

C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
LOCALITY OF MONTREAL

(Class Action Division)
S U P E R I O R C O U R T

N° : 500-06-000913-182

RICKY TENZER

Plaintiff

v.

HUAWEI TECHNOLOGIES CANADA CO., LTD.

Defendant / Plaintiff in Warranty

v.

GOOGLE INC., a corporation created under the laws of the State of Delaware, having its principal establishment at 1600 Amphitheatre Parkway, Mountain View, State of California, 94043, United States of America

and

GOOGLE CANADA CORPORATION, a legal person created under the laws of the Province of Nova Scotia, having its principal establishment at 1253 McGill College Avenue, Suite 150, Montreal (Quebec) H3B 2Y5

Defendants in Warranty

ORIGINATING APPLICATION IN WARRANTY

(Articles 141 *et seq.* and 189 of the Code of Civil Procedure)

IN SUPPORT OF ITS JUDICIAL APPLICATION IN WARRANTY, THE DEFENDANT AND PLAINTIFF IN WARRANTY HUAWEI TECHNOLOGIES CANADA CO., LTD. STATES THE FOLLOWING:

I. INTRODUCTION

1. By way of his Originating Application as a Class Action (the "**Claim**"), the Plaintiff alleges that the Nexus 6P smartphones (the "**Nexus 6P**") sold in the Province of Quebec were affected by a premature battery drainage issue substantially impacting the use of the product (the "**Battery Drainage Issue**"). The Battery Drainage Issue is alleged to constitute a hidden defect in breach of the legal warranty of quality provided by the *Civil Code of Quebec* and the *Consumer Protection Act*, as appears from the Originating Application as a Class Action ("*Demande introductive d'instance*") dated June 26, 2020, **Exhibit AW-1**;

2. The liability of the Defendant and Plaintiff-in-Warranty Huawei Technologies Canada Co., Ltd. (“**Huawei Canada**”) is sought as in its capacity as a distributor of the Nexus 6P in the Province of Quebec;
3. Huawei Canada denies that the Nexus 6P was affected by a hidden defect and further denies that the Battery Drainage Issue, if any, occurred with all Nexus 6P sold in the Province of Quebec;
4. However, in the event that this honourable Court concludes to the contrary and finds that any Nexus 6P was affected by a defect, Huawei Canada submits that the Defendants in Warranty Google Inc. (“**Google**”) and Google Canada Corporation (“**Google Canada**”) should be liable for having designed and developed the Nexus 6P and for having sold Nexus 6P devices into the Province of Quebec directly, without Huawei Canada’s involvement or participation;
5. Thus, by way of the present *Originating Application in Warranty*, Huawei Canada seeks to hold Google and Google Canada directly liable and further seeks to have them hold Huawei Canada harmless for any judgment that may be rendered against it in respect of the Nexus 6P;

II. THE HISTORY OF THE CLASS ACTION

6. On May 11, 2020, the Court of Appeal authorized the institution of this class action on behalf of the following class:

Toutes les personnes propriétaires, ou qui ont été propriétaires d'un téléphone cellulaire Nexus 6P initialement acheté au Québec

as appears from the decision of the Court of Appeal in the case at bar reported as *Tenzer v. Huawei Technologies Canada Co., Ltd.*, 2020 QCCA 633 (the “**Decision of the Court of Appeal**”), **Exhibit AW-2**;

7. The common issues authorized by the Court of Appeal to be adjudicated at trial are the following :

1. Est-ce que le problème de déchargement prématuré de la batterie constitue un déficit d'usage sérieux?

2. Est-ce que la batterie du téléphone des membres du groupe servant à un usage normal a une durée de vie raisonnable?

3. Est-ce que le problème de déchargement prématuré de la batterie viole la garantie de qualité prévue au Code civil du Québec?

4. Est-ce que les membres du groupe connaissaient le vice de conception et de fabrication au moment de l'achat ou auraient dû le déceler par un examen ordinaire?

5. Les membres du groupe ont-ils droit à un montant correspondant au coût de réparation du téléphone ou de remplacement de la batterie?

6. *Les membres du groupe ont-ils droit au remboursement des frais découlant du vice de conception, notamment les frais d'analyse, de diagnostic, d'expédition ou d'achat de pile portative?*

7. *La défenderesse doit-elle être condamnée à verser des dommages-intérêts punitifs aux membres du groupe qui sont des consommateurs?*

as appears from the Decision of the Court of Appeal;

8. In addition, the conclusion sought authorized by the Court of Appeal to be adjudicated at trial are the following :

ACCUEILLIR l'action collective pour tous les membres du groupe;

RÉDUIRE le prix de vente payé par les membres du groupe pour l'achat de leur téléphone du coût de réparation du téléphone ou de remplacement de la batterie, avec intérêt au taux légal et l'indemnité additionnelle à compter de la date de la demande d'autorisation;

CONDAMNER la défenderesse à payer aux membres du groupe qui sont des consommateurs une somme de 100 \$ chacun à titre de dommages-intérêts punitifs, sauf à parfaire, avec intérêt au taux légal et l'indemnité additionnelle à compter du jugement à être prononcé;

ORDONNER le recouvrement collectif de ces sommes;

CONDAMNER la défenderesse à rembourser aux membres du groupe les frais découlant du vice de conception, notamment les frais d'analyse, de diagnostic, d'expédition ou d'achat de pile portative, avec intérêt au taux légal et l'indemnité additionnelle à compter de la date de la demande d'autorisation;

ORDONNER le recouvrement individuel de ces sommes;

LE TOUT avec frais de justice, incluant les frais d'experts, d'avis et de dépenses de l'administrateur, le cas échéant;

as appears from the Decision of the Court of Appeal;

9. On June 26, 2020, the Plaintiff filed the Claim, which alleges that the Nexus 6P has been developed and marketed by Google, which represented that its battery was performing and provided for a long autonomy;
10. In addition, the exhibits in support of the Claim¹ indicate, *inter alia*, that the Battery Drainage Issue would have started occurring after Google rolled out Android Nougat and after the Nexus 6P was upgraded from Android Marshmallow to Android Nougat;

¹ Exhibits P-9 to P-11.

III. THE LIABILITY OF GOOGLE AND GOOGLE CANADA

11. The Nexus 6P was manufactured by Huawei Device (Hong Kong) Co. Ltd., as a custom product for Google in accordance with, *inter alia*, the following requirements:
 - a) The Nexus 6P was designed and developed as per the detailed specifications set out by Google; and
 - b) The Nexus 6P was pre-loaded with Google-approved software and with Google having the right to deliver software updates to the Nexus 6P from time to time;
12. Accordingly, in the event that the court was to find that any Nexus 6P was defective at the time of its sale, which is denied by Huawei Canada, Google ought to be held liable and hold Huawei Canada harmless of any condemnation that may be rendered against it, as the case may be;
13. In addition, Google and/or Google Canada sold Nexus 6P devices directly to customers in the Province of Quebec, including through the Google Store, independently and without the involvement of Huawei Canada. Huawei Canada thus is in no way the distributor or seller of those Nexus 6P devices;
14. As a result, Google and/or Google Canada ought to be held solely liable, to the exclusion of Huawei Canada, for Nexus 6P devices sold directly by them to customers in the Province of Quebec in the event that the court was to find that any such Nexus 6P devices was defective at the time of their sale;

IV. CONCLUSION

15. Google and Google Canada had a central role in the issues at hand and their involvement in the litigation is thus both relevant and useful for the full and complete adjudication of the common issues that were authorized, all in accordance with the guiding principles of procedure;
16. This *Originating Application in Warranty* is well founded in fact and in law, and without prejudice to Huawei Canada's grounds of defence towards the Claim;

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT this *Originating Application in Warranty* against Google Inc. and Google Canada Corporation;

ORDER Google Inc. to indemnify and hold Huawei Technologies Canada Co., Ltd. harmless of any condemnation that may be rendered against it, in capital, interest, and costs;

IN THE ALTERNATIVE, ORDER Google Inc. and Google Canada Corporation to indemnify and hold Huawei Technologies Canada Co., Ltd. harmless of any condemnation that may be rendered against it in relation to the Nexus 6P smartphones sold directly by them to the class members, in capital, interest, and costs;

WITH COSTS.

Montreal, February 12, 2021



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Our file: 342746-0001

10755548_1

SUMMONS

(Article 145 and following C.C.P.)

Take notice that the Plaintiff in warranty has filed this Originating application in warranty in the office of the Superior Court in the judicial district of Montreal.

You must answer the application in writing, personally or through a lawyer, at the courthouse of Montreal situated at 1 Notre-Dame Street East, Montreal, Quebec, H2Y 1B6 within 15 days of service of the application or, if you have no domicile, residence or establishment in Québec, within 30 days. The answer must be notified to the plaintiff's lawyer or, if the plaintiff is not represented, to the plaintiff.

If you fail to answer within the time limit of 15 or 30 days, as applicable, a default judgement may be rendered against you without further notice and you may, according to the circumstances, be required to pay the legal costs.

In your answer, you must state your intention to:

- negotiate a settlement;
- propose mediation to resolve the dispute;
- defend the application and, in the cases required by the Code, cooperate with the plaintiff in preparing the case protocol that is to govern the conduct of the proceeding. The protocol must be filed with the court office in the district specified above within 45 days after service of the summons **or**, in family matters **or** if you have no domicile, residence or establishment in Québec, within 3 months after service;
- propose a settlement conference.

The answer to the summons must include your contact information and, if you are represented by a lawyer, the lawyer's name and contact information.

You may ask the court to refer the Originating application in warranty to the district of your domicile or residence, **or** of you elected domicile, **or** the district designated by an agreement with the plaintiff.

If the application pertains to an employment contract, consumer contract or insurance contract, or to the exercise of a hypothecary right on an immovable serving as your main residence, and if you are the employee, consumer, insured person, beneficiary of the insurance contract or hypothecary debtor, you may ask for a referral to the district of your domicile or residence or the district where the immovable is situated or the loss occurred. The request must be filed with the special clerk of the district of territorial jurisdiction after it has been notified to the other parties and to the office of the court already seized of the Originating application in warranty.

If you qualify to act as a plaintiff under the rules governing the recovery of small claims, you may also contact the clerk of the court to request that the application be processed according to those rules. If you make this request, the plaintiff's legal costs will not exceed those prescribed for the recovery of small claims.

Within 20 days after the case protocol mentioned above is filed, the court may call you to a case management conference to ensure the orderly progress of the proceeding. Failing this, the protocol is presumed to be accepted.

In support of the Originating application in warranty, the Plaintiff in warranty intends to use the following exhibits:

- Exhibit AW-1:** Originating Application as a Class Action ("*Demande introductive d'instance*") dated June 26, 2020;
- Exhibit AW-2:** Decision of the Court of Appeal reported as *Tenzer v. Huawei Technologies Canada Co., Ltd.*, 2020 QCCA 633.

These exhibits are attached.

If the application is an application in the course of a proceeding or an application under Book III, V, excepting an application in family matters mentioned in article 409, or VI of the Code, the establishment of a case protocol is not required; however, the application must be accompanied by a notice stating the date and time it is to be presented.

Montreal, February 12, 2021



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Our file: 342746-0001

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ORIGINAL



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