphones) and on behalf of all users located in Canada, but excluding Ontario and Quebec residents.
- [13] Sibble advances these claims: (1) trespass (intrusion onto devices); (2) conversion (monetization of personal information); (3) invasion of privacy; (4) violations of the privacy acts of British Columbia, Saskatchewan, Manitoba, and Newfoundland; (5) intrusion upon seclusion; (6) unjust enrichment; (7) violations of the consumer protection acts of British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland & Labrador, and Prince Edward Island; and (8) breach of the federal competition act. Punitive and exemplary damages are sought.

- [14] Sibble Counsel are part of a national consortium ("Sibble Consortium"). There are Sibble companion actions in Ontario and Quebec: *Lindsay Provost v. Google LLC, Google Canada Corporation and Alphabet Inc.*, Ontario Superior Court of Justice, Court File No. CV-20-00645911-00CP ("Provost Action" or "Provost"); and *Options Consommateurs c. Google LLC*, Superior Court of Quebec, No. 500-06-001127-212 ("OC Action" or "OC"). The Provost and OC Actions were filed by firms in the Sibble Consortium: Foreman & Company in London, Ontario (Provost), and Belleau Lapointe, S.E.N.C.R.L. in Montreal, Quebec (OC).
- [15] The OC Action was filed on June 22, 2020, as a motion for authorization in the Superior Court of Quebec under the original style of cause *Louis-Alexandre Leclaire c. Google LLC*, Quebec Superior Court File No. 500-06-001079-207 (Montreal). (On March 18, 2021, the original claim was amended and Option consommateurs became the representative plaintiff).

## B. The Reid Action

- [16] The Reid Action was filed on July 27, 2020. It names Google as the sole defendant. It was filed by Anthony A. Vecchio Q.C. of the law firm Slater Vecchio LLP ("Reid Counsel").
- [17] Reid's claim period is 2008 through to the date of judgment.
- [18] Reid asserts that Google collects personal information without consent from people using Google Chrome to browse on a computer or using the equivalent Google Chrome app on an Android or Apple iOS device.
- [19] The Reid claim centres on information collected while a person is browsing using the "Incognito" (private) browsing mode. Reid alleges that Google represents that Incognito provides privacy protection, but then nonetheless collects the personal information of persons browsing in Incognito. The Reid class is limited to users who browse in Incognito while not logged into a Google account.
- [20] The personal information at issue in the Reid Action is data relating to users' internet browsing activity: e.g., IP addresses, URL addresses, website visits, and particular website pages visited ("Reid Data").
- [21] Reid alleges that the Reid Data (alone or along with other data collected by Google) enables Google to create a "digital fingerprint" for an individual user. It asserts that Google then combines each fingerprint with all of the known data Google has about the subject individual to create comprehensive biographical portraits that "profile" each individual.
- [22] Reid asserts that Google monetizes the Reid Data by selling: Reid Data; advertising services based on the Reid Data; and the profiles or access to the profiles (which profiles include Reid Data).
- [23] The Reid Action is filed on behalf of users in all of Canada, but excludes Quebec residents.

- [24] Reid advances these claims: (1) violations of the privacy acts of British Columbia, Saskatchewan, Manitoba, and Newfoundland; and (2) the tort of intrusion upon seclusion with respect to Yukon, Northwest Territories, Alberta, Nunavut, Ontario, New Brunswick, Nova Scotia, and Prince Edward Island residents.
- [25] Reid seeks disgorgement as a remedy for the alleged breaches of the privacy acts, excluding the BC privacy act. Punitive damages are also sought.
- [26] On April 6, 2021, Reid Counsel delivered an unfiled certification application and materials to Google. To date, Google has filed no response.

### C. The Kett Action

- [27] The Kett Action was filed on August 15, 2018, by David A. Klein and Aden H. Klein of the law firm Klein Lawyers LLP, and Mathew. P. Good of the law firm Good Barrister ("Kett Counsel"). Google is the sole named defendant.
- [28] Kett alleges that for an unknown period before January 1, 2019, Google collected location-based personal information without consent from individuals with a Google account whenever Google services were used on Android or Apple iOS smartphone devices.
- [29] Kett defines "Google services" as including:
- Internet search (Google Search), map display and route guidance (Google Maps), email hosting (Gmail), notifications (Google Now), weather (Google Weather), photo management (Google Photos), and cloud-based file storage, editing and retrieval (Google Drive).
- [30] The personal information forming the subject matter of the Reid claim includes (without limitation): GPS coordinates, longitude and latitude, map location, geographical location, nearby Wi-Fi networks, IP addresses, or other markers of physical orientation ("Location Data").
- [31] Google is said to collect Location Data and aggregate it to create a timeline of where the individual user was physically situated. Kett alleges that, without consent, Google collected, retained, and commercialized Location Data by selling: advertising based on user location as shown by Location Data; Location Data; and user profiles (which profiles include Location Data):
8. In addition to manipulating and presenting data to users, Google's Services and Apps have the ability to collect extensive information about the users themselves, including timing and frequency of use, and the place of use, and associating them with a user's Google Account.
  9. Google makes most of its money from selling advertising to third parties based on its users' characteristics, including their location.

- [32] The Kett class includes persons who deactivated or disabled their location services or location history function ("Location History function"). Kett alleges that Google allowed users to turn off the Location History function, but if the user did so, Google nonetheless collected their location history under a default setting in Web & App Activity. It asserts that Web & App Activity's collection of location history, and the fact that the Web & App Activity collection function could also be turned off, were not made apparent to the user.
- [33] Kett claims on behalf of users located in Canada, but excludes Quebec residents. There is a Kett companion case for Quebec residents: *Sergio Lima v. Google LLC*, Superior Court of Quebec, No. 500-06-000940-185 ("Lima Action" or "Lima").
- [34] Kett advances these claims: (1) violations of the privacy acts of British Columbia, Saskatchewan, Manitoba, and Newfoundland; (2) the tort of intrusion upon seclusion; (3) unjust enrichment; (4) the tort of unlawful means; and (5) breach of the BC Consumer Protection Act.
- [35] Kett seeks statutory damages or disgorgement as the remedy for alleged breaches of the Saskatchewan, Manitoba and Newfoundland & Labrador privacy acts. Kett's unjust enrichment claim seeks restitution or disgorgement of all benefits received by Google attributable to the Location Data. Punitive damages are sought.
- [36] On October 23, 2020, Kett Counsel delivered certification application materials to Google. To date, Google has not responded to the certification application.

### III. THE CARRIAGE MOTION

#### A. Introduction

- [37] Carriage motions are used to determine which of several proposed class actions on the same subject matter in the same jurisdiction will proceed to certification: e.g., *Strohmaier v. K.S.*, 2019 BCCA 388; *Fantov v. Canada Bread Company, Limited*, 2019 BCCA 447 at para. 48. If overlap is established, generally one action proceeds while the others are stayed.
- [38] Sibble Counsel seek carriage of the claims set out in the Reid Action and a number of related orders. No orders are sought under the carriage motion in relation to Kett.
- [39] Reid Counsel have not filed a competing carriage motion and do not ask that Sibble be stayed. They assert that Sibble and Reid are distinct causes of action and both should proceed, with any ultimate overlap left to be addressed by the doctrine of *res judicata* and the rule against double recovery.
- [40] Google submits that Reid and Sibble are duplicative and that one or the other must be stayed to avoid abuse of process.

## B. Legal Framework

- [41] There is no dispute about the court's jurisdiction to determine the carriage motion, the timing of the carriage motion, or the general principles to be applied.
- [42] In determining which action should proceed, BC courts consider a non-exhaustive list of factors: *Wong v. Marriott International Inc.*, 2020 BCSC 55 at para. 24. A helpful discussion of these factors and some of the principles relevant to their application is found in Perell J.'s decision, *Winder v. Marriott International Inc.*, 2019 ONSC 5766:
- [49] Where two or more class proceedings are brought with respect to the same subject-matter, a proposed Representative Plaintiff in one action may bring a carriage motion to stay all other present or future class proceedings relating to the same subject-matter. There should not be two or more class actions that proceed in respect of the same putative class asserting the same cause(s) of action, and one action must be selected.
- [50] The court will grant carriage to the putative Class Counsel whose proposed action is better for the interests of the putative Class Members while being fair to the defendants and promoting the prime objectives of class proceedings, which are access to justice for plaintiffs, class members, and defendants, behaviour modification, and judicial economy. Although the determination of a carriage motion will decide which counsel will represent the plaintiff, the task of the court is not to choose between different counsel according to their relative resources and expertise; rather, it is to determine which of the competing actions is more, or most, likely to advance the interests of the class.
- [51] Courts generally consider a list of overlapping and non-exhaustive factors in determining which action should proceed; including: (1) The Quality of the Proposed Representative Plaintiffs; (2) Funding; (3) Fee and Consortium Agreements; (4) The Quality of Proposed Class Counsel; (5) Disqualifying Conflicts of Interest; (6) Relative Priority of Commencement of the Action; (7) Preparation and Readiness of the Action; (8) Preparation and Performance on Carriage Motion; (9) Case Theory; (10) Scope of Causes of Action; (11) Selection of Defendants; (12) Correlation of Plaintiffs and Defendants; (13) Class Definition; (14) Class Period; (15) Prospect of Success: (Leave and) Certification; (16) Prospect of Success against the Defendants; and (17) Interrelationship of Class Actions in more than one Jurisdiction.
- [52] It is useful to note that: factors (1) to (3) concern the qualifications of the proposed Representative Plaintiffs; factors (4) to (8) concern the qualifications of the proposed Class Counsel; and factors (9) to (17) concern the quality of the litigation plan for the proposed class action. Thus, nine of the factors are about or are connected to case theory, which is understandable, because at the very heart of the test for determining carriage is a qualitative and comparative analysis of the case theories of the rival Class Counsel.

[Footnotes omitted.]

[43] A "tick the boxes" approach to the factors is discouraged. The focus of a carriage motion should be the broader goals of promoting the best interests of class members and ensuring fairness for the defendants: Strohmaier at para. 41. When factors are very similar or have only minor differences, the court may consider them neutral and need not expressly address them in its analysis: Strohmaier at paras. 76-77. The weight to be given to each factor will depend on the circumstances of each case.

### C. Carriage Considerations

[44] I will focus on those factors to which I accord meaningful weight or were focussed upon by the parties. If I do not refer to a factor, it is because I consider it either largely neutral or of little significance in this case.

#### 1. Fee Agreements

[45] The Sibble and Reid retainer agreements are both in evidence.

[46] The Reid agreement sets legal fees in the range of 20-25% under these terms:

- a) For settlements before certification, a maximum of 20% of the total amounts recovered;
- b) For settlements after certification, a maximum of 22.5% of the total amounts recovered; and,
- c) For settlements after a common issues trial, a maximum of 25% of the total amounts recovered.

[47] The Sibble agreement says fees will be sought at:

- a) 25% of amounts recovered, if the matter is settled before certification; and,
- b) 33 1/3% of amounts recovered, if the matter is settled after certification.

[48] Reid Counsel contend that the fee arrangement is a weighty factor that vitally affects class interests: *Asquith v. George Weston Limited*, 2018 BCSC 1557 at paras. 15, 64; *Mancinelli v. Barrick Gold Corporation*, 2016 ONCA 571 at para. 18. Sibble Counsel submit that the Reid fees are not significantly lower, and that the fees will have to be judicially approved in any event.

[49] As stressed in *Mancinelli*, in the carriage motion context, the Court is looking to see if there is a significant difference in fees:

[18] I suggest an additional factor that may have a bearing. The proposed fee arrangement between class counsel and the representative plaintiff is a factor that vitally affects the interests of the class. While the fee is ultimately subject to the approval of the court, significant differences between the fee arrangements may be considered on a carriage motion.

[50] In Asquith, once funding fees were accounted for (see paras. 57, 62, 64), the fee difference was 10%, which was considered significant in the circumstances. In Wong, an 8% fee difference was considered significant (at para. 52). Here, the pre-certification stage difference is 5%, and the post-certification stage difference is 8.5 to 10.5%. At all stages, the Sibble fees are higher.

[51] This is an atypical carriage motion. The competing actions are not of comparable scope. Reid Counsel acknowledge (indeed argue) that Sibble is concerned with more personal information and is factually and legally more complex. The Reid fees are lesser, but the counsel time and effort required to conduct the Reid litigation would also be less. Given the differences in the nature and scale of the Sibble and Reid cases, it is inappropriate to simply compare fee percentages to ascertain whether the difference is actually significant. The concept of value for money is more nuanced here.

[52] Both fee agreements stipulate maximums within the range previously accepted by this Court. No fees can be applied without court consideration and approval.

[53] I conclude fees should be treated as a neutral factor here.

## 2. Quality of Proposed Class Counsel

[54] The proper approach to this factor was restated in Wong:

[57] The quality of proposed counsel is a threshold question. I am not determining which lawyers are the best. Slight or marginal differences in experience is a neutral factor. The quality of counsel should not devolve into a beauty contest but some comparison is inevitable. Justice Blok in *Ewert v. Canada (Attorney General)*, 2014 BCSC 215, citing *Smith v. Sino-Forest Corporation*, 2012 ONSC 24, described this difficult task:

[14] [T]he task of the court is not to choose between different counsel according to their relative resources and expertise; rather, it is to determine which of the competing actions is more, or most, likely to advance the interests of the class.

[58] The question is whether counsel have the experience, resources, and capability to advance a substantive claim: *Strohmaier SC* at para. 57. The approach focusses on "which case is in the best interests of the proposed class to advance. Counsel's experience and expertise are but one part of that approach": *Laliberte v. Canada (Attorney General)*, 2019 FC 766 at para. 30.

[55] Slater Vecchio LLP is a Vancouver law firm with 7 partners, 11 lawyers, and about 100 support staff. Slater Vecchio LLP began performing class action work in May 2020. Since that time, they have filed 25 class actions. Of those, five (besides Reid) are privacy-based claims. Reid Counsel emphasize their extensive personal injury trial experience. They note that Sibble Counsel have adduced no evidence of trial experience.

[56] Sibble Counsel are:

a) Luciana P. Brasil and Trevor Siemens of Branch MacMaster LLP in Vancouver;

- b) Reidar Mogerman QC, David Jones, Jamie Thornback, and Rebecca Coad of Camp Fiorante Matthews Mogerman LLP in Vancouver;
  - c) Jonathan J. Foreman and Anne E. Legate-Wolfe of Foreman & Company in London, Ontario;
  - d) Greg McMullen of Greg McMullen Law in Vancouver; and,
  - e) David Loukidelis, QC of David Loukidelis QC Law Corporation, in Vancouver.
- [57] The Sibble Consortium consists of the Sibble Counsel and the law firm responsible for the OC and Provost Actions.
- [58] Sibble Counsel contend that its members include counsel who have litigated multiple complex and national class action claims through to conclusion and authors and contributors to leading class action texts. Mr. Loukidelis' extensive privacy experience and expertise is also highlighted in their submission.
- [59] Sibble Counsel note that while Slater Vecchio LLP has filed multiple class actions, these were all filed after May 2020 and the firm has no record of having successfully conducted and completed class action claims. Sibble Counsel agree that Reid Counsel have significant personal injury trial experience, but argue that trial experience is not relevant on a carriage motion.
- [60] Evidence of having filed class actions is not the equivalent of evidence of having carried and completed such actions. Similarly, evidence of having filed privacy-related actions is not itself evidence of privacy law expertise. Mr. Loukidelis, in comparison, is a subject matter expert with decades of specialized privacy law experience. Sibble Counsel have successfully carried numerous class actions to conclusion. There is a clear edge in privacy and class action expertise and experience in favour of Sibble Counsel.
- [61] Reid Counsel have personal injury trial experience. While Sibble Counsel have not put forward any specific evidence on the point, I accept that Sibble Counsel have the skill and ability required to conduct general litigation. On the evidence, the edge on trial experience leans in favour of Reid Counsel. I disagree with Sibble Counsel's characterization of trial experience as irrelevant. Nonetheless, I am satisfied that trial experience is not a significant metric on this carriage motion.
- [62] As set out above, quality of proposed counsel is a threshold consideration. Both sets of counsel here are capable and adequately resourced.
- [63] Still, Sibble Counsel's edge in relevant subject-specific expertise and experience is marked. In my view, a marked difference in expertise and experience may be appropriately revisited and taken into account in the final analysis should it present a close call.

- [64] Reid Counsel contend that the potential for disagreement among the firms and individuals in the Sibble Counsel and Sibble Consortium groupings should be of concern here: Wong at paras. 53-56; Winder. They contend that a consortium agreement ought to have been put into evidence.
- [65] Sibble Counsel submit, supported by the affidavit evidence of Ms. Brasil, that there is a history of successful cooperation between the Sibble Consortium members. (The historical claim excepts Mr. Loukidelis, who recently returned to private practice from the regulatory sphere.) Ms. Brasil also outlines the resolution process agreed upon by the Sibble Consortium members. She describes a dialogue process backstopped by an agreement to remit differences of opinion or disagreements under the co-counsel agreement to expedited arbitration.
- [66] While it would have been preferable to attach the agreement or at least quote the agreed upon terms for resolving disputes, Ms. Brasil's narrative description of the agreement is fairly detailed. I am prepared to accept Ms. Brasil's evidence regarding the agreement.
- [67] The Sibble Consortium members (other than Mr. Loukidelis) have successfully collaborated on other long and complicated class actions. There is no reason to suppose the addition of Mr. Loukidelis as a subject matter expert will be disruptive. More significantly, if issues do arise, there is an agreed upon mechanism to efficiently resolve them. I do not consider the multi-firm nature of the Sibble Counsel and Sibble Consortium groups a factor weighing against Sibble.
3. Priority of Commencement/ Stage of Readiness
- [68] Reid was filed a month before Sibble. The OC Action was filed (in Ms. Leclaire's name) a month before Reid. There is a dispute as to whether the OC Action should count as a first filing in the circumstances. Either way, a one-month difference is not significant. As noted by Justice Blok in *Ewert v. Canada (Attorney General)*, 2012 BCSC 621, (where the actions were filed within the same month):
- [43] I consider that "first to file" should not be given undue weight in general, certainly not where the respective filings are relatively close in time, because to do so might encourage law firms to engage in an unseemly rush or "unedifying scramble" to the court registry.
- [69] Date of commencement is neutral here.
- [70] There was no case management in Reid before the joint case management conferences leading into the carriage motion. Without any certification schedule, Reid Counsel delivered unfiled certification materials on April 6, 2021.
- [71] In the circumstances, Reid Counsel cannot rely on that delivery as evidence that Reid is meaningfully ahead of Sibble for purposes of the carriage motion. I endorse Perell J.'s astute comments on the early delivery of certification materials during the run-up to a carriage motion: Winder at paras. 108-115.

[72] Sibble Counsel attest that they too have been working with experts and on certification materials during the period preceding the carriage motion.

[73] I conclude preparation and readiness are neutral considerations here.

#### 4. Preparation and Performance on Carriage Motion

[74] Reid Counsel retained independent counsel (Mr. Dennis) to represent them on the carriage motion. They advise this was done in light of Perell J.'s comments in *Quenneville v. Audi AG*, 2018 ONSC 1530 at paras. 2-4. Reid Counsel contend that Sibble Counsel's failure to do the same should weigh against them on this motion.

[75] Mr. Mogerman argued the carriage motion for Sibble Counsel. In doing so, he made comparative submissions about proposed counsel. His comments were tempered and focussed on objective measures: e.g., depth of class action experience by reference to cases litigated, review of publications, and review of professional experience (such as Mr. Loukidelis' regulatory work). Mr. Mogerman's comments about Sibble Counsel were appropriately restrained (see *Joel v. Menu Foods Genpar Limited*, 2007 BCSC 1482 at paras. 102, 105) and his comments about Reid Counsel did not raise issues of professional conduct or otherwise enter the arena of what is oft-described as "mudslinging" (see *Strohmaier* at para. 46).

[76] While proposed counsel are well-advised to give careful consideration to the propriety of making submissions about the quality of counsel before doing so themselves, I believe that Mr. Mogerman kept well to the right side of the line. I do not consider it inappropriate for him to have made submissions on behalf of Sibble counsel.

[77] This factor is neutral.

#### 5. Selection of Defendants

[78] Sibble names Google Canada Corporation and Alphabet Inc. as additional defendants. Sibble Counsel do not contend that the additional defendants weigh in their favour. Reid Counsel, on the other hand, argue their inclusion weighs against Sibble, contending that there was no legal justification for their inclusion.

[79] Sibble Counsel say the additional defendants were named "out of an abundance of caution" and can be easily removed should it become evident that they are unnecessary.

[80] Sibble's inclusion of the additional defendants is a neutral factor.

#### 6. Case Theories, Formulation, and Prospects of Success

[81] This combined heading captures the core submissions of both Sibble and Reid Counsel.

[82] Sibble Counsel contend that Sibble is a comprehensive claim that seeks to grapple with Google's business model, while the Reid Action is a carve-out lacking any good reason to proceed alone.

- [83] Sibble Counsel say both actions are founded on Google's collection, aggregation, and commercialization of personal information. All Reid Data is also Sibble Data, all Reid class members are also Sibble Class members, and all the claims in Reid are also advanced under Sibble. They describe Reid as a "slice" of Sibble.
- [84] Sibble Counsel says that if both actions proceed: there will be two actions dealing with the same collection of information; people who browsed in both Incognito and regular modes will have claims about their information split between two actions; and there will be an unprincipled distinction drawn between those whose privacy expectations were informed by Incognito (Reid Action) and those whose were informed by the "Do Not Track" standard (Sibble Action, para. 25).
- [85] Sibble Counsel note that Quebec residents are covered by the Sibble Consortium (under the OC Action).
- [86] Reid Counsel do not deny there is overlap, but characterize Reid as a distinct cause of action, referencing the definition of "cause of action" in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44:
- 54 A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. ...
- [87] Reid Counsel contend that the same information is not at issue, as Reid Data is more narrowly defined. Besides the Incognito limitation, Reid Data excludes personal information that is typically considered public information (e.g., name, address, and phone number), while Sibble includes such information.
- [88] Reid Counsel suggest that Reid class members might argue that Reid Data (as data harvested under the illusion of Incognito's protection) is more valuable to Google than other Sibble Data in order to enhance damages recovery for Reid class members.
- [89] Reid Counsel characterize Reid as a stream-lined claim. They say its narrow focus gives it a higher probability of certification and will enable it to be prosecuted more quickly: Joel at paras. 75, 82. They argue that it is not in the best interests of the Reid class to have the Reid claim bogged down as part of Sibble's "meta-claim".
- [90] Reid Counsel argue the Reid class is in a position analogous to the Aviva plaintiffs who were allowed to proceed separately in *Workman Optometry v. Aviva Insurance*, 2021 ONSC 142 [Workman]. They argue that here, as in *Workman*, the Reid class ought not to have to wait for Sibble to advance claims the Reid class members are uninterested in: *Workman* at paras. 39-43.
- [91] Finally, Reid Counsel note that Reid covers Ontario residents, while Sibble does not.

## D. Analysis

[92] The first five factors canvassed above were largely neutral. In any event, I agree with the parties, as reflected in their submissions, that case theory, formulation and prospect of success are the real focus here.

[93] The party positions set out below are unusual ones for a carriage motion. This reflects Reid Counsel's atypical carriage motion response - that both actions should proceed, but with Reid Counsel having carriage of the Reid claims (as a carve out from Sibble).

### 1. Distinct Causes of Action

[94] Reid Counsel argue at length that Reid is different in that Reid is smaller. That is a counterargument to an argument not made. Sibble Counsel do not assert that the actions are identical or near identical; their point is that Reid is entirely subsumed within Sibble.

[95] If the arguments directed at establishing that Reid is smaller are set aside, along with that about Reid's coverage of Ontario, Reid Counsel essentially assert that Reid is a distinct of cause of action because it is the cause of action set out in Reid:

The Reid Action serves an essential purpose for the proposed Reid class: advancing the distinct cause of action pleaded in Reid. The argument made by Sibble misunderstands what in law constitutes a cause of action. As explained below, a cause of action is not merely a legal label (intrusion upon seclusion or conversion). It is the set of facts which entitle a plaintiff to a judgment from the Court. On that correct understanding of the law, the proposed Reid class is not a subset of anything. It is the class with the cause of action that the Reid claim advances: breaches of class members' statutory and common law privacy rights arising from Google's tracking of internet browsing activity while users are in private browsing mode. That is a discrete and complete class in and by itself which derives no benefit from having their claim subsumed into claims that are both different from their claim and potentially in conflict with it.

[96] I note that Reid Counsel cited no case authority in support of this assertion. In my view, it amounts to a tautology.

[97] The question is not whether Reid fails to disclose "a" cause of action in the sense of being a valid pleading. No one has asserted otherwise. The question is whether Reid is an action on the same cause of action - in the Danyluk sense - as Sibble. The answer to that is clearly "yes".

[98] Sibble and Reid both arise out of Google's alleged collection, use, and monetization of users' personal information. The claim periods overlap for some 11 years. Reid Data is a subset of Sibble Data. The Reid class is a subset of the Sibble class. The privacy claims advanced in Reid are advanced in Sibble. The factual situation that founds Reid is, as Sibble Counsel asserts, a "slice" out of the factual situation that founds Sibble.

[99] Reid and Sibble share the same cause of action.

## 2. Reid as a Stand-Alone Action

- [100] Reid Counsel assert that the Reid class is better served if Reid proceeds as a stand-alone proceeding and thus a carve-out from Sibble is warranted.
- [101] I conclude that this argument lacks merit. The Sibble Action offers reasonable access to justice for the Reid class, and does so without splitting their personal information and claims between two class actions.
- [102] The assertion that Reid will proceed apace is speculative. Google has stated its concerns about res judicata with respect to findings made in the actions should both proceed. Google can be expected to litigate its significantly overlapping defence positions in Sibble and Reid with equal vigour regardless of which case presents them first.
- [103] Nor is there any urgency here. In Joel, the defendants to the Joel action had a limited and ever depleting recovery fund from which to pay judgments. That fact was a significant factor in the conclusion that "less was more" in the circumstances and that the narrower Joel action, which was limited to those defendants, should be allowed to proceed (at paras. 81-82). In Workman, timely access to justice was a driving consideration as the plaintiff businesses were at risk of failing pending receipt of the insurance benefits alleged to have been wrongfully denied. There is nothing comparable here.
- [104] Expedition aside, the facts are not analogous to those before the Court in Workman. Workman involved multiple class actions filed against a number of different insurers based on a number of different insurance policies. The policies varied significantly, but the claims all alleged wrongful denial of business interruption coverage with respect of pandemic-related closures.
- [105] Justice Belobaba summarized the Workman facts as follows:
- [4] What remains, in essence, is a carriage battle between two groups: the Nordik Consortium and Lerner, whose clients are suing only Aviva, and the Workman Consortium, whose clients are suing some 16 insurers including Aviva. This is obviously not the usual carriage motion where the competing actions involve the same proposed class and the same set of defendants. Here, there are significant differences in both the proposed classes and the targeted defendants.
- [5] The relationship between the Lerner, Nordik and Workman actions is akin to Russian Matryoshka nesting dolls: the two Lerner's actions fit within the Nordik Aviva Action which fits within the Workman Omnibus Action.

- [7] In the more conventional carriage motion - same class, same defendants - the "best interests of the class" can be determined by considering a list of some 13 or 14 factors that have been summarized under six heads: (i) the experience and resources of the competing firms; (ii) the proposed plaintiffs and defendants; (iii) the causes of action; (iv) the state of preparation; (v) the overall approach and theory of the case; and (vi) the proposed fee and funding arrangements.
- [8] Here, although some of these factors are addressed in counsels' submissions, the key determinants are more fundamental. The competing camps are not vying for carriage of the same class action but for carriage of the Aviva portion that also happens to be a subset of the larger Omnibus Action. And they are doing so in the context of a pandemic that is wreaking havoc on large and small businesses. For businesses whose loss of income claims have been denied by their insurers, a speedy legal determination is obviously of paramount importance.

[Emphasis added; footnotes omitted.]

- [106] The omnibus claim in Workman bundled similar contract claims arising on different policies between plaintiff policy holders and a number of different insurer defendants. It was possible to excise the Aviva policy-based claims from the omnibus bundle. Once excised, the Aviva policy holders did not continue to be members of the class in what remained of the bigger action. Once excised, Aviva was a defendant only to the excised claims, and no longer a defendant in what remained of the bigger action. The relevant terms of the Aviva policies used language dissimilar from that found in the non-Aviva policies that were in dispute in the bigger action. On those facts, it was feasible to carve-out the Aviva litigation and enable it to proceed at its own pace.
- [107] That Reid focusses on a subset of data and alleges a particular misrepresentation does not permit an analogy to the Aviva policy claims. If Reid were to proceed as a carve-out, Reid class members would continue to be Sibble class members and would continue to have legal claims about their browsing information covered by the Sibble Action, and Google would have to defend both actions.

### 3. Res Judicata & Rule Against Double Recovery

- [108] Reid Counsel submit that it is feasible for Reid and Sibble to both proceed on the basis that any problems caused by the overlap can be addressed by application of res judicata and the rule against double recovery. They point to the Supreme Court of Canada's comments in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [Pro-Sys], as support for this assertion.

- [109] The doctrine of res judicata and the rule against double recovery are solutions to problems. Employing them as such takes time and resources. The existence of a solution does not render the corresponding problem a cost neutral proposition. For example, while stitches are good, avoiding being stabbed is better - better for the individual involved and better from the perspective of the health care system.
- [110] In Pro-Sys, the Supreme Court of Canada held that, rather than deny indirect purchasers the ability to claim for losses (at para. 60), those claims should be permitted to proceed and the Court should address the resulting complexities by employing the rule against multiple recovery (at paras. 35-41).
- [111] Here, there is no policy objective warranting the creation of a state of affairs that would then need to be sorted out with estoppels and additional damages hearings. No one will be denied access to justice if Reid does not proceed as a carve out: Sibble would advance the Reid claims.
- [112] Here, allowing both actions to proceed would be inconsistent with the CPA objectives. It would needlessly oblige the classes, Google and the court system to invest the resources and time required to conduct duplicative actions and, above and beyond that, the resources and time needed to address res judicata and double recovery issues that can be avoided.

#### 4. Spectre of Sibble Class Conflict

- [113] Reid Counsel suggest the Reid class may be advantaged by arguing that Incognito data is more valuable to Google than the rest of the Sibble Data. However, there is no pre-existing cap on recovery here (see, for comparison, Joel). Reid Counsel have not provided any reason why the value-based damages sought under Sibble would or could not claim any such ascertainable value.

### E. Conclusion

- [114] Sibble and Reid are founded on the same cause of action. There is no policy basis for permitting both actions to proceed. Thus, this motion boils down to the usual carriage question - which matter should proceed.
- [115] Reid Counsel submit that the primary consideration should be the best interests of the Reid class. I do not agree. When, as here, the actions on the carriage motion propose dissimilar classes, it is the best interests of the totality of the putative class members that are relevant.
- [116] I am satisfied that Sibble's broader scope and case theory better serve the interests of the putative class, the objective of behaviour modification, and the common interests of the class members, the defendants, and the Court in the efficient use of time and resources. Reviewing the factors overall, I do not find the determination a close call. However, if it were, counsel experience and expertise would then lean in favour of Sibble.

[117] I do not suggest that a broader claim should generally be preferred. Here, I consider it very telling that the Reid claim itself describes the collection of data aside from the Reid Data and the aggregation of Reid Data with that other data in order to describe the wrongdoing at issue. This gives credence to Sibble Counsel's argument that the Reid action - one focussed on a narrow subset of data and a discrete representation in the collection process - aspires to offer, at best, a glancing blow to the wrong it identifies.

[118] Reid Counsel suggest in their submissions that Sibble will ultimately be found "too large" to be certified. Sibble Counsel disagree. Either way, it is an issue for the Sibble certification hearing.

[119] Reid is stayed pending a final determination on certification in Sibble.

#### IV. THE STAY APPLICATION

##### A. Overview

[120] Google seeks alternative orders depending on the result of the carriage motion. The carriage motion having been determined, Google seeks an order that either Kett or Sibble be stayed pending certification in the other.

[121] Google relies on the doctrine of abuse of process: *Toronto (City) v. (C.U.P.E.), Local 79*, 2003 SCC 63 at paras. 35-37 [CUPE]; *Drover v. BCE Inc.*, 2013 BCSC 1341 at paras. 12-23; *Lacharity v. University of Victoria Students' Society*, 2012 BCSC 1819. If there is no abuse of process, Google says a stay is warranted in any event to avoid the unnecessary and costly use of resources: *Fantov* at para. 53; *Ainsworth Lumber Co. v. A.G. of Canada*, 2001 BCCA 105 at paras. 14-15.

[122] The Court's authority to make the orders sought is undisputed. The Court has the inherent jurisdiction to control its processes, authority under the Supreme Court Civil Rules, B.C. Reg. 168/2009 (including RR. 1-3, 5-3(1), 9-5(1) and 13-1(19)), and under the Law and Equity Act, R.S.B.C. 1996, c. 253, ss. 8(2) and 10. This authority is canvassed in the cases cited above.

[123] The actions have already been summarized. Google has filed a multi-faceted response to civil claim in Kett. Google's response on the merits includes reliance on its privacy policy and terms of service to establish disclosure and consent. While Google has yet to file a response to civil claim in Sibble, its counsel advise that Google's response will be similar and that it will also rely on its privacy policy and terms of service in response on the merits.

##### B. Improper Advantage

[124] Kett Counsel argue that Google's stay application is a strategic attempt to derail Kett as the first action to deliver certification materials and the action most likely to succeed. The facts do not align with that assertion.

- [125] Kett was originally filed with two representative plaintiffs, Mr. Kett and Kip Warner. Complications arose regarding Mr. Warner's participation. The issue was resolved indirectly through a different action: see *Warner v. Google LLC*, 2020 BCSC 1108, and *Chartrand v. Google LLC*, 2021 BCSC 7.
- [126] A case management conference was held in Kett on October 1, 2020. No orders were sought at that conference. Its primary purpose was to ascertain whether Mr. Warner would participate (he did not). At the conference, both sides raised issues to be addressed in the future. Google Counsel advised that Sibble had been filed, expressed concern about overlapping actions, and urged common case management. Kett Counsel advised that they were prepared to deliver certification materials. A further conference in Kett was set for November 30, 2020.
- [127] On October 23, 2020, Kett Counsel delivered unfiled certification materials.
- [128] On January 13, 2021, the initial case management conference was held in Sibble. Sibble Counsel agreed that Sibble and Reid overlapped and said they intended to file a carriage motion. As for Kett, Sibble Counsel advised they were prepared to amend Sibble to avoid overlap with Kett. Google Counsel said Google would apply for a stay unless the Kett/Reid/Sibble overlap was satisfactorily resolved.
- [129] On February 5, 2021, a joint case management conference was held in Kett, Reid, and Sibble (and a fourth action not at issue here). Sibble Counsel confirmed that a carriage motion would be filed regarding Reid, but now advised that Sibble would not be amended to address overlap with Kett. Google Counsel then indicated that Google would file a stay application.
- [130] Google's stay application addresses all of the possible permutations. It does not seek to have any particular action stayed. This accords with Google's position on overlap as stated shortly after Sibble's filing. I am not persuaded Google is improperly seeking to determine which action will proceed to certification.

### C. Intra-jurisdictional Multiplicity

- [131] Google argues that Kett and Sibble are duplicative and, as such, an abuse of process. It contends that if both actions proceed, Google will be prejudiced by having to defend the same dispute on two fronts, and that party and court resources will be needlessly expended. Google also contends that if the actions did proceed in tandem, the common allegations and common defences would result in serial res judicata issues between the ongoing proceedings.
- [132] Kett and Sibble Counsel assert that Sibble and Kett are distinct claims and thus not an abuse of process. They concede some commonality and overlap, but say this can be addressed by res judicata and the rule against double recovery. They both assert that Google has not established that it will be significantly prejudiced if both actions proceed.

- [133] The proposition that multiple claims against the same defendant in the same jurisdiction about the same dispute or subject matter can amount to an abuse of process is unchallenged: *Lacharity*; *Drover* at para. 20; *Deslauriers v. Phillip*, 2015 BCSC 756 at para. 57; *Balm v. BHC Securities, Inc.*, 2003 ABQB 773 at paras. 31-32; *Urban Landmarks Master Builder Inc. v. Lloyd's Underwriters*, 2012 ABQB 224 at paras. 19, 24-31 [*Urban Landmarks*]. For purposes of these reasons, I will refer to this particular form of overlap - that is, multiple actions against the same defendant on the same dispute or subject matter in the same jurisdiction - as "intra-jurisdictional multiplicity".
- [134] The law on intra-jurisdictional immunity is canvassed in *Lacharity*. *Lacharity* involved two petitions against the same respondent about the same failure to remit funds. The first petition, filed by a society, was converted to a trial. The second petition was then filed by individual members of the society. The respondent applied to have the second petition either struck or stayed. Justice Goepel (then of this Court) wrote:
- [24] This court has the jurisdiction to control its process and to that end is empowered to stay an action. The commencement by a plaintiff of more than one action against a defendant in relation to the same dispute or matter can be an abuse of process. The usual remedy for such an abuse is to stay one of the proceedings: *Englund v. Pfizer Canada Inc.*, 2007 SKCA 62, 284 D.L.R. (4th) 94 [*Englund*]; *Collins v. BCE Inc.*, 2010 SKQB 74, 352 Sask. R. 205; *Duzan v. Glaxosmithkline, Inc.*, 2011 SKQB 118, 372 Sask. R. 108; and *Ewert v. Canada (Attorney General)*, 2012 BCSC 621.
- [25] In *Englund*, Richards J.A. said at paras. 33-34:
- [33] Superior courts of justice have long exercised an inherent jurisdiction to control their proceedings and process so as to prevent interference with the proper administration of justice. I.H. Jacob in "The Inherent Jurisdiction of the Court" (1970), 23 *Current Legal Problems* 23, briefly describes this history as follows at p. 25:
- the superior courts of common law have exercised the power which has come to be called "inherent jurisdiction" from earliest times, the exercise of such power developed along two paths, namely, by way of punishment for contempt of court and of its process, and by way of regulating the practice of the court and preventing the abuse of its process.
- [34] It is well established that the commencement by a plaintiff of more than one action in the same jurisdiction against a defendant in relation to the same dispute or matter is an abuse of process. As Sir George Jessel observed over one hundred years ago, "It is prima facie vexatious to bring two actions where one will do". See: *McHenry v. Lewis*, [1883] 22 Ch. D. 397.

- [26] In this case, the petitioners and Access have brought what amounts to identical claims on the same facts, seeking to have UVSS pay money arising from the referenda to Access. Any differences in the proceedings are cosmetic, not substantive or real. This petition is an attempt to circumvent the decision of Mr. Justice Shabbits that the 2011 Petition be converted into an action. It is an abuse of process.
- [27] I recognize that the petitioners in the two proceedings are different. In the circumstances of this case it is a distinction without a difference. The petitioners are active members of Access. Their petition is brought for Access's direct financial benefit. The substantive relief they seek is that UVSS pay over to Access the monies raised by the referenda. It is the identical relief sought by Access in the 2011 Petition. There is plainly a sufficient community of interest to establish privity between the petitioners and Access: *Tylon Steepe Homes v. Pont*, 2011 BCSC 385.
- [28] UVSS's application is allowed. It was suggested in argument that the petitioners, as members of UVSS, might have certain remedies available to them if Access's claim in the 2011 Petition failed. Accordingly, this petition will not be struck out, but stayed until the 2011 Petition is heard and determined.
- [135] I note the comment by Jessel, M.R. in *McHenry v. Lewis*, [1883] 22 Ch. D. 397, 52 LJ Ch 325, endorsed by both Richards J.A. in *Englund v. Pfizer Canada Inc.*, 2007 SKCA 62, and Goepel J. in *Lacharity*. Jessel M.R.'s comment describes a presumption of fact. On review of the *McHenry* reasons, it is evident that the point of his comment was that a presumption of vexation operates in circumstances of intra-jurisdictional multiplicity. At greater length, Jessel M.R.'s comments in *McHenry* read (at 400):

As regards the second point, it appears to me that very different considerations arise where both the actions are brought in this country and where one of them is brought in a foreign country. In this country, where the two actions are by the same man in Courts governed by the same procedure, and where the judgments are followed by the same remedies, it is *prima facie* vexatious to bring two actions where one will do. But where it is in a foreign country it certainly appears to me that we cannot draw the same inference. He might have a personal remedy in one country and a remedy only against the goods in another. He may have a remedy against the real estate in one country and no such remedy against the real estate in the other. It is not so very long ago since the law of England did not allow a creditor to take a dead man's real estate, and we know that in foreign countries various laws apply, as regards the remedies, of a totally distinct character from the laws regulating the remedies in this country, so that it is by no means to be assumed in the absence of evidence that the mere fact of suing in a foreign country as well as in this country is vexatious. It seems to me that you must make out a special case, and there is therefore that distinction between the case of the two actions being brought in the Queen's Courts, and one action being brought in the Queen's Court and the other in the Court of a foreign sovereign.

[Emphasis added.]

- [136] Englund involved two class actions filed in two different jurisdictions (Ontario and Saskatchewan). After commenting on the law regarding intra-jurisdictional multiplicity, Richards J.A. went on to conclude that an abuse of process of the same nature might arise in some circumstances even though the facts involved class actions filed in different jurisdictions:
- [36] We believe the same concerns which motivate the courts to characterize the bringing of multiple actions in a single jurisdiction as an abuse of process can also apply, in appropriate circumstances, where the multiple actions have been brought in two or more jurisdictions. .
- [40] We would not suggest that it is always or necessarily an abuse of process for a plaintiff to launch claims against the same defendant, and arising out of the same subject matter, in more than one jurisdiction. There will sometimes be entirely valid reasons for such an approach. See: Castel and Walker, *Canadian Conflict of Laws*, Vol. 1, 6th ed. looseleaf (Markham, Ont.: LexisNexis Canada Inc, 2005) at para. 13.6. But where, as here, there is no suggestion that multiple claims serve any legitimate interest of the plaintiffs, the complexion of things changes. In such circumstances, the courts are being used in a manner which serves no proper purpose or which is vexatious or oppressive.
- [137] Richards J.A. held that where class actions are filed in different jurisdictions, the court must "look to the various considerations and arguments which might qualify or undercut" a finding of abuse of process (at para. 42). He noted that, in the multi-jurisdictional class action context, it might be relevant whether the filings were made by the same plaintiffs and same counsel (at paras. 30-31). But even where plaintiff and counsel were the same, it could still be the case that multiple findings were made in different jurisdictions for a legitimate reason (at para. 40). For example, it might be that both cases were required in order to fully vindicate the class (at para. 39).
- [138] Restating the conclusion in Englund in the language of McHenry, Richards J.A. held that while filing multiple class actions on the same dispute or subject matter against the same defendant in different jurisdictions could be shown to be an abuse of process, they were not *prima facie* vexatious. In reaching that conclusion, Richards J.A. affirmed that the presumption of vexation does operate in circumstances of intra-jurisdictional multiplicity.
- [139] I agree that a presumption of vexation exists and operates in favour of the defendant in circumstances of intra-jurisdictional multiplicity. That both intra-jurisdictional actions aspire to become class actions does not prevent the presumption's operation.
- [140] If Google can establish intra-jurisdictional multiplicity here, vexation and abuse are presumed. Google does not need to demonstrate prejudice by evidence in order to succeed. It can rely on the presumption and the presumption will prevail unless it is displaced by evidence to the contrary.

- [141] As there is no presumption in the multi-jurisdictional class action context, the court must be satisfied on the evidence that the multiple filings constitute an abuse of process. Where the multiple cases are filed by the same plaintiff and same counsel, that may be evidence that the multiple claims are vexatious. If there was no legitimate purpose for filing multiple claims, the absence of legitimate purpose may lead the court to conclude that the multiple claims are vexatious.
- [142] Contrary to Kett Counsel's submission, the absence of these particular aggravating factors is not ameliorating here. Putting that in terms of the presumption, evidence establishing the absence of these aggravating factors is not evidence rebutting the presumption that applies in intra-jurisdictional multiplicity.
- [143] The next question, then, is whether intra-jurisdictional multiplicity is established here. Location Data is a subset of Sibble Data. Kett class members are also Sibble class members. Google is a defendant in both actions. Both actions were filed in BC (and on behalf of BC residents). The only element in dispute here is whether Kett and Sibble are actions on the same dispute or subject matter.

#### **D. Same Dispute or Subject Matter**

- [144] Kett and Sibble Counsel assert the two actions are distinct "claims". Sibble does not define claim. Kett Counsel adopt the Danyluk definition of cause of action (see para. 86 above).
- [145] The Danyluk definition corresponds to that approved in *Cahoon v. Franks*, [1967] S.C.R. 455. There, the Court endorsed the following definition set out below (at 458-459):
- The cause of action or, to use the expression of Diplock, L.J., "the factual situation" which entitles the plaintiff here to recover damages from the defendant is the tort of negligence, a breach by the defendant of the duty which he owed to the plaintiff at common law which resulted in damage to the plaintiff. The injury to the person and the injury to the goods, and perhaps the injury to the plaintiff's real property and the injury to such modern rights as the right to privacy flowing from negligence serve only as yardsticks useful in measuring the damages which the breach caused.
- [146] *Cahoon* was applied in the context of intra-jurisdictional multiplicity in *Urban Landmarks* (at paras. 36, 47). I agree that this is the correct framework for assessing "same dispute or subject matter" for purposes of assessment.
- [147] The issue of same dispute or subject matter is more often the focus of close consideration in the *res judicata* context. The following decisions provide illustrations: *Williams v. Hunt*, 1905 1 K.B. 512, 74 L.J.K.B. 364; and *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286, [1996] O.J. No. 3210 (Gen. Div.) at 297 O.R., *aff'd* (1997), 32 O.R. (3d) 651, [1997] O.J. No. 1033 (C.A.) [Las Vegas].

[148] In Williams, the first action filed deliberately sought less than it might have, and a second action was then filed for the relief omitted. The plaintiff preferred two actions. The Court held the plaintiff had no right to that preference (at 514-515):

Where two separate remedies are possible, and a start is made by putting in force one of those remedies by a writ which would entitle the plaintiff to the relief he subsequently desires, he cannot by deliberately leaving that out of his claim reserve his right to ask for it in another proceeding. Where proceedings have been started, it is an abuse of the process of the Court to divide the remedy where: there is a complete remedy in the Court in which the suit was first started. In this case personal payment was not asked for in the writ in the Chancery action, and that appears to have been done because the plaintiff desired to put in operation the remedy under Order XIV. and have recourse to two separate proceedings, in the first of which she might have got all the relief to which she is entitled.

[Emphasis added]

[149] In Las Vegas, a second action was filed on a much narrower set of facts than the first. The plaintiff contended the second claim presented a different factual situation and thus a distinct cause of action. Justice Sharpe (as he then was) disagreed (at 297):

In my view, the present application cannot be said to be based upon a different set of facts for the purposes of res judicata. Las Vegas has, in effect, subtracted certain facts from the earlier claim, those concerning the prior use of the premises, but the issue remains whether its operation is illegal under the by-law. In *Grandview (Town) v. Doering*, 1975 CanLII 16 (SCC), [1976] 2 S.C.R. 621, 61 D.L.R. (3d) 455, the Supreme Court of Canada held that a party cannot claim to assert a new and distinct cause of action by manipulation of the factual elements if what remains is essentially the same claim. In that case, the plaintiff sought to add certain facts

The situation can surely not be improved from the plaintiffs' perspective where it is sought to subtract rather than add facts. All of the facts upon which Las Vegas's present contention rests were available in its earlier action and precisely the same relief is sought, namely, a declaration that the by-law does not in law prevent Las Vegas from carrying on its operation. In my view, this means that for the purposes of the doctrine of res judicata, as defined by the dictum of Wigram V.C. in *Henderson*, supra, Las Vegas cannot claim to be advancing a separate and distinct cause of action.

[Emphasis added.]

## E. Same or Distinct Cause of Action

[150] This assessment requires a careful review of the respective claims. A brief review of the Kett claim and relevant portions of the Sibble claim may assist.

- [151] Kett alleges that people using Google services on smartphones have had their Location Data collected without consent. Location Data includes GPS coordinates, longitude and latitude, map location, geographical location, nearby Wi-Fi networks, IP addresses, or other markers of physical orientation.
- [152] Kett alleges that Google represented to users that they could turn the Location History function off, but then collected Location Data anyway by collecting it under a different function not apparent to the user.
- [153] Sibble asserts that Google collects, without consent, personal information data from Google services users, including users' IP addresses, physical address and location. The Sibble claim alleges:
12. Google collects Personal Information, without consent, from the Class Members who do not have an Account but use certain Google Services, including Google Search and Google Maps. The Personal Information collected includes a wide range of Personal Information from a wide range of sources, including, but not limited to, search terms entered in Google Search or Chrome and omnipresent tracking of location in Android and Google Maps.

[Emphasis added.]

- [154] Sibble alleges that Google misrepresents to users that they can control and limit Google's collection of personal information by adjusting their Google settings, but then collects their information anyway:
20. In response to increasing public concern about online privacy, Google took steps to reassure users that they had control over Google's collection, retention, and use of their Personal Information. However, those measures are uniformly and objectively misleading, and materially misrepresented the nature of Google's collection of Personal Information and the choices available to Class Members using Google Services.
  21. Since at least 2008, Google has represented to Class Members that they can choose to control Google's access to and use of their Personal Information.
  24. On or about December 11, 2008, Google introduced Incognito as a method of using the internet "privately" in Chrome. Despite the representations made when a user enters Incognito mode and throughout the Support Pages, Google still collects Class Members' Personal Information when they visit a Third-Party Website that uses Google Ads or Google Analytics.
  25. In or about November 2012, Google introduced a Do Not Track feature in Chrome. Do Not Track is an internet standard that allows visitors to a website to indicate they do not want their activity online to be monitored or recorded. However, Google did not implement Do Not Track in its advertising products. As a result, Class Members who turned on Do Not Track in Chrome are still tracked by Google Ads and Google Analytics when visiting Third-Party Websites, and when visiting Google websites or using Google Services.

26. Google's representations give users the impression that the user, not Google, is in control of Google's collection, retention, and use of the user's Personal Information. However, as further illustrated below, the choices and settings available to Class Members give no such control and have no effect on Google's collection, retention, and use of their Personal Information, including the monetization of their Personal Information.
28. Google consistently, uniformly, and materially misrepresents its practices regarding the collection, retention, and use of Class Members' Personal Information while using Google Services. Further, Google materially misrepresents the effect or efficacy of features and settings available to the Class Members which Google represented as preventing or limiting the collection, retention, and use of Personal Information. These objectively material misrepresentations were to the prejudice of the Class Members.

[Emphasis added.]

- [155] Both actions allege that Google aggregates Location Data with other Sibble Data in order to monetize it in use for targeted advertising.
- [156] Kett and Sibble traverse the same factual ground, allege the same wrongdoing and claim for the same loss. The only point of difference is that the Location History misrepresentation alleged in Kett is not among the alleged misrepresentations (presently) particularized in support of Sibble's more general assertion of misleading misrepresentations made in the collection of Sibble Data.
- [157] Multiple causes of action do not materialize when a party omits (by choice or not) to make all possible factual allegations in support of their claim as filed. More accurately here, they do not materialize when a party omits (by choice or not) to particularize any given misrepresentation in support of an umbrella allegation of misrepresentation supported by other particulars.
- [158] Put another way, two sets of counsel cannot - by happenstance or by agreement and design - divvy up a single cause of action amongst themselves by parcelling out facts from the same "factual situation" into separate notices of civil claim to the detriment of the defendant. The facts that make up the factual situation, if they are to be alleged at all, properly belong in a single notice of civil claim.
- [159] Kett and Sibble are actions about the same dispute and subject matter. They are but variations on a single cause of action. The presumption of vexation and abuse is engaged here.
- [160] The remaining issue then is whether there is evidence displacing that presumption. There is not. It has not been established - nor even asserted - that two actions are warranted for a policy reason that should be accepted by the Court.

[161] I pause to address Kett Counsel's argument that Kett, having been properly filed, cannot "become" an abuse of process because Sibble was subsequently filed. Reliance is placed on DALI 675 Pension Fund v. SNC Lavalin, 2019 ONSC 6512 at paras. 41-42 [DALI], and Kirsh v. Bristol-Myers Squibb, 2020 ONSC 1499 at paras. 136-137. In both DALI and Kirsh, a narrow claim was filed first in Quebec, a broader claim then filed in Ontario, and the Quebec claim then amended to mirror the Ontario one. Suffice to say that neither decision is authority for the proposition that an action properly filed cannot be implicated in an abuse of process by the filing of a subsequent claim in the same jurisdiction.

[162] I find that Google has established an abuse of process.

## F. Timing

[163] Kett and Sibble argue the stay application should be deferred and determined at the time of the first certification hearing. Google contends that the stay application was scheduled by consent and that Kett and Sibble cannot now assert that it is premature.

[164] The stay application was scheduled by adding an agreed upon third day to the two already set for the carriage motion. There was no sequencing application, and thus no sequencing decision. It is open to Kett and Sibble to submit, as they do, that the stay application should be deferred.

[165] Sibble Counsel submit that any overlap is hypothetical until one action has been certified, and that CPA s. 4(2) requires overlap to be assessed at certification. Kett Counsel concur, citing: Fantov at paras. 53-73; Gomel v. Ticketmaster Canada LLP, 2019 BCSC 2178 at paras. 62-63; and Forster v. Monsanto Company, 2020 BCSC 1376 at paras. 85-90.

[166] The CPA includes these provisions:

### Plaintiff's class proceeding

2 (1) A resident of British Columbia who is a member of a class of persons may commence a proceeding in the court on behalf of the members of that class.

(2) The member who commences a proceeding under subsection (1) must

(a) make an application to the court for an order

(i) certifying the proceeding as a class proceeding, and

(ii) subject to subsection (4), appointing the member as the representative plaintiff for the class proceeding, and

(b) give notice of the application for certification to

(i) the representative plaintiff for any multi-jurisdictional class proceeding, and

(ii) the representative plaintiff for any proposed multi-jurisdictional class proceeding

that has been commenced elsewhere in Canada and that involves the same or similar subject matter.

### **Plaintiff in other proceeding may appear**

3.1 A person who receives notice of an application for certification under section 2(2)(b) may make submissions at the certification hearing.

### **Class certification**

4 (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
  - (b) there is an identifiable class of 2 or more persons;
  - (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
  - (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
  - (e) there is a representative plaintiff who .
- (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
  - (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
  - (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
  - (d) whether other means of resolving the claims are less practical or less efficient;
  - (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.
- (3) If a multi-jurisdictional class proceeding or a proposed multi-jurisdictional class proceeding has been commenced elsewhere in Canada and involves the same or similar subject matter to that of the proceeding being considered for certification, the court must determine whether it would be preferable for some or all of the claims of the proposed class members, or some or all of the common issues raised by those claims, to be resolved in the proceeding commenced elsewhere.

- (4) When making a determination under subsection (3), the court must
- (a) be guided by the following objectives:
- (i) to ensure that the interests of all parties in each of the relevant jurisdictions are given due consideration;
  - (ii) to ensure that the ends of justice are served;
  - (iii) to avoid irreconcilable judgments, if possible;
  - (iv) to promote judicial economy, and
- (b) consider relevant factors, including the following:
- (i) the alleged basis of liability, including the applicable laws;
  - (ii) the stage that each of the proceedings has reached;
  - (iii) the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the proposed class;
  - (iv) the location of class members and representative plaintiffs in each of the proceedings, including the ability of representative plaintiffs to participate in the proceedings and to represent the interests of class members;
  - (v) the location of evidence and witnesses.

[167] These provisions were considered in *Fantov*. In *Fantov*, class counsel for a multi-jurisdictional Ontario action that included BC residents applied to this Court (by filing a parallel BC action solely to obtain standing) to stay a BC class action for BC residents on the same subject matter. Some defendants in the actions also sought a stay in favour of the Ontario proceeding.

[168] The Court of Appeal found both stay applications were - to the extent they rested on grounds other than abuse of process - premature and ought to be addressed at certification. Writing for the Court, Justice Goepel said:

[64] The timing of a stay application under the amended legislation was directly raised in *Brooks v. Canada (Attorney General)*, 2009 SKQB 54 [Brooks]. In *Brooks*, the Merchant Law Group had commenced class actions in several jurisdictions. The defendants sought to stay the Saskatchewan proceedings. After reviewing the amendments to the Saskatchewan legislation, which amendments mirror those found in the CPAA, Mr. Justice Zarzeczny concluded that the issues raised in support of stay should be addressed at the certification hearing.

[65] In *DALI 675 Pension Fund v. SNC Lavalin*, 2019 ONSC 6512 [DALI], an Ontario case not governed by the new amendments, Justice Belobaba reached a similar conclusion holding at para. 8:

where parallel proceedings are not an abuse of process but nonetheless raise questions of preferability, these questions are best addressed at certification under the preferability criterion.

[66] I agree with and adopt the reasons of Justice Zarzeczny. They are consistent with the language of the amendments and the reasons behind them. Of particular import are ss. 2(b) and 3.1 of the CPA, which require notice of the application for certification to be served on the representative plaintiff of existing or proposed multi-jurisdictional class proceedings. The party who receives notice is given the opportunity to make submissions at the certification hearing. Further, the legislation sets out in detail that when multi-jurisdictional class proceedings have been commenced elsewhere in Canada, the court at the certification hearing must determine whether it would be preferable for some or all of those claims to be resolved in the other proceedings. The legislation sets out the criteria that must be taken into account in reaching those decisions. The court must decide whether to certify the local action or alternatively stay the local action and send it elsewhere. Such a determination cannot be made in an evidentiary vacuum. The evidentiary foundation to decide the issues comes from the materials filed by the parties seeking certification and those who may oppose it.

[70] In *Brooks*, Justice Zarzeczny acknowledged that there may arise circumstances where it is appropriate to decide an application to stay a multi-jurisdictional class action for abuse of the court's process in advance of certification. I agree with that proposition. ...

[169] The concerns identified in para. 66 of *Fantov* do not apply here. Kett and Sibble are parties to the stay application. As it is not an issue of preferability at all, it is not a premature consideration of preferability. The relevant parts of the *Fantov* decision for present purposes are paras. 65 and 70. The issue here is the abuse of process in the form of intra-jurisdictional multiplicity.

[170] Intra-jurisdictional multiplicity is assessed by considering the pleadings and the factual situation comprising the cause (or causes) of action. If the actions are found to be on the same cause of action following assessment, the overlap is in no sense hypothetical.

[171] Further, while I found them of no particular assistance in assessing the issue of same dispute or subject matter, the Kett notice of application for certification was before me on this application, as were significant parts of the certification materials. (If Kett Counsel thought the remaining supporting materials should be considered, they could have filed them by response affidavit.)

[172] I am not obliged to determine the stay now simply because the application was brought now. If there were reasons to find it more appropriately considered at certification, that could be done. But I am satisfied that it is fair and appropriate to decide the stay now. In

reaching that conclusion, I note that carriage motions are the traditional mechanism used to determine which of several proposed class actions in the same jurisdiction on the same subject matter should proceed, and carriage motions are usually determined before certification: *Fantov* at para. 48.

[173] The law and policy supporting determination of carriage motions pre-certification was canvassed at some length by Justice Allen in *Nelson v. Merck*, 2006 BCSC 1549:

[13] I am not aware of any case in B.C. where the Court has directed that certification proceed before a carriage motion is heard.

[14] In *Richard v. British Columbia*, 2003 BCSC 976, Madam Justice Morrison considered motions by counsel in two separate potential class proceedings on the issues of carriage, which action should proceed, who should be lead counsel and which action should be stayed. Those motions were heard prior to certification of either action. The Court noted that it was given a wide discretion in a carriage motion by the Law and Equity Act, R.S.B.C. 1996, c. 253 and the CPA.

[15] Section 10 of the Law and Equity Act mandates the avoidance of the multiplicity of proceedings:

10. In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

[24] In *MacKinnon v. National Money Mart Co.*, 2004 BCCA 472, the Court upheld the chambers judge who had dismissed applications by the defendants under Rule 19(24) [now Rule 9-5(1)] in putative class proceedings. Saunders, J.A. referred to *Edmonds* but added that, on a pre-certification application, there must be some recognition that the action had the "ambition" to be a class action:

It is true that in one sense the action, before certification, is an ordinary action. And s. 40 of the Class Proceedings Act expressly provides that the Rules of Court apply. It does so, however, with the caveat "to the extent those rules are not in conflict with this Act". I think it is also clear that an action commenced under the Class Proceedings Act is, even before the certification application, more than just "any old action": it is an action with ambition. That ambition, by Rule 4(4.1), must be reflected on the face of the pleadings. The question is whether that ambition stated on the face of the pleadings affects the application of Rule 19(24)(a) to the question before this Court.

(para. 33)

[25] Saunders J.A. observed that there was "no doubt" that Rule 19(24)(a) could be invoked prior to a certification hearing.

[26] A pre-certification Rule 18A summary trial was held in *Consumers' Assn. of Canada v. Coca-Cola Bottling Co.*, 2006 BCSC 863. Madam Justice Russell noted that as certification has become the "battleground", interlocutory applications potentially streamline an increasingly cumbersome process.

[29] I conclude that, in British Columbia, the CPA does not confer jurisdiction to order that a carriage motion be heard before certification. However, I find that such jurisdiction is clearly grounded in the Law and Equity Act and the inherent jurisdiction of this court to control its process and manage litigation.

Should the Court hear the proposed carriage motion?

[30] The objective set out in Rule 1(5), namely, "to secure the just, speedy and inexpensive determination of every proceeding on its merits," is clearly applicable to class proceedings. Such a goal can only be met by determining the carriage issues prior to certification. The real issue is which counsel should have carriage of the class proceedings in the circumstances, having regard to the policy objectives of class proceedings: judicial economy by avoiding multiplicity of individual suits; access to justice by making the prosecution of claims economical; and behavioural modification by calling actual and potential wrongdoers to account.

[31] In my opinion, it is clearly logical as well as fair and expeditious to hear the carriage motion in this case before any certification hearing.

[174] Reid and Kett stand in the same shoes in terms of overlap with Sibble. In the normal course, this would have been a single carriage motion involving all three actions. The appropriate time to address multiple cases on the same cause of action in the same jurisdiction should not hinge on Sibble Counsel's strategic decisions. The policy concerns here are those canvassed in Nelson.

#### G. Remedy

[175] Google's stay application is allowed.

[176] Google has left it to the Court to determine which action should be stayed and which should proceed. Google's neutral stance is appropriate in the circumstances.

[177] Sibble and Kett Counsel have done likewise, with neither making submissions beyond the assertion that both should proceed. That is not appropriate. While this posture may foster goodwill across the class action bar, it is contrary to counsel's duty to assist the Court.

[178] In the circumstances, it is appropriate to have recourse to the carriage motion framework. I am satisfied I can do that without further evidence.

[179] I am prepared to assume that fee agreements, quality of proposed counsel and selection of defendants are neutral factors as between Kett and Sibble.

- [180] Kett Counsel have delivered certification materials. Like Reid Counsel, they did so without a certification schedule. Although delivered earlier on than in Reid, they were delivered after Google raised overlap as an issue and urged joint case management so there could be a process to address it. I consider the Kett certification materials similarly filed in the run-up to the present applications.
- [181] I accept that the lack of progress in Kett before the filing of Sibble was, at least in significant part, due to issues with Mr. Warner. Still, those issues arose out of Kett Counsel's decision to file with Mr. Warner as a representative plaintiff.
- [182] The most notable difference in terms of the conventional carriage factors in Kett versus Sibble (as compared to Reid versus Sibble) is Kett's 2018 filing date.
- [183] While I consider the 2018 commencement date a significant factor favoring Kett, the ultimate outcome in Kett versus Sibble follows that in Reid versus Sibble. I adopt my reasons given under the carriage motion as being of parallel application here.
- [184] The Kett Action will be stayed.

## V. Disposition

[185] In the result:

- a) The carriage motion is allowed. Sibble Counsel shall have carriage of the claims in the Reid Action. The Reid Action will be temporarily stayed pending a final determination on certification in Sibble.
- b) The stay application is allowed. The Kett Action will be temporarily stayed pending a final determination on certification in Sibble.
- c) No further proposed class proceedings in respect of the subject matter of the Sibble Action shall be filed in the province of British Columbia without leave of this Court, pending a final determination on certification in Sibble.
- d) Following final determination on certification in Sibble, no steps are to be taken under the Reid or Kett Actions prior to a joint case management conference being held in both actions.

"Tucker, J."

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