

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEBORAH LOUISE DOUEZ

PLAINTIFF

AND:

FACEBOOK, INC.

DEFENDANT

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

**WRITTEN ARGUMENT OF FACEBOOK, INC.
(Sequencing Motion)**

I. OVERVIEW

1. The purpose of this hearing is to determine whether the application by the Defendant Facebook, Inc. (“**Facebook**”) to contest the jurisdiction of the Supreme Court of British Columbia over these proceedings, should properly be heard prior to the Plaintiff’s application to certify a class proceeding (the “**Certification Application**”). Facebook submits that, for the reasons set forth below, its application contesting jurisdiction should properly proceed first because sequencing the pending applications in this order is decidedly the more fair and efficient approach.

2. The Plaintiff, Deborah Douez (“**Douez**”), a resident of British Columbia, seeks various remedies against Facebook and has brought an application (the “**Application**”) pursuant

to the *Class Proceedings Act*, RSBC 1996, c 50 (the “*CPA*”) (the “**Douez Claim**”) on behalf of all resident persons in British Columbia who are Facebook users (“**Users**”) and whose name, portrait, or both have been used by Facebook in “Sponsored Stories” (the “**Proposed Class**”).¹ As the proposed representative plaintiff, Douez alleges that Facebook’s use of names or portraits of the Proposed Class to advertise or promote goods or services in connection with Sponsored Stories breached section 3(2) of the *Privacy Act*, RSBC 1996 c 373 (the “*Privacy Act*”).² The Douez Claim is similar to a class action currently pending before the U.S. District Court for the Northern District of California (the “**U.S. Proceeding**”).

3. Facebook challenges the British Columbia Supreme Court’s jurisdiction over the Douez Claim (the “**Jurisdiction Application**”), and seeks to have its Jurisdiction Application heard in advance of the Certification Application.

4. This Court has discretion to grant Facebook’s request and order that the Jurisdiction Application be heard prior to the Certification Application. While as a general rule, certification is the first matter determined in a putative class proceeding, a court may depart from the general rule where there are compelling reasons to do so.

5. In the circumstances of this case, there are compelling reasons to hear the Jurisdiction Application before the Certification Application. Resolving the jurisdiction issue before the Certification Application will not create excess cost or delay for the parties. The jurisdiction application has strong merit and has the potential to dispose of this litigation in British Columbia. Therefore, the pre-certification jurisdiction motion has the potential to save considerable time and expense for the parties, and to promote judicial economy. Determining

¹ Notice of Civil Claim at para 43

² Facebook’s Authorities, Tab 2.

the Jurisdiction Application before the Certification Application will not result in any delay to certification if this Court's jurisdiction is confirmed, but will avoid wasted time and expense if jurisdiction is found lacking. Further, the jurisdictional issues can be considered separate and distinct from the class certification issues.

6. According to the scheduling order agreed to by the parties, the Certification Application will be heard for three days commencing on June 18, 2013. That is to say, if the jurisdiction of this Court is first considered there will be no delay to the Plaintiff's certification motion if this Court's jurisdiction is confirmed. However, if this Court declines jurisdiction prior to certification, the parties will avoid the significant costs and inconvenience of a hotly contested certification motion, and this Court will not have wasted scarce judicial resources on a contested certification motion in a proceeding over which it lacks jurisdiction.

II. PROCEDURAL HISTORY

7. Douez filed a Notice of Civil Claim and purported to serve it upon Facebook on March 29, 2012. Douez brought the action on her own behalf, and on behalf of all persons whose name, portrait, or both, were used by Facebook as part of "Sponsored Stories." Douez claims that Facebook's use of Users' names and/or portraits in Sponsored Stories breaches s. 3 of the *Privacy Act*, RSBC 1996, c 373. Douez seeks damages and an injunction enjoining Facebook from using members' names and portraits in Sponsored Stories.

8. On May 15, 2012, Douez requested that the action be supervised by a case management judge. On July 5, 2012, Douez filed certification materials. The first case management conference took place on July 30, 2012, in Vancouver. At that time, Facebook advised the Court that it would contest the jurisdiction of the British Columbia Supreme Court over the action. At the case management conference it was agreed that there would be a hearing

on December 14, 2012, to determine whether Facebook's Jurisdiction Application should be heard prior to the Douez' Certification Application (the "**Sequencing Hearing**"). The Consent Order of the parties sets forth the various litigation steps leading up to certification and incorporates on a provisional basis the determination of the jurisdiction issue in a way that does not delay certification. That Consent Order is attached as Schedule 'B' hereto for ease of reference.

9. Under the Consent Order, a hearing of the Jurisdiction Application is provisionally scheduled for January 15, 2013, pending the outcome of the Sequencing Hearing. A hearing of the Certification Application is provisionally scheduled for June 18, 2013.

III. LAW AND SUBMISSIONS

A. The General Rule that the Certification Application Should Be the First Procedural Step

10. The recent case of *Clark v. Energy Brands Inc.* makes reference to the "general rule" that certification should be the first procedural step in the action, as contemplated by the *CPA*.³ Likewise, in the Ontario case of *Baxter v. Canada (Attorney General)*, the Superior Court indicated that a certification motion should be heard before other motions.⁴ The policy underlying the general rule reflects the Supreme Court of Canada's caution in *Garland v. Consumers' Gas Co.* against "litigation by instalments", which can be prejudicial to parties to a class action.⁵

³ 2012 BCSC 557 at para 37, Facebook's Authorities, Tab 3.

⁴ [2005] OJ No 2165 at para 9, Facebook's Authorities, Tab 4.

⁵ 2004 SCC 25 at para 90, Facebook's Authorities, Tab 5.

B. Exceptions to the General Rule

11. In *Holland v. Canada (Agriculture, Food and Rural Revitalization)*, a case that has been cited with approval by British Columbia courts, Chief Justice Laing (as he was then) stated:

The case law is reasonably uniform that only motions which are likely to dispose of a litigation, or more efficiently address the objectives of *The Class Actions Act*, should be heard and determined prior to the certification hearing.⁶

12. The case management judge has discretion to determine the timing of certification and pre-certification motions based on the context and unique facts of a case.⁷ According to the *Kwicksutaineuk* case, judicial discretion as to the timing of pre-certification and certification motions will be exercised in circumstances where the motion is time-sensitive, would benefit all parties, further the *CPA* objective of judicial efficiency, or more efficiently address the general policy objectives of class proceedings.⁸

C. Factors Considered in a Jurisdictional Motion

13. In *Lieberman v. Business Development Bank of Canada*⁹, Davies J. identified the factors to be considered when courts exercise their discretion to sequence the hearing of jurisdictional issues. These included:

...[The cost to the parties of participation in *Class Proceedings Act* pre-certification procedures; the strength of a defendant's jurisdictional arguments and the extent to which a preliminary application may dispose of the whole of the proceeding; the potential for delay arising from interlocutory appeals; [...]
and, the interplay between the issues on both applications. [Emphasis added]¹⁰

⁶ 2009 SKQB 334 at para 8, Facebook's Authorities, Tab 6.

⁷ See *Pro-Sys Consultants Ltd. v. Microsoft*, 2008 BCSC 1263 at para 15, Facebook's Authorities, Tab 7; *CPA*, *supra*, s 12, Facebook's Authorities, Tab 1.

⁸ See *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*, 2009 BCSC 1593 at para 62, Facebook's Authorities, Tab 8.

⁹ 2005 BCSC 389 ("*Lieberman*"), Facebook's Authorities, Tab 9.

¹⁰ *Ibid*, at paras 16-17.

14. A consideration of each of these factors supports granting this motion to hear Facebook's jurisdiction motion in advance of the certification hearing.

(i) *Participation in the Pre-Certification Motion Will Not Create Excess Cost for the Parties*

15. Jurisdiction is a fundamental initial issue in this case, given that it involves a non-resident party with minimal ties to British Columbia.¹¹ The jurisdiction issue is critical to the proceedings, and it is inevitable that parties will devote time and resources to their arguments on jurisdiction. Far from creating excess cost to the parties, hearing the jurisdiction application first has the potential to save considerable time and expense because the jurisdiction issue has the potential to dispose of this litigation in British Columbia.

(ii) *Participation in the Pre-Certification Motion Will Not Delay the Proceedings*

16. Most importantly, in accordance with the Consent Order setting out scheduling steps agreed to by the parties, the Certification Application will be heard for three consecutive days commencing on June 18, 2013. Furthermore, there is also an agreed schedule for the exchange of evidence and briefing in anticipation of the certification motion proceeding. There is no risk of delay, or litigation by installments, since the certification schedule has been established.

17. The schedule agreed to by the parties at the initial case management conference will not result in any delay to certification if jurisdiction is confirmed by hearing the jurisdiction application in January 2013 (as provisionally scheduled). However, if jurisdiction is found lacking and that determination is made first, there will be the avoidance of wasted expense to the Parties and the avoidance of wasted judicial resources.

¹¹ Solanki Affidavit at para 16

18. Facebook is aware of no case in which a court has compressed a jurisdiction challenge into a certification hearing where, as in this case, provisional dates for jurisdiction and certification hearings were set, and there was no risk of delay to certification.

(iii) Facebook’s Jurisdiction Application has Strong Merit Given the Forum Selection and the U.S. Proceeding

19. As developed in its Submissions on Jurisdiction, Facebook’s *Statement of Rights and Responsibilities* (ie. the “**Terms**” as defined in Facebook’s Submissions on Jurisdiction), to which all Users must agree when registering for and using Facebook, contains a forum selection clause (the “**Forum Selection Clause**”). In *Lieberman*, Davies J. based his decision to jointly hear the jurisdiction and certification motions on the fact that there was no choice of forum clause, which he observed is “a factor that is often of significance in determining whether a court will decline jurisdiction.”¹² In the present circumstances, the Forum Selection Clause will likely be a significant determinant of this Court’s consideration of the jurisdiction issue. Facebook has a strong argument that this Court should decline jurisdiction on the ground of *forum non conveniens*.¹³

¹² *Lieberman, supra* at para 19, Facebook’s Authorities, Tab 9. The existence of a forum selection clause can, by itself, be sufficient for a court to decline jurisdiction: *Viroforce Systems Inc. v. R&D Capital Inc.*, 2011 BCCA 260 at para 14, Facebook’s Authorities, Tab 10; *Microcell Communications Inc. v. Frey*, 2011 SKCA 136 at paras 106 to 115; Facebook’s Authorities, Tab 11. See Facebook’s Brief of Argument for the Jurisdictional Challenge at paras 21-38, in which it is argued that the Forum Selection Clause should be enforced.

¹³ See Facebook’s Brief of Argument for the Jurisdictional Challenge at paras 39-55, in which it is argued that this Court should decline to exercise its jurisdiction over the Douez claim because California is the more appropriate forum. Specifically, there is greater comparative convenience in litigating in California because the majority of key witnesses and evidence are located there; the law to be applied to the issues is California law, based on the choice of law clause in Facebook’s Terms; an injunction issued by a British Columbia court ordering Facebook to refrain from using Users’ names and/or portraits in “Sponsored Stories” may not be enforced outside the jurisdiction; and considerations of fairness and justice support staying the application in favour of California courts.

(iv) This Motion Has the Potential to Dispose of the Entire Proceeding

20. If successful, Facebook’s jurisdiction application has the potential to dispose of the Douez Claim, avoiding wasted expense on the part of both parties as well as wasting the Court’s resources. By invoking the Forum Selection Clause, Facebook is seeking to have the Douez Claim stayed indefinitely by directing Douez and the Proposed Class to the courts of Santa Clara County, California. Granting a stay in favour of the courts in Santa Clara County would be in keeping with the principles of comity and the policy objective of judicial efficiency in the CPA.¹⁴

(v) The Jurisdictional Issues Can Be Considered Separate and Distinct from the Class Certification Issues

21. The jurisdictional issues in the Douez Claim are separate from the certification issues, given the clear and unambiguous Forum Selection Clause in the Facebook Terms. An “exclusive jurisdiction clause” akin to Facebook’s Forum Selection Clause was upheld and enforced in *Ezer v. Yorkton Securities*¹⁵ in determining that the class certification application should not have been heard before the decision to stay the action. Levine J.A. stated therein:

The question is whether the jurisdiction in which the action may be brought is determined by the contract between the parties. If the exclusive jurisdiction clause is enforceable, Mr. Ezer cannot bring any action against Yorkton in B.C., including a class proceeding, and there is no action to be certified. The issues of whether a class proceeding is the fair and preferable procedure or there are common issues do not arise.¹⁶

22. The jurisdictional issues in the Douez Claim are similarly distinct. As in *Ezer*, the question here is simply whether the jurisdiction in which the action may be brought is

¹⁴ CPA s 4, Facebook’s Authorities, Tab 1; see also *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 11, Facebook’s Authorities, Tab 12; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para 112, Facebook’s Authorities, Tab 13.

¹⁵ 2005 BCCA 22, Facebook’s Authorities, Tab 14.

¹⁶ *Ibid* at para. 19.

determined by the contract between the parties. Indeed, if the Forum Selection Clause is enforceable, there is no action to be certified.

23. The circumstances of this application are distinguishable from *Lieberman*, in which Davies J. of the British Columbia Supreme Court concluded that the defendant's jurisdictional application should be heard at the same time as the plaintiffs' certification application and resolved as part of the certification process. In *Lieberman*, the absence of a forum selection clause was a decisive factor in Davies J.'s ruling.¹⁷ The *Lieberman* jurisdictional challenge was weak because of the absence of such a clause in that case. Further, in *Lieberman*, the jurisdictional issues were complex and interrelated with certification issues.¹⁸ In this case, as previously discussed, there is little overlap between the jurisdictional and certification issues because there is an enforceable Forum Selection Clause that can be addressed separate and apart from the issues in the Certification Application.

IV. CONCLUSION

24. A determination of jurisdiction may dispose of the entire proceeding before this Court and avoid inefficiency and cost. Hearing the Jurisdiction Application prior to the Certification Application will not result in any delay in the proceedings, as the date of the Certification Application and the litigation steps leading up to that hearing, are already scheduled. It would be inefficient to hear the certification motion first, only to determine that the case is more appropriately heard in another forum.

25. Is respectfully submitted that this court should grant the motion to hear the Jurisdiction Application prior to the Certification Application.

¹⁷ *Lieberman* at para 19, Facebook's Authorities at Tab 9.

¹⁸ *Ibid.*

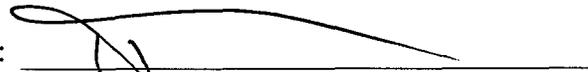
V. ORDER SOUGHT

26. For all of the foregoing reasons, Facebook requests an Order granting the hearing of its Jurisdiction Motion prior to the certification application and an award of their costs in this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Osler, Hoskin & Harcourt LLP

Per:



Tristram J. Mallett
Kelly Osaka
Counsel for Facebook, Inc.

SCHEDULE “A” – LIST OF AUTHORITIES

1. *Class Proceedings Act*, RSBC 1996, c 50, s 4; s 12.
2. *Privacy Act*, RSBC 1996, c 373, s 3.
3. *Clark v. Energy Brands Inc.*, 2012 BCSC 557.
4. *Baxter v. Canada (Attorney General)*, [2005] OJ No 2165.
5. *Garland v. Consumers’ Gas Co.*, 2004 SCC 25.
6. *Holland v. Canada (Agriculture, Food and Rural Revitalization)*, 2009 SKQB 334.
7. *Pro-Sys Consultants Ltd. v. Microsoft*, 2008 BCSC 1263.
8. *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*, 2009 BCSC 1593.
9. *Lieberman v. Business Development Bank of Canada*, 2005 BCSC 389.
10. *Viroforce Systems Inc. v. R&D Capital Inc.*, 2011 BCCA 260.
11. *Microcell Communications Inc. v. Frey*, 2011 SKCA 136.
12. *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 11.
13. *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17.
14. *Ezer v. Yorkton Securities*, 2005 BCCA 22.



SCHEDULE "B"

No. VLC-S-S-122316
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEBORAH LOUISE DOUEZ

PLAINTIFF

AND:

FACEBOOK, INC.

DEFENDANT

Brought pursuant to the *Class Proceedings Act*, RSBC 1996, c 50

BEFORE (a Judge of the Court) 02/November/2012

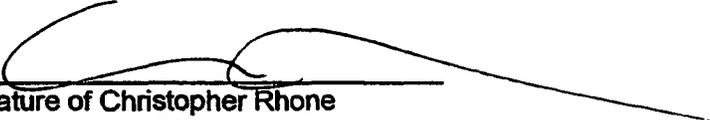
CONSENT ORDER

ON THE APPLICATION OF THE PLAINTIFF, without a hearing and by consent;
THIS COURT ORDERS that:

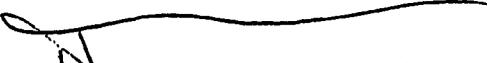
1. The Defendant's application for the sequencing of its application with respect to jurisdiction (the "Jurisdiction Application") and the Plaintiff's application for the certification of this action as a class action (the "Certification Application") will be heard on December 14, 2012 (the "Sequencing Application").
2. The parties will adhere to the following schedule in the lead-up to the Sequencing Application:
 - a. September 28, 2012 – The Defendant files and delivers its materials for the Sequencing Application and the Jurisdiction Application;
 - b. October 26, 2012 – The Plaintiff files and delivers her responding materials for the Sequencing Application and the Jurisdiction Application;
 - c. November 9, 2012 – The Defendant delivers its written submissions for the Sequencing Application and the Jurisdiction Application;
 - d. November 30, 2012 – The Plaintiff delivers her response submissions for the Sequencing Application and the Jurisdiction Application; and
 - e. December 7, 2012 – The Defendant delivers its reply submissions, if any, for the Sequencing Application and the Jurisdiction Application.
3. If the court orders that the Jurisdiction Application be heard before the Certification Application, the Jurisdiction Application will be heard on January 15, 2013, or on such other date as the court may order.

4. If the court orders that the Certification Application and Jurisdiction Application be heard concurrently or the Plaintiff is successful on the Jurisdiction Application, the Certification Application and, if necessary, the Jurisdiction Application will be heard on June 18, 19, and 20, 2013, or on such other date as the court may order.
5. Subject to modification by agreement or by the court, the parties will adhere to the following schedule in the lead-up to the Certification Application:
 - a. March 26, 2013 – The Defendant will file and deliver its responding materials for the Certification Application;
 - b. April 23, 2013 – The Plaintiff will file and deliver any reply materials for the Certification Application;
 - c. April 30, 2013 – The Plaintiff will deliver her written submissions for the Certification Application;
 - d. May 28, 2013 – The Defendant will deliver its response submissions for the Certification Application; and
 - e. June 11, 2013 – The Plaintiff will deliver its reply submissions, if any, for the Certification Application.
6. Counsel for the Defendant may attend future hearings by telephone if counsel for the Plaintiff is given reasonable notice and does not oppose attendance by telephone.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND
CONSENT TO EACH OF THE ORDERS NOTED ABOVE:



Signature of Christopher Rhone
[x] lawyer for the Plaintiff



Signature of Tris Mallett
[x] lawyer for the Defendant

Digitally signed by
Butler, J

By the Court
Digitally signed by Berg,
Mellani

Registrar

No. VLC-S-S-122316
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEBORAH LOUISE DOUEZ

PLAINTIFF

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CONSENT ORDER

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