

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sibble v. Google LLC*,  
2024 BCSC 1716

Date: 20240916  
Docket: S208705  
Registry: Vancouver

Between:

**Harondel J. Sibble**

Plaintiff

And

**Google LLC, Google Canada Corporation and Alphabet Inc.**

Defendants

Before: The Honourable Justice Tucker

## Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.  
June 24 and 25, 2024

Place and Date of Judgment:

Vancouver, B.C.  
September 16, 2024

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**I. INTRODUCTION**

[1] This decision addresses two applications arising out of a class action proceeding against Google LLC, Google Canada Corporation and Alphabet Inc. (collectively, the “Defendants” or “Google”).

[2] The Defendants’ first application (the “Filing Application”), seeks an order for deferring the time for filing the Defendants’ response to civil claim (the “Pleading Response”) until delivery of the Defendants’ response to the certification application (the “Certification Response”).

[3] The Defendants’ second application (the “Production Application”) seeks an order that the plaintiff, Mr. Sibble (or the “Plaintiff”), produce:

- a) the takeout archive downloaded by the Plaintiff on April 5, 2023 (the “Sibble Takeout Archive”); and
  - b) the takeout archive downloaded by the plaintiff’s legal counsel, Greg McMullen, on February 20, 2024 (the “McMullen Takeout”)
- (collectively, the “Takeout Archives”).

[4] The Plaintiff opposes all orders sought.

**II. PROCEDURAL HISTORY**

[5] This putative class action proceeding was filed on August 17, 2020.

[6] On July 9, 2021, the Plaintiff filed an amended notice of civil claim.

[7] On February 1, 2022, in a decision indexed as *Reid v. Google LLC, 2022 BCSC 158*, counsel for the Plaintiff were granted carriage of claims and a competing notice of civil claim was stayed (the “Carriage Decision”).

[8] On November 21, 2022, the Court of Appeal heard an appeal of the Carriage Decision.

[9] On May 31, 2023, counsel for the Plaintiff wrote the Court advising that they would deliver their certification notice of application and materials (“Certification Application”) shortly after the issuance of the appeal decision.

[10] On September 8, 2023, the Court of Appeal affirmed the Carriage Decision: *Kett v. Google LLC*, 2023 BCCA 350.

[11] On September 29, 2023, counsel for the Plaintiff wrote to counsel for the Defendants saying they expected to be able to deliver their Certification Application by November 17, 2023.

[12] On October 20, 2023, counsel for the Plaintiff advised counsel for the Defendants that they expected to deliver their Certification Application by November 27, 2023. In this letter, counsel for the Plaintiff requested the Defendants file a Pleadings Response.

[13] On October 26, 2023, counsel for the Plaintiff advised counsel for the Defendants that they would be providing a further amended notice of civil claim and would do so by November 27, 2023.

[14] On November 9, 2023, counsel for the Defendants wrote back saying that requiring the Defendants to file a Response Pleading in advance of their receipt of the Certification Application was neither fair nor efficient in the circumstances.

[15] On November 27, 2023, counsel for the Plaintiff provided his second amended notice of civil claim (the “ANOCC”) to the Defendants. The amendments were significant.

[16] The ANOCC claims trespass, conversion, invasion of privacy, intrusion upon seclusion, breach of the *Competition Act*, breach of consumer protection laws, and unjust enrichment. The “Class” includes all residents of Canada (except those in the Quebec Class) who used a Google Service (defined broadly to include Android, Chrome, Google Search, Google Maps, and Gmail) or visited a Third-party Website for personal purposes from November 1, 2008 to the date of the judgment.

[17] On December 19, 2023, the parties attended a judicial management conference. Counsel for the Plaintiff sought: (1) leave to file a “fresh as amended” version of the ANOCC, (2) an order that Google file a Pleading Response by January 12, 2024, and (3) a certification schedule be set.

[18] Counsel for the Plaintiff argued that the Defendants should be directed to file a Pleadings Response because it was overdue under Rule 3-3 of the *Supreme Court Civil Rules* (the “Rules”). Counsel for the Plaintiff advised that they intended to deliver their Certification Application on January 12, 2024. I declined to direct the Defendants to file a Pleading Response within 21 days. I did direct the Defendants to advise, within 21 days of receipt of the certification materials, whether they intended to make an application to defer the filing of the Pleading Response.

[19] On January 12, 2024, counsel for the Plaintiff attempted to deliver their Certification Application by email, but failed for technical reasons. On January 18, 2024, counsel for the Plaintiff successfully delivered their Certification Application to the Defendants. The Certification Application comprised a notice of application and five supporting affidavits, including affidavits from Mr. Sibble and Mr. McMullen.

[20] On February 6, 2024, counsel for the Defendants wrote counsel for the Plaintiff. The letter included a demand for production of the Sibble Takeout Archive. On that same date, counsel for the Defendants also proposed to provide the Pleading Response at the same time as the Certification Response.

[21] On February 7, 2024, counsel for the Plaintiff requested the proposed date for the Defendants’ delivery of the Certification Response. The same day, counsel for the Defendants responded advising that they could not provide a proposed date until they completed a review of the Certification Application, but hoped to be in a position to provide a date. Counsel for the Plaintiff responded that without a date for delivery of the Certification Response, they could not agree to the Defendants’ proposal to provide the Pleading Response at the same time.

[22] On February 8, 2024, the Defendants filed the Filing Application.

[23] On February 23, 2023, counsel for the Plaintiff wrote to counsel for the Defendants refusing to produce the Sibble Takeout Archive.

[24] On March 21, 2024, counsel for the Defendants wrote to counsel for the Plaintiff, again seeking production of both the Sibble Takeout Archive and the McMullen Takeout Archive. Counsel for the Plaintiff replied refusing the disclosure sought.

[25] On April 23, 2024, a case plan order was made (the “Case Plan Order”). Terms 1-6 of the Case Plan Order were set by the Court, while Terms 7-13 were by consent of the parties. The Case Plan Order includes the following terms:

- 5. The Defendants will deliver their responding materials to the certification application on or before October 4, 2024; and
- 6. The certification application will be scheduled for eight (8) days commencing June 2, 2025.
- 7. The plaintiff will deliver his reply, if any, to the Defendants’ Response to Civil Claim within 21 days of delivery of the Response to Civil Claim;
- ...
- 9. The plaintiff will deliver any reply materials to certification on or before December 4, 2024;
- ...

[26] The Takeout Application was filed on May 17, 2024.

**III. THE FILING APPLICATION**

**A. Legal Principles**

[27] Rule 3-3 (3) of the Rules requires a person served with a notice of civil claim anywhere in Canada to file a response to civil claim within 21 days after that service. Where an amended notice of civil claim is filed and served, then Rules 6-1(5), (6) and (7) come into play, governing further responsive amendments:

**Response of a party to amended document**

- (5) If a pleading (in this subrule and in subrule (6) called the "primary pleading") is amended under this rule and the amended pleading is served on a party of record under subrule (4) (a), that party

(a) may amend, under this rule, any pleading he or she had filed in response to the original version of the primary pleading but only with respect to any matter raised by the amendments to the primary pleading, and

(b) in that event, must, within 14 days after being served with the amended pleading, serve a copy of the filed amended responding pleading on all parties of record.

#### **Failure to serve amended responding document**

(6) If a party on whom an amended pleading is served under subrule (4) (a) does not serve an amended responding pleading as provided in subrule (5),

(a) the pleading he or she filed in response to the original version of the primary pleading is deemed to be the pleading he or she filed in response to the amended pleading, and

(b) any new facts set out in the amended pleading are deemed to be outside the knowledge of the defendant.

#### **Responding to amended pleading**

(7) If an originating pleading is amended under this rule and served under subrule (4) (b) on a person who is not yet a party of record, the person has the same period for filing a responding pleading to that amended originating pleading as the party had to file a responding pleading to the original version of the originating pleading.

[28] As the Defendants had not filed a response to civil claim to any of the earlier versions of the civil claim and thus were not yet parties of record (Rule 1-1(1) of the Rules), the Rules gave them 21 days to file a responding pleading following service of the ANOCC.

[29] It is well-established that this Court has discretion to direct the timing for the filing of a response to civil claim in a putative class action proceeding: *Maclean v. Telus Corp.*, 2005 BCCA 338 at para. 10.

[30] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2015 BCSC 74 [Pro-Sys], Justice Myers weighed in on the practice that had developed up to the date of his decision. At paras. 31-34, he stated:

[31] I will conclude with a comment regarding the practice of deferring the filing of a statement of defence until after the action has been certified. This case is an illustration of the difficulties that can create. It is a practice that ought to be revisited. I am not the first judge to make that comment: in *Pennyfeather v. Timminco Ltd.*, 2011 ONSC 4257 and *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2012 ONSC 1924, Mr. Justice Perell made the same observation.

[32] There is nothing in the *Class Proceedings Act* mandating the delay, nor is there anything in the *Supreme Court Civil Rules*. The courts have come to allow the deferral as a matter of course, often simply based on an agreed schedule between the parties who adopt the ingrained practice. Given the financial stakes of class actions and the consequences of a certification ruling, it cannot be justified on the basis of potential cost savings. As Perell J. noted, defence counsel will have to investigate the case and ascertain the facts in order to argue certification. The actual drafting of a defence after that work has been done is a minimal incremental effort and expense in the larger picture.

[33] It is hard to see what legitimate purpose is served by deferring the statement of defence when it, and the plaintiff's reply, if any, crystallise the issues, something that the certification process is supposed to accomplish.  
...

[34] I do not say that deferring the statement of defence should never be allowed; rather, that there ought to be good reason to do so.

[31] A new practice developed following the *Pro-Sys* decision. This practice was reviewed in the comments of Justice Griffin (then of this Court), in *Shaver v. British Columbia*, 2017 BCSC 108:

[82] Hindsight has shown us that delaying the filing of a defence is not always ideal, as the filing of a defence can reveal common issues that are relevant to the certification application and closes the pleadings in a timely way, focusing the issues before the certification decision is subject to appeals and associated delay, as was noted by Myers J. in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2015 BCSC 74 at para. 32.

[83] The plaintiff is entitled to know the case it has to meet. The plaintiff's claim and certification application will likely be better informed, including incorporation of amendments, once the plaintiff knows the Province's Response.

[84] Further the Court will be better informed as to the true issues between the parties, once a Response is filed. This is especially so in *Charter* litigation which makes relevant contextual factors: see *Murray v. Alberta (Minister of Health)*, 2007 ABQB 231.

[85] I am of the view that the certification application will be much better informed if the Province files its Response, and there is no good reason not to require it to do so. Given the Province's application to strike the claim, the Province must already be quite familiar with the issues it needs to understand in order to plead. I therefore decline to exercise my jurisdiction to grant the Province an order postponing the filing of a Response.

[32] In *Shaver v. Mallinckrodt Canada ULC*, 2021 BCSC 404 [*Shaver*], Justice Matthews confirmed the evolution noted by Justice Griffin. In *Shaver*, Ms. Shaver filed a formal notice of application seeking an order that the defendants file their



responses to civil claim within 21 days of the order. Justice Matthews commented on the means by which plaintiffs generally raise disputes regarding outstanding responses to civil claim in class actions matters:

[21] A plaintiff who has not received a response to a notice of civil claim or an amended notice of civil claim within the time set out in the Rules may seek default judgment. There is no provision in the Rules requiring, or even providing, for a plaintiff to make an application to compel a response to a notice of civil claim or an amended notice of civil claim. In practice, it is rare for a plaintiff in a proposed class action to seek default on the basis that the defendant has not filed a response. In some cases, the parties proceed to certification as though the defendant is a party of record. In other cases, the issue is raised at a case planning conference and addressed by consent. In other cases, it becomes the subject of an application, either by the defendant for permission to defer the filing of the response or by the plaintiff to compel a response.

[33] Here, the Plaintiff raised the fact that the Response Pleading was outstanding as an issue at the judicial management conference. I therefore directed the Defendants to file a notice of application, as it is the Defendants who seek relief from the default put in place by the Rules.

[34] While the order sought in *Shaver* requested the filing within 21 days, what was sought in practical terms was an order requiring the defendants to file a response pleading early enough to enable Ms. Shaver to have it in hand while preparing her certification materials. Thus, Justice Matthews framed the inquiry as follows:

[35] I conclude that the question is whether, on the specifics of the case, there is a "good reason" (as described by Mr. Justice Myers in *Pro-Sys*), to permit the response to the notice of civil claim to be filed at a date other than the time at which it is due under the *Supreme Court Civil Rules*. If there is a good reason, it must be weighed against the advantage of having a complete set of pleadings underlying the certification materials, as described by Griffin J. in *Shaver*, and as I have also described.

[36] British Columbia and the College of Pharmacists rely on *Poundmaker Cree Nation v. Canada*, 2017 FC 447, in which Madam Justice Strickland reviewed jurisprudence across Canada in deciding what the proper approach on this issue should be under the Federal Court Rules of class proceedings, and set out the following factors:

- a) whether the statement of defence would serve any useful purpose prior to certification because it will be essential to a determination of

the issues to be addressed at the certification motion or likely to be of assistance to the Court;

- b) whether requiring responses to be filed prior to certification will advance the just efficient and least costly resolution of the litigation;
- c) whether the nature of the proceedings and the rights asserted are relevant contextual factors;
- d) the complexity of the matter;
- e) the amount of time and effort involved to prepare the statement of defence;
- f) whether the statement of defence may have to be entirely reformulated, depending on the outcome of the certification hearing; and
- g) whether there is any obvious prejudice to the plaintiff.

[37] These factors may be applied in accordance with the decision of Myers J. in *Pro-Sys*, and Griffin J. in *Shaver* to answer the questions of whether there is a "good reason" to not require responses to be filed before certification materials being delivered and whether that good reason outweighs the benefits of having a complete set of pleadings to inform the certification, the identification of certification issues, and the analysis of certification issues. In that regard, I would not apply factor (a) in the manner described by Strickland J. in *Poundmaker*. It is not a question of whether the response to civil claim is "essential" to a determination of the issues to be addressed at a certification motion. It is enough that it be useful to determine the issues to be addressed at the certification motion. The presumption is that it will be useful. The burden is on the defendant to establish that the circumstances are such that the responses ought not to be required when they are due: *Poundmaker* at para. 21.

[35] Justice Matthews refers to the factors listed in *Poundmaker Cree Nation v. Canada*, 2017 FC 447 (the "*Poundmaker* factors"), and endorses them with the exception of the change from "essential" to "useful" in the first factor. Notably, the *Poundmaker* factors arose in the context of an application to defer filing until after a decision on certification had been rendered. That context is reflected in the wording of the *Poundmaker* factors (e.g., factor (f) which refers to the outcome of the certification decision). While Justice Matthews set out the *Poundmaker* factors as originally articulated in para. 36 of the *Shaver* decision, her analysis adjusts the *Poundmaker* factors to a context in which the response pleading is requested prior to the delivery of certification materials.

[36] Ms. Shaver argued that a filed response pleading would benefit her in preparing her certification materials in several respects: (1) allowing her to determine how and whether to address the anticipated limitation period defence as part of her certification materials (*Shaver*, at para. 47); (2) enable her to see how and whether a potential statutory immunity defence would be plead and to consider its potential impact on her certification materials (*Shaver*, at para. 48); and (3) enable her to know, when preparing her certification materials, whether certain material facts central to her case were contested (*Shaver*, at paras. 50-52). Justice Matthews agreed that closed pleadings would assist Ms. Shaver in properly structuring her certification application in these respects (*Shaver*, at para. 58).

[37] Due to the benefit that closed pleadings would bring to Ms. Shaver in crafting her certification materials, Justice Matthews found that the defendants had failed to establish that the deferral they sought would not prejudice Ms. Shaver (*Shaver*, at paras. 66-68). The detriment that Ms. Shaver would suffer from delaying the filing of response pleading until after the delivery of her certification materials was given significant weight in the final weighing:

**Weighing the reasons to defer responses against the benefits of a complete set of pleadings to inform the certification materials and analyses**

[69] The only reason advanced by British Columbia and the College of Pharmacists that is a reasoned rationale for deferring the requirement to file responses is the potential for a pre-certification application to strike. When the hypothetical benefit of delaying responses is weighed against the detriment of delaying responses, as described by Myers J. in *Pro-Sys* and Griffin J. in the previous *Shaver* class proceeding, and in the circumstances of this case, given the issues that require crystallization, there is insufficient potential benefit to be gained to permit the delay in filing responses in this case based on the application to strike.

[38] The Plaintiff notes that in the final weighing, Justice Matthews did not give any weight to the defendants' argument that a delayed filing would avoid wasting resources (*Shaver*, at para. 5), which they say is comparable to the Defendants' arguments here.

## B. Analysis

[39] Given that the Certification Application is already filed and that the Defendants seek a deferral of their delivery of the Certification Materials to October 4, 2024, in anticipation of a certification hearing set to commence on June 2, 2025, I would restate the *Poundmaker* factors for application in this context as follows:

- a) whether having the response pleading prior to the Certification Response would be of any use to the Plaintiff or is likely to be of any assistance to the Court;
- b) whether requiring a response pleading to be filed prior to the Certification Response will advance the just efficient and least costly resolution of the litigation;
- c) whether the nature of the proceedings and the rights asserted are relevant contextual factors;
- d) the complexity of the matter;
- e) the amount of time and effort involved to prepare the response pleading;
- f) whether the response pleading is likely to be reformulated during the process of preparing the Certification Response; and
- g) whether there is any obvious prejudice to the Plaintiff.

[40] In my view, there is no particular usefulness to the Plaintiff in having the Response Pleading prior to the Certification Response. Obviously, it would enable the Plaintiff to begin giving further consideration to their reply pleadings, but under the Case Plan Order, any reply pleading is due within 21 days of receipt of the Response Pleading. It is just a question of when the 21 day period is triggered, not an issue of obtaining additional time should the Response Pleading be filed sooner rather than as proposed.

[41] The deferral will allow the Defendants to draft the Response Pleading in light of the research and work done in preparing the Certification Response. This may be

efficient and may avoid potential amendments. While it is necessarily speculative to say that it might avoid amendments, it is notable that the Plaintiff did amend his own pleading in preparing the Certification Application.

[42] The ANOCC is complex and it is reasonable to expect that the drafting of the Response Pleading to involve a significant amount of time.

[43] While there is no burden on the Plaintiff to establish prejudice, the evidence discloses no apparent prejudice to the Plaintiff.

[44] I do not accept that the Defendants are required to demonstrate “exceptional circumstances” in order to justify a deviation from compliance with the timelines under the *Rules*. That is not the test. The test is whether there is a “good reason” in the circumstances, as shaped by the particular facts and informed by the considerations highlighted by the *Poundmaker* factors (as adjusted to the facts at hand). Thus, the existence of “good reason” is always contextual.

[45] While Justice Matthews did not find concerns about efficiency and wasted resources weighty in *Shaver*, the weighing there took place following a finding that delay would be prejudicial to the plaintiff. Where, as here, there is no apparent prejudice, reducing inefficiencies and avoiding potential amendments may be more salient concerns.

[46] Here, there is no apparent prejudice to the Plaintiff, the deferral is sought only to the time of delivery of the Certification Response and the Response Pleading will be filed long before the certification hearing. Given that the ANOCC is complex and expansive, I am satisfied the benefits of the deferral are sufficient in the circumstances.

[47] The Filing Application is allowed. The Response Pleading will be required to be filed in conjunction with delivery of the Certification Response.

#### IV. THE TAKEOUT APPLICATION

##### A. The Certification Application

[48] The proposed class action alleges Google unlawfully collects personal information through the services it offers. The relevant services broadly fall into two categories:

- a) Services Google directly offers to proposed class members (e.g., Google Search or Maps) that are designed to transmit users' personal information to Google; and
- b) Services Google offers to businesses (e.g., Google AdSense, Google Analytics) that are designed to transmit proposed class members' personal information to Google as they browse the internet.

[49] The Plaintiff alleges Google collects information from the proposed class members regardless of their account or device settings, whether they have a Google account, or whether the class members took steps to protect their privacy (e.g., enabling the Do Not Track or Incognito features, or disabling the "Location History" function).

[50] The Plaintiff claims against Google in trespass, conversion, invasion of privacy (at common law or breach of privacy statutes), breach of s. 52 of the *Competition Act*, breach of consumer protection legislation, and unjust enrichment.

[51] The Plaintiff seeks to represent the following Class:

All residents of Canada who used a Google Service or visited a Third- Party Website for personal purposes during the Class Period, excluding (i) members of the Quebec Class; and (ii) Google and any of their subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors or assigns.

[52] The Plaintiffs' proposed common issues include questions regarding what information Google collects and how, as well as questions that go to whether Google obtained consent before collecting class members' personal information. Schedule B to the certification application sets out 53 proposed common issues.

[53] Given the multiple privacy-based claims, some of the common issues deal with the concept of consent. Schedule B includes the following proposed common issues:

3. What, if any, online actions taken by a Class Member could constitute prior and sufficient consent for such collection, retention or use of their Personal Information?
4. Were Class Members provided with a meaningful opportunity to give their prior and sufficient consent for the collection, retention or use of their Personal Information?
5. During the Class Period, did:
  - (a) Google make misrepresentations to Class Members about Google's collection, retention or use of Class Members' Personal Information?; or
  - (b) fail to disclose information to Class Members about Google's collection, retention or use of Class Members' Personal Information?; or
  - (c) use Dark Patterns or other undisclosed methods to increase the chances that Class Members would give Google their Personal Information?
6. If the answer to common issue #2(b) is no, or common issues #5(a), (b) or (c) is yes, could this conduct vitiate or otherwise affect any consent Google purportedly obtained from Class Members?  
...
19. In what circumstances, if any, could Google obtain prior and sufficient consent from Class Members according to sections 8, 9, and 10 of PIPA AB?  
...
21. In what circumstances, if any, could Google obtain prior and sufficient consent from Class Members according to sections 7, 8, and 9 of PIPA BC?

## **B. The Takeout Archives**

[54] The Google "Takeout" tool is described in Google's application:

8. Google Takeout ("Takeout") is a tool that Google developed that allows a user to download a copy of some or all of the data stored in relation to many Google products (the "Takeout Archive").
9. Takeout is a free service and is designed to be user-friendly and to enable users to download data in a simple way. Takeout supports more than 80 Google Product integrations. Through Takeout, a user may export and download their data from Google products including: the Chrome browser, including settings and extensions used over time; Gmail; Youtube; Location History; a list of devices and products or services used; My Activity; and registration and account activity.

10. When a user uses Takeout to download their data, the Takeout Archive may include both user-generated data (such as query and visit data from Search), as well as user-provided data (such as account and profile information, rating, reviews, saved links and saved locations). Takeout Archive only contains the data associated with a Google Account, as selected for download by the user, as of the day a user requests Takeout Data for a particular Google Account that has not been deleted by the user or as a result of retention periods that delete data associated with a Google account over time.

11. There are a multitude of factors which influence whether and to what extent information is contained within a Takeout Archive. There are a variety of settings at the device, Google Account, and application level that can affect the content and amount of data associated with a Google Account. Examples of Google Account settings which may affect the content of a Takeout Archive include Web & App Activity which saves a retrospective record of users' interactions with certain Google products and Location History which stores location data that is generated by the user's mobile device 'in the background'. Both of these settings are disabled by default and can be enabled by a user for their Google Account. A user may choose to turn these settings on or off during the course of use of their Google Account. These settings only capture data when a Google Account user is using a Google Product on a device while logged into their Google Account.

12. At the device-settings level, a user may affect the data associated with their Google Account. Whether or not location data is associated with the use of a Google product or service depends on, among other things, whether the user's device or app permissions are configured to provide location to the Google product or service. For example, a user may adjust other settings on their device which would prevent location information from being used by Location History.

[55] In Mr. Sibble's January 5, 2024 affidavit (filed as part of the Certification Application), he attests to having downloaded the Sibble Takeout Archive for his Google account using the Takeout tool on April 5, 2023. His evidence is that on review of the data in the Sibble Takeout Archive, he was "surprised and dismayed", both regarding the quantity of information collected in it and about the personal nature of that information.

[56] The Plaintiff goes on to list some of the folders and subfolders found in the Sibble Takeout Archive. He identifies a "My Activity" folder and attests to having taken a screenshot of that folder, and then attaches the screenshot as an exhibit to the affidavit.



[57] The Plaintiff goes on to describe some of the contents of the Sibble Takeout Archive in general terms. He attests that the records include searches going back to 2013, searches that reveal his home address, and searches that relate to his political views, banking information, and other personal information that he considers sensitive. He attests that the Sibble Takeout Archive includes extensive location records of where he had been, and of his media consumption (e.g., records of videos watched and of books purchased). He comments that he cannot tell from the Sibble Takeout Archive which Google Services created each particular record, nor whether he can prevent such records from being created in the future by changing his Google Services settings.

[58] The Plaintiff attests that he is not attaching the Sibble Takeout Archive as an exhibit because he is concerned about the privacy implications.

[59] Greg McMullen is one of the counsels for the Plaintiff. He provided an affidavit dated January 8, 2024, that forms part of the Certification Application. In it, he attests that on April 23, 2023, he created a new Google Account and then used that account with various different device settings, including with “Incognito” activated on Google Chrome, and with the “Do Not Track” and “Block Third Party Cookies” settings for the account enabled.

[60] At a subsequent point in time, Mr. McMullen used the Takeout tool to download the McMullen Takeout Archive from the account he created on April 23, 2023. The McMullen Takeout Archive is not referred to in Mr. McMullen’s affidavit in support of the Certification Application.

### **C. Defendants’ Position**

[61] The Defendants contend that the Plaintiff expressly and impliedly put the content of the Takeout Archives in issue by putting them in evidence and relying on the contents of the Takeout Archives to provide some basis in fact for his case that the proposed common issues exist and can be answered in common.

[62] The Defendants say the information in a Takeout Archive either contains or can be used to infer certain aspects of the device, account and application settings chosen by a user that affect whether and to what extent information is collected, used and retained. They also say that differences in the information in an account over time or between users can also be used to infer certain aspects of the effects of different device, account and application setting choices.

[63] The Defendants argue as follows with respect to the Takeout Archives and the requirement to establish a “basis in fact” for the existence of the proposed common issues relating to consent:

28. In the Certification Application, Mr. Sibble pleads that the Defendants committed statutory and common law torts of invasion of privacy, which he says consists of the following elements: (i) wilfully (or intentionally); (ii) without claim of right; (iii) violated Class Members’ privacy. Mr. Sibble claims that (i) the Defendants “acted wilfully” because it “does not collect personal information by accident”, and that the Defendants know the Class Members had a privacy interest in their Personal Information; (ii) that the Defendants acted “without claim of right” because Class Members were not “given a real choice about whether to participate”; and (iii) the Defendants violated Class Members’ privacy by engaging in conduct which, at common law, “a reasonable person would regard Google’s conduct as highly offensive”.

29. Central to Mr. Sibble’s theory is the proposition that the Defendants never obtain the “prior and informed” consent of the proposed class members for the collection, retention or use of personal information. Mr. Sibble appends a list of proposed common issues at Schedule B of the Application, which include a number of proposed common issues regarding consent, breach of privacy, and intrusion upon seclusion. Mr. Sibble’s theory of an alleged lack of consent is a common thread amongst the broad claims he seeks to have certified.

[64] The Defendants contend that in his affidavit, the Plaintiff “anchors” his evidence in the content of the Sibble Takeout in stating that he was “surprised and dismayed” by its contents and that this “implicates whether Mr. Sibble in fact consented” to the collection and use of that information, including by his choice of device, account or application settings. The Defendants make a similar assertion about the McMullen Takeout Archive:

41. Further, Mr. Sibble relies on the evidence of Mr. McMullen regarding the Google Account set up process and the specific activities in using that account, including to purportedly show some basis in fact for the proposed

issues regarding invasion of privacy and intrusion upon seclusion as it relates to the allegations about informed consent. The choices, consents, and settings choices will have influenced the content of the McMullen Takeout Archive.

43. The content of a Takeout Archive will vary from user to user based on the Google Services they use while logged into their Google Account, the volume and time period of those interactions, and a user's device, account and application settings over time including changes in those settings.

44. The Defendants are unable to review the contents of the Sibble Takeout Archive and the McMullen Takeout Archive absent disclosure from Mr. Sibble. The Defendants are unable to recreate the data within the Sibble Takeout Archive and the McMullen Takeout Archive. ...

[65] Finally, the Defendants note that as the content of a Takeout archive varies from user to user based on the Google Services they use while logged into their Google Account, the volume and time period of those interactions, and a user's device, account and application settings over time, Google cannot reproduce the Sibble and McMullen Takeout Archives for itself. Thus, the Takeout Archives are within the exclusive power and control of the Plaintiff.

#### **D. Plaintiff's Position**

[66] The Plaintiff says that Defendants' argument that the Plaintiff is relying on the Takeout Archives to provide some basis in fact for the existence of common issues regarding consent misconstrues the Certification Application.

[67] The Plaintiff says, properly characterized, its claims under ANOCC allege that Google collects information from proposed class members regardless of whether they have a Google account, what account or device settings they choose, and whether they took steps in an effort to protect their privacy by opting in or out of certain feature or functions (e.g., by choosing to enable the Do Not Track feature). Accordingly, the Plaintiff's proposed common issues include questions about what information Google collects and how, and questions about whether Google obtained valid consent before collecting class members' personal information (or engaged in conduct that vitiated any ostensible consent).

[68] The Plaintiff acknowledges that Google's eventual Response Pleading may allege Google had the consent of proposed class members under its policies, its terms and conditions, or under or by means of users' account or device settings (or otherwise). The Plaintiff says that if that is the case, then consent will be an issue on the merits for determination at the merits stage, but that the (disputed) issue of whether Mr. Sibble or Mr. McMullen did provide consent is not a question before the Court for determination at that certification.

[69] The Plaintiff says the affidavit evidence filed regarding the Sibble Takeout Archive provides some basis in fact for the criteria under s. 4(1)(b) to (e). It gives the following examples:

- a) While the content of Sibble Takeout Archive is unique to the Plaintiff, there is nothing unique about the Plaintiff's Google account in terms of the information Google collects or extracts from his online activities, so it follows that there is likely to be a class of two or more people;
- b) The described content of the Sibble Takeout Archive provides some basis in fact for the assertion that Google collects information from many different services, and therefore the assertions that Google has:
  - i. collected vast amounts of information from the people who use those services; and
  - ii. collected information likely to be sensitive (e.g., search histories and locations).

[70] With respect to preferability, the Plaintiff asserts that the description of the contents of the Sibble Takeout Archive provides some basis in fact for a finding that there are other similarly situated individuals, and that the proposed class members would all be subject to the same alleged wrongdoing.

[71] The Plaintiff says the Defendants have not met the test for pre-certification disclosure, as they have not explained how the contents of the Takeout Archives are *necessary* to inform the Court's assessment of the *certification criteria*.

[72] The Plaintiff points out that Google's application states only that the Takeout Archives are "illustrative" of "the ways in which settings, consents, and users' decisions may affect the information [Google] collected". He says that if that is Google's objective, then Google can include anyone's Takeout archive as an example or simply create a mock-up archive to use in its Certification Response.

[73] With respect to the McMullen Takeout Archive, the Plaintiff states that the McMullen Takeout Archive is neither referred to nor relied upon in the Certification Application.

### E. Analysis

[74] Very conveniently for present purposes, the issue of pre-certification production was very recently considered by the Court of Appeal: *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127 [*Mentor*].

[75] In *Mentor*, Madam Justice Horsman (writing for the Court) summarized both the relevant certification principles and the approach to pre-certification production taken by the courts of this Province:

#### The nature of a certification hearing

[29] In considering the various errors alleged by the appellants, I begin with a review of the principles that govern the scope and purpose of a certification hearing. These principles inform the limits that the courts have placed on pre-certification discovery.

[30] As the Supreme Court of Canada has reiterated on numerous occasions, the certification stage of a class proceeding is not concerned with the merits of the action. Rather, it is concerned with its form and whether the action can properly proceed as a class action: *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16 and 25 [*Hollick*]; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99 [*Pro-Sys*]; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 68 [*Sun-Rype*]; *AIC Limited v. Fischer*, 2013 SCC 69 at para. 43 [*Fischer*].

[31] In order to have an action certified as a class proceeding in British Columbia, the proposed representative plaintiff must establish the criteria set out in s. 4(1)(a)–(e) of the CPA:

- (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
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
  - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[32] The requirement in s. 4(1)(a) that the pleadings disclose a cause of action is assessed on the same test as on a motion to strike pleadings under R. 9-5(1) of the *SCCR*. The question is whether, assuming the facts pleaded are true, it is plain and obvious that the plaintiff's claim has no reasonable prospect of success: *Pro-Sys* at para. 63.

[33] For the remaining criteria in s. 4(b)–(e), the plaintiff must present sufficient evidence to show ‘some basis in fact’ that the requirements for certification are met: *Hollick* at para. 25. This does not involve an assessment of the merits. Thus, for example regarding the commonality requirement, the plaintiff must show some basis in fact that the issues are common to all class members, not some basis in fact that the acts alleged actually occurred: *Pro-Sys* at para. 110. The purpose of the ‘some basis in fact’ requirement is to ensure that that the action can proceed on a class basis without “foundering at the merits stage” because the certification requirements are not met: *Pro-Sys* at para. 104.

[34] The evidentiary threshold that the plaintiff must meet on a certification hearing is a low one: “some basis in fact is to be contrasted with no basis in fact”: *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 104. This evidentiary requirement must be understood in the context of the *CPA* scheme, which envisions that applications for certification will be brought at the early stages of the proceeding: *Nissan v. Mueller*, 2022 BCCA 338 at para. 136. As the merits are not being argued on certification, the record does not have to be exhaustive: *Fischer* at para. 41. While the defendant is entitled to respond to the plaintiff with its own evidence, the court cannot engage in any detailed weighing of conflicting evidence: *Sun-Rype* at para. 68; *Fischer* at para. 43.

### **The approach to pre-certification document production in British Columbia**

[35] The *CPA* does not expressly address pre-certification document production. A series of decisions of the Supreme Court of British Columbia, following on the enactment of the *CPA*, established the rule that parties do not have an automatic right to document discovery prior to certification. The

concerns that animate the restricted right of pre-certification discovery include the delay and expense that would inevitably ensue from broad discovery rights, which would undermine the scheme of the CPA. Questions of proportionality and fairness are also relevant. Absent a limiting rule, parties could face potentially onerous extensive, and/or intrusive discovery obligations before the case had even been certified as a class action. Accordingly, the general rule has developed that pre-certification production of documents will only be ordered where it is necessary in order to inform the certification process: *Mathews v. Servier Canada Inc.* (1999), 1999 CanLII 5900 (BC SC), 65 B.C.L.R. (3d) 348 (S.C.) at 349–350; *Hoy v. Medtronic Inc.*, 2000 BCSC 1105 at para. 8; *Samos Investments v. Pattison*, 2001 BCSC 440 at para. 20; *Kimpton v. Canada (Attorney General)*, 2002 BCSC 67 at paras. 12–16; *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2007 BCSC 1663 at paras. 23–25.

[36] This general rule applies to pre-certification applications for production of a plaintiff’s medical records: production is ordered only where the defendant demonstrates that it is necessary to inform the court at the certification hearing. The question of necessity is to be assessed by reference to the procedural purpose of a certification hearing, and the limited nature of the evidentiary burden on a plaintiff. See *Bartram* at paras. 11–16, 21; *Stanway* at para. 21; *Cantlie* at paras. 33–38; *Charlton* at paras. 42–44; and *Achtymichuk* at paras. 6–9. The reference in the caselaw to production only being ordered in “the exceptional case” does not create a different or higher standard. As explained by Justice Sharma in *Cantlie*, where the test of “necessary to inform the court at the certification hearing” is applied correctly, “it will only be the exceptional case where such production is warranted”: *Cantlie* at para. 43.

[37] The chambers judge thoroughly reviewed the relevant cases at paras. 42–65 of her reasons. It is not necessary to repeat her careful analysis. The governing approach in British Columbia is helpfully summarized in a more recent Chambers judgment of Justice Griffin in *Abbotsford (City) v. Mosterman*, 2022 BCCA 448 (Chambers). Justice Griffin noted that “[i]t is well established that document discovery does not precede certification applications”: at para. 26. She observed that this limitation applies to both plaintiffs and defendants, and held that:

[27] ...It is precisely to avoid bogging down the certification process that a party requesting documents before certification must be sufficiently precise in their request and show that the documents will inform the certification process: *Pro-Sys BCSC* at paras. 25–29; *2007513 Alberta Ltd. v. Pet Planet Franchise Corp.*, 2022 ABCA 310 at para. 12; *Tetefsky v. General Motors Corp.*, 2010 ONSC 1675 at para. 38, *aff’d* 2011 ONCA 246.

[38] The following principles emerge from the British Columbia case law: (1) there is limited scope for document production prior to a certification hearing, (2) any application for pre-certification production must focus on the certification criteria, (3) the onus is on the applicant to show that document production is necessary to inform the court’s assessment of the certification criteria, and (4) that onus cannot be discharged by bare assertions that documents may be relevant to the certification criteria—the applicant must be

precise in their request and explain how the requested documents will inform the issues on certification. To that I would add that principles of proportionality and fairness to the parties may also be at play. The question of whether production should be ordered is contextual and fact-specific.

[76] Thus, the general rule regarding pre-certification production is that it will be ordered only where an applicant successfully demonstrates that production is necessary to inform the Court at certification, with necessity being assessed by reference to the procedural purpose of certification and the correspondingly limited evidentiary burden on the plaintiff.

[77] The Defendants assert as follows:

42. Mr. Sibble's theory of commonality includes the propositions that the Defendants collect, retain, and use personal information from the proposed class members without obtaining their prior and informed consent. A user's experience with their Google account and the settings chosen over time bears on what they knew, understood and were consenting to with respect to the collection and use of personal information. The content of Takeout Archive is illustrative of not only the settings, consents, and decisions of a user and the data collected about a user's Google Account, but also the ways in which settings, consents, and users' decisions may affect the information collected.

[78] Describing consent as the Plaintiff's "theory of commonality" does not, in and of itself, advance the Defendants' claim that production is necessary for the purposes of certification. The Defendants are required to identify with precision what the production sought is relevant to and to specify why production is necessary to consider the matter.

[79] In the ANOCC, the Plaintiff has pled that Google collected information without first obtaining valid permission from him. He has also pled that Google engaged in conduct that would vitiate any ostensible consent. That pleading forms an element of some of his legal claims and is thus relevant to whether he has pleaded a reasonable cause of action in his claims under the ANOCC. The s. 4(1)(a) "cause of action" requirement is determined based solely on pleadings and does not require any "basis in fact". Mr. Sibble's affidavit is not relevant to that particular certification requirement.



[80] Turning to the certification requirement that the claims raise common issues, while there are proposed common issues directed at the issues of what would constitute sufficient and ongoing consent for purposes of claims advanced, the question of whether, when, or how (including by making setting choices) Mr. Sibble, Mr. McMullen, or any other class member provided a valid consent is a question for determination at the merits stage. The certification will not address the latter question, not even at the level of “basis in fact”.

[81] I am not satisfied that the production of the records sought is necessary to inform the certification process. On the contrary, I am satisfied that the production sought would steer the certification inquiry directly into the heart of the mire.

[82] The decision in *Mentor* is instructive here beyond its statement of the applicable test for production. *Mentor* is also notable for its disposition on the facts. The proposed class action in *Mentor* asserted that the defendants manufactured defective breast implants, failed to adequately test for risks, and failed to warn consumers of risks. In support of the certification application, the plaintiffs attested that they were in good health before having the implants and suffered the described adverse symptoms afterward. The defendants took the position that the plaintiffs had put their medical histories “in issue” under their affidavits, and sought production of their medical records in order to challenge the plaintiffs’ evidence about their conditions, diagnoses and treatment: *Mentor* at para 14

[83] The Court of Appeal affirmed the chambers judges’ finding that the production sought was unnecessary for certification. In so doing, it stated:

[57] The appellants’ argument ignores the fact that the merits of the respondents’ individual claims are not in issue at the certification hearing. The certification hearing will not resolve the question of whether the respondents, or any other individual class member, developed any of the conditions listed in the proposed common issues as a result of receiving Mentor Breast Implants. The respondents’ proposed common issues concern questions of general causation: whether the Mentor Breast Implants are unfit for their intended use due to their propensity to cause BIA-ALCL, ASIA/BII, and/or because they contain toxins. It appears that the respondents intend to rely on expert evidence—the affidavits of Drs. Zuckerman and Tervaert—to establish some basis in fact for the commonality of the proposed common issues.

...

[66] For the foregoing reasons, I am not persuaded that the chambers judge was obliged to order the production of the respondents' medical records simply because their medical history was described in the certification application material. The test for pre-certification production of records is not that the content of the records is referenced in a certification application, but rather that production is necessary to inform the certification process. In finding that production was not warranted in this case, the chambers judge cited and applied the correct principles.

[Emphasis added.]

[84] The Defendants take essentially the same approach here. The real core of their argument is not that the production sought is necessary to deal with certification issues, but rather that, because the content of the Sibble Takeout Archive was described in the Plaintiff's affidavit, it ought to be produced. That does not suffice for the purposes of pre-certification production.

[85] Further, with respect to the McMullen Takeout Archive, the Defendants are correct in pointing out that this document is nowhere referenced in the Certification Application. Without dismissing the possibility that materials could be sufficiently present by implication, there was no argument advanced as to how that could be the case here.

[86] Finally, the Defendants agreed in argument that if they wanted to refer to "a" Takeout archive in order to illustrate a point they wish to make in argument at the certification hearing, the Defendants have the ability and resources to produce one.

[87] The Takeout Application is dismissed.

[88] Given the outcome, the parties will each bear their own costs.

"Tucker J."