

OCT 04 2012

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No. \_\_\_\_\_  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

WAYNE PLIMMER

PLAINTIFF

AND:

GOOGLE, INC.

DEFENDANTS

**NOTICE OF CIVIL CLAIM**

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

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

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

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

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

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

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

**TIME FOR RESPONSE TO CIVIL CLAIM**

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

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or,
- (d) if the time for response to civil claim has been set by order of the court, within that time.

## **CLAIM OF THE PLAINTIFF**

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

1. The plaintiff, Wayne Plimmer, retired, is a resident of Sechelt, British Columbia with an address for service at 2500-700 West Georgia Street, Vancouver, British Columbia.
2. The defendant, Google, Inc. ("**Google**") is a Delaware corporation with its principal place of business at 1600 Amphitheatre Parkway, Mountain View, California 94043, in Santa Clara County, California.
3. Since in or about 2004, Google has operated a "webmail" (internet-based e-mail) service known as "**Gmail**."
4. Google uses Gmail to collect data about consumers who use Google's products and services, and about others whose communications come within Google's reach.
5. Google's activities include intentionally and systematically intercepting email sent to Gmail users by individuals who are not Gmail subscribers and whose emails are sent from non-Gmail email accounts. Google intercepts incoming emails to Gmail accounts in order to obtain the words, content, and meaning of the emails. The intercepted data within these emails and the use of this data has value to Google.
6. Google is not an actual or intended recipient, nor a party, to those private communications.
7. Google intercepts, obtains, and uses personal information ("**data**") it collects from emails sent to Gmail users to avoid paying for the data, to further the sale and display of advertising, and for other uses to thereby obtain revenue.
8. Among other things, Google increases its revenues from third party advertisers by displaying "targeted" ads to consumers based upon data received from others. Google's intercepting and taking of the data from the content of emails allows Google to avoid paying traffic acquisition costs – i.e. the costs it would normally pay to third party owners or providers for such data.

9. The plaintiff and other members of the proposed Class have sent emails to Gmail accounts of persons who reside within and outside of British Columbia.
10. The plaintiff brings this action on behalf of a proposed class of individuals (the “**Class**”) consisting of:

All persons in the province of British Columbia who have sent email to a Gmail account. This Class includes individuals who, by virtue of their profession or status, are obligated to maintain and protect confidentiality or privilege in respect of communications they send and includes emails between solicitor and client, physician and patient, and priest or other religious advisor and parishioner.
11. The plaintiff and members of the Class (hereinafter, collectively, the “**Class Members**”) have not consented to Google’s activities as described above.
12. Google has failed or omitted to disclose or describe, either adequately or at all, the fact and the extent of Google’s interception, copying, retention, review and use of emails sent by the Class Members to Gmail account holders.
13. The Class Members own copyright and moral rights in the emails they draft, prepare, and send and in any other works attached thereto such as photographs, drawings, and sound recordings (collectively, the “**Emails**”).
14. The Class Members hold property interests in the Emails. Google interferes with those interests by exercising control or dominion over the Emails, including by intercepting and reproducing the emails, using the data therein, and keeping copies.
15. Google knew or ought to have known that its conduct as described above was unlawful and in violation of the statutory and common law rights and interests of Class Members. By way of example:
  - (a) Google has a demonstrated track record of surreptitiously or carelessly taking, keeping and using people’s information; denying having done so when confronted; and later admitting, when faced with evidence, that the earlier representations and denials Google had made to the public were not true.
  - (b) In May, 2012 Google was put on notice, by a letter signed by no fewer than thirty-six of the Attorneys General of the United States of America, that Google’s practices surrounding data collection, retention and use were of great concern, and were “*troubling for a number of reasons*”, particularly from a privacy standpoint. Google was urged to change its practices which, as the letter noted, run counter to Google’s “*...representations repeatedly over the years...*” suggesting “*...a respect for privacy that Google has carefully cultivated as a way to attract customers...*”

**Part 2: RELIEF SOUGHT**

1. The plaintiff, on his own behalf and on behalf of the Class Members, seeks the following:
  - (a) An order certifying this action as a class action pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*Class Proceedings Act*");
  - (b) Declarations that:
    - (i) Google has breached sections 1 and 3 of the *Privacy Act*, R.S.B.C. 1996, c. 373 (the "*Privacy Act*");
    - (ii) Google has committed the common law tort of invasion of privacy;
    - (iii) Google has violated the confidentiality of the Class Members;
    - (iv) Google has violated solicitor-client privilege and also physician-patient, priest/pastor-penitent, and journalist-source privilege;
    - (v) Google has infringed the copyright and moral rights of Class Members;
    - (vi) Google has committed the torts of conversion and detinue in respect of the Class Members' Emails and information therein; and that
    - (vii) Google has breached s.52 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "*Competition Act*");
  - (c) An interim, interlocutory and permanent injunction prohibiting Google from intercepting, reading, reviewing or making use of email sent by Class Members without the fully informed, express, advance consent of all parties to the communication;
  - (d) General, aggravated, exemplary, and/or punitive damages, assessed:
    - (i) in the aggregate pursuant to section 29(1) of the *Class Proceedings Act*; or
    - (ii) as the court may otherwise direct;
  - (e) Disgorgement and restitution to Class Members of all revenues or alternatively, all profits, derived by Google in association with, or from, the conduct described above;
  - (f) Further, statutory damages for breach of copyright of \$500 per Email, should plaintiffs so elect under s.38.1 of the *Copyright Act*, R.S.C., 1985, c C-42 (the "*Copyright Act*");
  - (g) Orders for the seizure, delivery up or destruction of any and all copies of Emails sent by Class Members which are in Google's possession or control, with appropriate provisions for inspection and verification of same;

- (h) Further, regarding the claims in tort, Class Members reserve the right to elect, at or before trial, to waive the tort and seek disgorgement of Google's profits associated with or arising from Google's interference with, interception, copying, retention and use of the Emails;
- (i) Pre-and post-judgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c.79;
- (j) Costs and special costs; and
- (k) Such further and other relief as this Honourable Court may consider just.

**Part 3: LEGAL BASIS**

1. The *Privacy Act*, the *Copyright Act*, the *Competition Act*, the *Class Proceedings Act*, the *Law and Equity Act*, R.S.B.C. 1996, c.253, Part VI of the *Criminal Code*, R.S.C. 1985, c C-46 (the "*Criminal Code*"); and related common law.
2. In respect of each cause of action set out below, Google intentionally acted in a manner that it knew or should have known would violate the rights of Class Members by undertaking the acts described in paragraphs 3, 4, 5, 7, 8, 12, 14 and 15 of Part 1 above, and did so without an honest belief in a state of facts which, if it existed, would be a legal justification or excuse.

***PRIVACY***

3. The interception, copying, scanning and use of private communications for the purpose of profiting, including but not limited to for the purpose of providing advertising services, is subject to and governed by among other things the provisions of the *Privacy Act*.
4. Google intentionally acted as described above in circumstances in which Class Members were entitled to privacy.
5. Through its unlawful conduct as described above Google has among other things:
  - (a) committed the statutory tort of invasion of privacy pursuant to ss.1(1) of the *Privacy Act*;
  - (b) committed the common law tort of invasion of privacy; and
  - (c) violated the confidentiality and privilege of Class Members.
6. Class Members have suffered loss and damage as a result of Google's interception, copying, scanning, retention and use of their private communications.
7. The interception or retention of emails as described above, absent prior judicial authorization or consent, also violates Part VI of the *Criminal Code*.

***COMPETITION ACT***

8. Google's failure to disclose its actions described above had the capability, tendency or effect of deceiving or misleading a consumer, or alternatively had a misleading effect, or alternatively had this capability, tendency or effect specifically in relation to the Class Members.
9. By way of the acts and omissions described above, Google has breached s.52 of the *Competition Act*, in knowingly or recklessly making false and/or misleading representations to the public.
10. Google made those representations for the purpose of promoting its business interests, including the generation of further or increased advertising revenue.
11. Google is liable under s.36 of the *Competition Act* in damages, and for the costs of investigating and prosecuting this action.

***COPYRIGHT***

12. By way of its actions as described above Google has violated Class Members' copyright and moral rights in the Emails and is liable to Class Members as a result.
13. Further, Google infringes the copyright and moral rights of Class Members in the Emails by, without permission and for a fee or other reward, copying, using or otherwise dealing with the Emails in connection with the services and products offered by Google, including but not limited to Google's use for purposes of generating advertising revenue.

***CONVERSION and DETINUE***

14. The Emails are the property of Class Members. Google has no right, title or interest in the Emails. By way of its actions as described above, including by intercepting and reproducing the Emails, Google commits the tort of conversion. By retaining copies of the Emails, Google commits the tort of detinue.

***PUNITIVE DAMAGES***

15. Google's actions as described above, including its interception, copying, scanning, retention and use of private email communications is high-handed, outrageous, wanton, reckless, callous, disgraceful, wilful and entirely without care for Class Members' statutory and common law rights. Google is liable to pay damages, including aggravated, exemplary and punitive damages.

Plaintiffs' address for service:

Farris, Vaughan, Wills & Murphy LLP  
Barristers & Solicitors

2500 - 700 West Georgia Street  
Vancouver, British Columbia V7Y 1B3

Fax number address for service (if any): 604-661-9349

Place of trial: Vancouver

The address of the registry is: 800 Smithe Street, Vancouver, British Columbia

Dated: 04/Oct/2012

  
\_\_\_\_\_  
Signature

Plaintiff

Lawyer for plaintiff(s)

**Robert Anderson, Q.C.**

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

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
  - (a) prepare a list of documents in Form 22 that lists
    - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
    - (ii) all other documents to which the party intends to refer at trial, and
  - (b) serve the list on all parties of record.

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION FOR SERVICE  
OUTSIDE BRITISH COLUMBIA**

The plaintiff, Wayne Plimmer, claims the right to serve this pleading on the defendant, Google Inc., outside British Columbia on the ground that there is a real and substantial connection between British Columbia and the facts alleged in this proceeding and the plaintiff and other Class Members plead and rely upon the *Court Jurisdiction and Proceedings Transfer Act* RSBC 2003 Ch 28 (the "*CJPTA*") in respect of these defendants. Without limiting the foregoing, a real and substantial connection between British Columbia and the facts alleged in this proceeding exists pursuant to ss10 (g) - (i) of the *CJPTA* because this proceeding:

- (g) concerns a tort committed in British Columbia;
- (h) concerns a business carried on in British Columbia; and
- (i) is a claim for an injunction ordering a party to do or refrain from doing anything in British Columbia.

And further, referencing s.6 of the *CJPTA*, section 4 of the *Privacy Act*, R.S.B.C. 1996, c.373 states that this proceeding is to be brought in the B.C. Supreme Court.



## APPENDIX

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

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

Breach of statutory and common law duties.

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

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

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

### Part 3: THIS CLAIM INVOLVES:

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

### Part 4:

1. *Copyright Act, R.S.C., 1985, c C-42*

2. *Class Proceedings Act*, R.S.B.C. 1996, c. 50.
3. *Competition Act*, R.S.C. 1985, c. C-34
4. *Court Jurisdiction and Proceedings Transfer Act*, R.S.B.C. 2003, c. 28.
5. *Law and Equity Act*, R.S.B.C. 1996, c. 253.
6. *Privacy Act*, R.S.B.C. 1996, c. 373