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-34

PLAINTIFF'S ARGUMENT

Re: Sequencing of Applications

I. INTRODUCTION AND OVERVIEW

A. The Sequencing Application

1. This is an application to decide whether the Plaintiff's application for the certification of this action as a class action (the "**Certification Application**") will be heard together with the Defendant's application regarding jurisdiction (the "**Jurisdiction Application**") or if two separate hearings will be required.

B. Procedural History

2. This action is a proposed class action, commenced by the Plaintiff's filing a Notice of Civil Claim on March 29, 2012. The Plaintiff sought relief on her own behalf, and on behalf of proposed classes described as follows:

> All British Columbia resident persons who are Members of Facebook and whose name, portrait, or both have been used by Facebook in a Sponsored Story.

3. As this is a proposed class action, it was assigned to Madam Justice Griffin for judicial case management.

4. On July 5, 2012, the Plaintiff filed and served materials for her Certification Application.

5. On July 26, 2012, counsel for the Defendant first advised counsel for the Plaintiff that the Defendant intended to bring the Jurisdiction Application.

6. On July 30, 2012, a preliminary judicial management conference was held before Madam Justice Griffin.

7. Following that judicial management conference, the Plaintiff and Defendant agreed to a schedule leading up to a June 2013 hearing of the Certification Application, along one of two possible paths:

    a. The Certification Application and Jurisdiction Application would be heard together on June 18, 19, and 20, 2013; or

    b. The Jurisdiction Application would be heard on January 15, 2013, and, if necessary following the results of the Jurisdiction Application, the Certification Application would be heard on June 18, 19, and 20, 2013.

8. This application (the "**Sequencing Application**") will decide whether Certification Application and Jurisdiction Application should be heard together, or if the Jurisdiction Application will be severed from the Certification Application.

C. The Plaintiff's Position

9. The Plaintiff submits that the Jurisdiction Application should be heard concurrently with the Certification Application for the following reasons, each of which is discussed in greater detail below:

    a. The structure of the *Class Proceedings Act*, RSBC 1996, c 34 expresses a "clear indication"[1] that the Certification Application is the first application heard;

    b. From a very practical and equitable perspective, the Plaintiff "was here first", in that her Certification Application was filed before the Defendants even signaled an intention to bring an application on jurisdictional issues;

    c. The Jurisdiction Application properly requires an assessment of whether a class action in British Columbia is the preferable procedure for the fair and efficient resolution of the common issues, which is also stated by sections 4(1)(d) and 4(2)(c)-(e) of the *Class Proceedings Act* to be elements of the test for the certification of a class action;

    d. Even if the Defendant is successful, the Jurisdiction Application is not certain to dispose of the action in its entirety;

    e. Access to justice and judicial efficiency favour hearing the Jurisdiction Application concurrently with the Certification Application;

    f. Hearing the Jurisdiction Application first would open the window to multiple appeals, even before the Certification Application can be held, and for

[1] *Baxter v. Canada*, 2005 CanLII 18717 (ONSC) at para. 9.

"litigation by instalments" in a manner that has been expressly rejected in earlier decisions. By contrast, if the Certification Application and Jurisdiction Application are heard concurrently, any appeals from the entire process can be heard in one stream;

g. Hearing the Certification Application first will not materially prejudice the Defendant, but hearing the Jurisdiction Application first will substantially prejudice the Plaintiff and the absent class members;

h. Hearing the Jurisdiction Application first creates significant costs exposure for the Plaintiff, which is contrary to the express language and underlying purposes of the *Class Proceedings Act*; and

i. The Jurisdiction Application lacks sufficient merit to justify moving it out of the order of service.

II. ARGUMENT

A. The intention of the *Class Proceedings Act*: Certification comes first

10. Class proceedings statutes of common law provinces contain essentially identical provisions mandating that, absent leave to the contrary, the certification application should be brought within certain established timelines. In Ontario and British Columbia, the certification is to be brought within 90 days from the date the statement of defence or reply has or should have been filed, whichever is later.[2, 3]

11. Based on these provisions, courts in Ontario and across the country have repeatedly ruled that in a class action the certification application should usually be the first application heard. This court has confirmed and adopted the approach taken in many Ontario cases. This has been acknowledged by the Defendant.[4]

12. In *Kwicksutaineuk/Ah-Kwa Mish First Nation v British Columbia (Agriculture and Lands)*, 2009 BCSC 1593, this Court made the following strong statement of the general rule, adopting the reasoning of the Ontario and New Brunswick courts:

> [59] As a general rule, the certification motion ought to be the first procedural matter to be heard and determined in an intended class

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[2] In this case, the Plaintiff filed her Notice of Civil Claim on March 29, 2012, and the defendant was served in California on April 3, 2012. The Defendant has not filed a Response to Civil Claim and the plaintiff has not required that it do so. However, the Plaintiff notes that pursuant to Rule 3-3(3)(a)(ii) of the Supreme Court Civil Rules, the Defendant's Response to Civil Claim would have been due on May 8, 2012, meaning that this is one of the few cases in which the Plaintiff brought her Certification Application within the 90 days required by the *Class Proceedings Act*.

[3] See the *Class Proceedings Act*, *supra*, s 2(3) and the Ontario *Class Proceedings Act*, SO 1992, c 6, s 2(3)

[4] Written Argument of Facebook, Inc. (Sequencing) at para 10

> proceeding: *Attis v Canada (Minister of Health)*, (2005) 75 OR (3d) 302 at para 7 (SCJ); *Baxter v Canada (Attorney General)*, [2005] OJ No 2165 (SCJ); *Gay v Regional Health Authority* 7, 2009 NBQB 101 at para 13, 343 NBR (2d) 331. This rule is premised in part on the basis that the brief 90 day period for bringing a certification application in class proceedings legislation is indicative of a legislative intent that certification precede other preliminary motions. This legislative intent underpins section 2(3) of the CPA: *Consumer's Association et al v Coca-Cola Bottling Company et al*, 2005 BCSC 1042 at paras 67-68, 46 BCLR (4^{th}) 137.

13. The key Ontario decisions were delivered by Justice Winkler, as he then was. In *Attis v Canada (Minister of Health*), 2005 CanLII 10884 (ONSC) Winker J. wrote:

> [7] As a matter of principle, the certification motion ought to be the first procedural matter to be heard and determined. This may be inferred from s 2(3) of the *Class Proceedings Act, 1992*, SO 1992, c 6 ("CPA") which provides that a certification motion shall be made within 90 days after the last statement of defence, except with leave of the Court. While this time limit is more often observed in the breach in that it is rarely achieved in practice, it does serve to emphasize the rationale for an early determination of certification because of the ramifications of the CPA to the proceeding, not the least of which is the binding effect on the class members of the determination of the common issues in a common issues trial.

14. And in *Baxter v Canada*, 2005 CanLII 18717 (ONSC) the Court held as follows:

> [9] Although the CPA does not expressly require the certification motion to be the first order of business, the 90 day time-frame imposed by section 2(3) provides a clear indication that the certification motion should be heard promptly and normally be given priority over other motions.

15. In *Gay v Regional Health Authority 7*, 2009 NBQB 101 at para. 18, Ouellette J. confirmed that certification should come first except "in exceptional circumstances". Further, the learned Justice stated:

> [13] By reading the *Class Proceedings Act*, it seems that the first order of business in any class action proceeding is to deal with the certification of the action. By setting the 90 day time-frame in Section 3(4) above stated, it is an indication that the certification motion should be heard promptly and normally in priority to other motions.

16. Justice Nordheimer applied the same reasoning in *Moyes v Fortune Financial*, [2001] OJ No 4455 (SCJ), ruling that certification should come first:

> [8] The time limits set out in section 2(3) [of the Ontario *Class Proceedings Act*] would strongly suggest that the certification motion is intended to be the first procedural matter that is to be heard and determined. While I recognize that these time limits are rarely, if ever, achieved in actual practice, I do not consider that that reality detracts from the intent to be drawn from the section.
>
> [9] The rationale for having the certification motion determined first is that it fulfills the objective of having an early determination of whether the action is going to move forward as a class proceeding, with the consequent binding effect on the members of the class, or whether the action will constitute and determine only the claim of the named plaintiff.

17. In *Cannon v Funds of Canada Foundation*, 2010 ONSC 146, Strathy J. ordered the defendant's motion be brought at the same time as the certification motion. In this key decision, at paragraph 15, the Court set out the relevant factors that a Court may consider when deciding whether to hear a motion before the certification motion:

    a. whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;

    b. the likelihood of delays and costs associated with the motion;

    c. whether the outcome of the motion will promote settlement;

    d. whether the motion could give rise to interlocutory appeals and delays that would affect certification;

    e. the interests of economy and judicial efficiency; and

    f. generally, whether scheduling the motion in advance of certification would promote the "fair and efficient determination" of the proceeding.

18. This test was adopted in British Columbia by Chief Justice Bauman in *Watson v Bank of America Corporation*, 2012 BCSC 146 at paras 22 and 27, as guiding the Court's discretion in scheduling applications.

19. A further list of issues to be considered in a proposed pre-certification application on jurisdiction is described by Justice Davies in *Lieberman et al v Business Development Bank of Canada*, 2005 BCSC 389 (leave to appeal denied in 2005 BCCA 268), in which the B.C. Supreme Court ruled that the certification and jurisdiction applications should proceed at the same time:

> [17] A non-exhaustive list of the factors that will likely have to be considered in exercising that discretion will include: 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; the complexity of the evidentiary and legal issues that may arise in both the jurisdictional and certification applications; and, the interplay between the issues on both applications.

20. The Plaintiff says that all of these factors weigh strongly in favor of hearing the Certification Application and Jurisdiction Application together.

B. The Jurisdiction Application will require a review that is very similar to aspects of the test for certification

21. The Defendant has not disputed that this Court has jurisdiction *simpliciter*, but argues that the Court should exercise its discretion to decline jurisdiction.

22. British Columbia courts have gone both ways in cases where the defendant seeks to insert a jurisdictional application or *forum non conveniens* application before the plaintiff's application for certification. Sequencing has generally hinged on whether the defendant denies that the court has jurisdiction *simpliciter* or whether the full "preferable procedure" type analysis under section 4(2)(d) of the *Class Proceedings Act* is required in the jurisdictional application. In cases such as the case at bar, in which a full consideration of the preferable procedure will be required, the Certification Application and Jurisdiction Application should be heard at the same time.

23. In *MacKinnon v Instaloans Financial Solutions Centres (Kelowna) Ltd*, 2004 BCCA 473 at para 59, reversing 2004 BCSC 136, the defendant's application to stay the proceeding in favour of arbitration was originally heard before certification. The Court of Appeal set aside the decision refusing the stay, finding that the question of the stay should have been considered along with certification as a part of the section 4(2) certification requirements under the *Class Proceedings Act,* and in fact could not be appropriately adjudicated apart from the full test for certification.

24. This direction was to resolve a conflict between the *Commercial Arbitration Act*, RSBC 1996, c 55, which requires staying actions in the face of valid arbitration clauses, and the *Class Proceedings Act*, which dictates that a class proceeding must be certified if the certification requirements are met. Madam Justice Levine explained, at paragraph 49, that the only way to resolve the conflict is to perform the certification test in its entirety, including the availability of arbitration in the preferability analysis.

25. The Court directed that the certification and jurisdiction applications be heard at the same time in *Lieberman.* In that case, as here, there was no challenge to the Court's jurisdiction *simpliciter*.

26. The Defendant has argued that in *Lieberman*, Davies J. based his decision to hear the certification and jurisdiction motions together on the fact that there was no forum selection clause at play.[5] However, the absence of a forum selection clause was only *one* of *four* factors considered by Davies J. in sequencing those applications. Davies J. also considered the time and expense of inserting an additional motion before certification, the interaction of the choice of law clause with various statutes, and overlapping aspects of the *forum non conveniens* and certification tests.[6]

27. *Lieberman* involved a similar conflict to the one in *MacKinnon*. *Per* Davies J.:

> [19(4)] The legal and evidentiary issues that relate to a determination of whether Quebec is a more convenient forum than British Columbia in which to litigate the issues raised by these proceedings are complex. To that extent, difficult issues concerning what law will govern the determination of various aspects of the plaintiffs' claims will also be of significance to the determination of whether this proceeding should be certified in British Columbia under the *Class Proceedings Act*. While the interplay between those evidentiary and legal issues does not reach the level of "interdependence" between the outcome of issues as in *Money Mart, supra*, I am satisfied that the overlap amongst the issues is such that a bifurcated hearing would not only have the potential to cause injustice but could also result in a multiplicity of proceedings on appeal. *Consumers' Gas, supra*, says that such a result should be avoided if possible.
>
> [20] I am accordingly satisfied that justice will be better served in this case by a determination of both the jurisdictional and certification applications at the same time to ensure that all issues are fully canvassed on as full an evidentiary record as the parties deem necessary to the complete analysis of all of the issues.

28. The Defendant has argued that in this case, there is "little overlap" between the Jurisdiction Application and the Certification Application simply because in this case the Court must consider a jurisdiction clause.[7] The Plaintiff disagrees.

29. The same overlap amongst the issues exists in this case as existed in *MacKinnon* and *Lieberman*. The Jurisdiction Application asks the Court to decline to take jurisdiction pursuant to section 11 of the *CJPTA*, and will assess the interaction of the *Class Proceedings Act, Privacy Act*, and the *CJPTA*. In considering whether to decline jurisdiction, the Court **must** consider **all** of the factors enumerated in section 11(2) of the *CJPTA*:

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5 Written Argument of Facebook, Inc. (Sequencing) at para 19

6 *Lieberman, supra*, at para 19

7 Written Argument of Facebook, Inc. (Sequencing) at para 22

> A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
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> (a) the comparative convenience and expense for the parties to the proceedings and for their witnesses, in litigating in the court or in any alternative forum,
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> (b) the law to be applied to the issues in the proceeding,
>
> (c) the desirability of avoiding multiplicity of legal proceedings,
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> (d) the desirability of avoiding conflicting decisions in different courts,
>
> (e) the enforcement of an eventual judgment, and
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> (f) the fair and efficient working of the Canadian legal system as a whole.

30. The consideration of the factors enumerated in the *CJPTA*, especially factors (a), (c), (d), and (f), cannot be assessed without determining whether the Plaintiff's proposed class proceeding meets the certification requirements under sections 4(1)(d) and 4(2)(c)-(e) of the *Class Proceedings Act*, which state:

> 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> [...]
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
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> [...]
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
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> [...]
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;

> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

31. In contrast, in *Ezer v Yorkton Securities Inc*, 2005 BCCA 22 the defendant asked the court to decline jurisdiction on the basis of a forum selection clause in an action that did not involve an analysis of competing statutory provisions; while in *Marren v Echo Bay Mines Ltd*, 2002 BCSC 1168 at paras 20, rev'd 2003 BCCA 298, the defendant challenged the Court's jurisdiction *simpliciter*. In those cases the Court allowed the jurisdiction application to come first.

32. In *Ezer*, the B.C. Court of Appeal considered the plaintiff's appeal of the lower court's decision to stay a proposed class proceeding on the basis of an exclusive jurisdiction clause in a contract. The Defendant has presented an extract from *Ezer* to support its argument that the existence of a forum selection clause was determinative in that case.[8] However, it omits the first sentence from paragraph 19, which it quotes: "There is no such statutory conflict in this case." Key issues in the case at bar were non-issues in *Ezer* including (a) whether class proceedings represented a preferable procedure; and (b) whether a B.C. statute conferring jurisdiction on the Supreme Court barred application of a contractual jurisdiction clause. The only questions to be determined in *Ezer* were whether the exclusive jurisdiction clause was binding on the plaintiff, and if so, whether a stay of proceedings should be granted.

33. In *Marren*, both the defendant and plaintiff brought pre-certification motions. The plaintiff first sought and was granted leave to amend its Statement of Claim to allow service on the defendant outside of British Columbia. The defendant sought an order setting service aside and staying the action, arguing the Court lacked jurisdiction *simpliciter*. The plaintiff had not filed its application for certification at the time of the application.

34. Unlike *Marren*, in the present case the Plaintiff has not brought a related application that she seeks to have determined before the Certification Application, and the Plaintiff has filed her Certification Application and intends to proceed with it at the same time as the Jurisdiction Application.

C. The Jurisdiction Application may not dispose of the action in its entirety

35. Where the application is only likely to dispose of part of the claim, the Court is even less likely to allow pre-certification motions to proceed.[9]

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[8] Written Argument of Facebook (Sequencing) at para 21

[9] See: *Watson, supra*; *Durling v Sunrise Propane Energy Group*, Endorsement of Justice Cullity, delivered October 27, 2009 (Ont SCJ); *Cecile v Retrofoam of Canada Inc*, 2010 ONSC 3457 at para 13; *Nette v Stiles*, 2009 ABQB 153 at paras 18-19; *Osmun et al v Cadbury Adams Canada Inc et al*, Ontario Superior Court of Justice File No 08-CV-347263PD2, unreported direction of Strathy J, October 18, 2011

36. Even if the Defendant is successful or partially successful in the Jurisdiction Application, this action may not be over.

37. First, the Defendant's Jurisdiction Application seeks alternate relief that would see the Court decline jurisdiction over just the injunctive relief sought by the Plaintiff. This outcome still requires a Certification Application and would not significantly alter the scope of the issues to be decided at the Certification Application.[10]

38. Second, the Defendant's Jurisdiction Application may only have binding effect on the Plaintiff and not the proposed class if brought at this time, given that the Defendant seeks to advance the Jurisdiction Application prior to creation of a class that would be bound by the result.

39. Even if an application has the potential to dispose of the entire claim, this factor in and of itself, does not entitle the applicant to have its application heard before certification. Certification still sometimes proceeds first in time, or at least at the same time as the apparently dispositive motion.[11]

40. In this regard, in refusing to allow motions to strike to proceed before certification, Ottenbreit J. of the Saskatchewan Court of Queen's bench reasoned in *Alves v My Travel Canada Holidays Inc, 2009 SKQB 77* as follows:

> [28] . . . I am not certain that generally speaking, timing decisions for motions should be based on the question of whether motions would terminate proceedings against a specific defendant. There are many motions, particularly the ones made by the defendants in this proceeding which end up terminating the proceedings by way of dismissal – striking or staying. Otherwise the defendants would not be making these applications prior to the certification. This in my view is not a determining factor. These motions may still result in the termination of proceedings but at or concurrently with the certification application.

D. Judicial efficiency

41. As the Plaintiff's action is a proposed class action (and therefore, more than an ordinary action; rather an "action with ambition")[12], the Plaintiff submits that in considering whether to sever the Certification Application, the court must take into account well-established objectives of the *Class Proceedings Act*: access to justice and judicial efficiency (the third factor, behavior modification, is not relevant to this application).

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[10] Defendant's Notice of Application at Part 1, para 2

[11] See *Alves v My Travel Canada Holidays Inc*, 2009 SKQB 77; *McNaughton Automotive v Co-Operators General Insurance Co*, [2002] OJ No 2026 (SCJ) ("*McNaughton*"); *Cannon, supra*

[12] *MacKinnon, supra* at para 33

42. Certification is the process by which access to justice takes shape. Certification evens the playing field. Certification allows parties to understand the issues at stake.

43. Judicial economy is front and centre in any decision to sever the section 4(1)(d) requirements from the rest of the Certification Application.

44. Allowing the Jurisdiction Application to proceed prior to the Certification Application will create two hearings where one will suffice and is intended. This will have a deleterious effect on judicial economy. There is no doubt more days of court time will be utilized for two separate hearings than for one, resulting in the following:

    a. The Court will have to clear more days from court calendars to deal with the hearings; and

    b. More hearing days will mean more days occupying a court room and more clerk time.

    The end result is a waste of scarce judicial resources to the detriment of other matters waiting for a courtroom and a clerk.

45. While it may seem hyperbolic to talk about days of court time in the context of this case and within the system as a whole, the reality is that judicial resources are scarce and the purpose of class actions is to create efficiencies. It is well known that cuts to registry staff require clerks and registry staff to double up on duty. Burdening these scarce resources with unnecessary duplicity in terms of filings and court time should not be countenanced in one class action or in 20 class actions unless there are very good reasons to do so.

46. Two hearings take more time and resources from all parties than the one hearing anticipated in the legislation. It also means the case moves more slowly as a whole.

47. The potential cost in judicial economy will be further exacerbated by the fact that the Jurisdiction Application will duplicate a portion of the test for certification. The Jurisdiction Application requires a determination of whether a class action in British Columbia is the preferable procedure for the determination of the common issues.

48. In *McNaughton*, Justice Haines granted the plaintiffs' motion to hear the certification motion together with a number of motions brought by the defendants. His Honour stated:

> [8] It is apparent from counsels' submissions that many of the issues to be argued are common to both the certification motions and the rule 20 and 21 motions. Therefore, although there are a large number of motions, the factual underpinnings are similar and the legal issues

> identical. In my view, the best way to proceed is to hear all these motions together . . .

49. Justice Haines comments are directly applicable to the case at bar.

E. Access to justice and the potential for multiple appeals

50. Recognizing the fundamental importance of certification, the legislature directed that certification should take place at an early stage in the proceedings. As indicated above, the default rule is that certification should occur within 90 days. More broadly, the Court must also be cognizant of the broader need to secure the "just, speedy and inexpensive determination" of an action.[13]

51. The "poster child" of the dangers of allowing an action to proceed in installments is *Garland v Consumer's Gas*, 2004 SCC 25, an action which took two trips to the Supreme Court of Canada and 10 years to finally arrive at a determination on the merits and settlement certification.[14] At paragraph 90, the Supreme Court endorsed the following comments of McMurtry C.J.O. ((2001), 57 OR (3d) 127):

> In this context, I note that the protracted history of these proceedings cast some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of Court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

52. Another cautionary tale can be found in the long history of *Seidel v Telus Communications Inc*, originally filed in December of 2005. In *Seidel*, the British Columbia Supreme Court allowed the defendant to bring two pre-certification motions, the first of which sought to strike portions of the plaintiff's claim and the second of which asked the court to stay the action in its entirety on the basis of a mandatory arbitration clause in the plaintiff's contract with Telus. The resulting appeals from the second motion led all the way to the Supreme Court of Canada for a determination of that question. Following the Supreme Court of Canada's decision, almost seven years later the parties are right back where they started – preparing for an as-yet unscheduled application for certification.[15]

53. The Defendant has argued that in this case there is no risk of delay in hearing the Jurisdiction Application before the Certification Application because the consent

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[13] *Samos Investments Inc v Pattison*, 1999 CanLII 1710 (BCSC) at para 17; Rule 1-3(1) of the BC Supreme Court Civil Rules; *Class Proceedings Act*, s 2(3)

[14] For the full history, see: *Garland v Consumer's Gas Co* (1995), 22 OR (3d) 451 (Gen Div), aff'd (1996), 30 OR (3d) 414 (CA), rev'd [1998] 3 SCR 112; [2000] OJ No 1354; aff'd (2001), 19 BLR (3d) 10 (ONCA), rev'd 2004 SCC 25; (2006), 38 CPC (6th) 70

[15] *Seidel v Telus Communications Inc*, 2008 BCSC 933, rev'd 2009 BCCA 104, rev'd 2011 SCC 15

schedule has the Certification Application heard in June 2013 whether the Jurisdiction Application comes first or not. The Defendant ignores the fact that the Consent Order is subject to revision by agreement or by order of the Court.[16]

54. If the Jurisdiction Application is heard before the Certification Application, any appeal of the result would almost certainly derail the current schedule. The contentiousness of the issues – both in the Jurisdiction Application and the Sequencing Application – mean that appeals are almost a certainty. All of the contentious certification issues should be dealt with by the trial court in one hearing and by the appeal court in one hearing, as intended by the legislature.

55. Hearing the Jurisdiction Application before the Certification Application promotes inefficiency, squanders judicial resources, creates litigation by instalment and increases costs for both sides, for the following reasons:

    a. While the decision on the Jurisdiction Application is pending, the Defendant will undoubtedly argue that it should not be required to file any responding material for the Certification Application/

    b. Whatever the result of the Jurisdiction Application, there will likely be an appeal (or an attempt to appeal), as in *MacKinnon*, *Ezer*, and *Marren*.

    c. Win or lose, the Defendant will likely argue that the hearing of the Certification Application should be adjourned until final disposition of the Jurisdiction Application appeal process.

    d. If the Jurisdiction Application is heard separate and apart from the Certification Application, a separate appeal route may arise for the Jurisdiction Application which will be distinct from any appeal or application for leave to appeal from the decision on the Certification Application.

56. Chief Justice Bauman raised these concerns in *Watson v Bank of America Corporation*, pointing to the near certainty that, if unsuccessful, the defendants would almost certainly lead an appeal of the proposed pre-certification application all the way to the Supreme Court of Canada. He also noted his concern with additional cost exposure through the proposed application and the appeal process.[17]

57. In *Cannon*, Justice Strathy expressed similar concerns about delays, inefficiencies and additional costs associated with a proposed pre-certification motion. He explained that if the motion was brought before the certification motion, the unsuccessful party would probably appeal or seek leave to appeal which would

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[16] Written Argument of Facebook, Inc. (Sequencing) at para 16

[17] *Watson v Bank of America Corporation*, 2012 BCSC 146 at para 29

result in delays to the certification motion.[18] Justice Patterson voiced similar concerns in *Cecile*.[19] The same concerns exist in the case at bar.

58. Conversely, if the Jurisdiction Application and the Certification Application are heard together, any appeals that may be launched can proceed together. The issue of whether or not Facebook' "Statement" is binds the Plaintiff and members of the proposed class will be placed only once before each Court.

59. Given the virtual certainty of appeals and application for leave to appeal, the admonition against "litigation by instalments" strongly encourages the concurrent scheduling of the Jurisdiction Application and the Certification Application.[20]

F. Lack of prejudice to Defendant

60. The Defendant argues that it is unfair that it be required to expend time and resources in having to participate in the Certification Application.[21]

61. However, costs cannot be evaluated in a vacuum, nor can costs be evaluated on the assumption that the Defendant's proposed Jurisdiction Application will succeed.

62. The certification process is not designed to drive "substantial litigation costs and expert costs". Rather, it is intended to be a procedural application ideally dealt with within 90 days of the filing of a Response, and includes restrictions on the amount of evidence one should have to file on a certification application.[22]

63. If the Defendant chooses to incur unnecessary litigation expense for a procedural application, that cannot be considered unfair prejudice to support a unique scheduling order.

64. In *Clark v Energy Brands Inc*, 2012 BCSC 557 at para. 60, Justice Verhoeven noted that the plaintiff filed his certification materials months before the defendant filed an application that it sought to have heard pre-certification. As in *Clark*, in this case the Plaintiff filed her materials in support of her Certification Application months before the Defendant filed its Jurisdiction Application, the Plaintiff's materials for the Certification Application are not extensive, and the Certification Application is scheduled for a relatively modest three day hearing. As the Court

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[18] *Cannon v Funds of Canada Foundation*, *supra*, at para 19

[19] *Cecile v Retrofoam of Canada Inc*, *supra*, at paras 13-14

[20] *Watson, supra*; *Garland v Consumers' Gas Co* (2001), 57 OR (3d) 127 (CA) at 152, aff'd 2004 SCC 25; *McNaughton*, *supra*, at para 9

[21] Written Argument of Facebook, Inc. (Sequencing) at para 15

[22] *Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2009 BCCA 503 at paras 63-69; *Fanshawe College of Applied Arts & Technology v LG Philips LCD Co*, 2011 ONSC 2484 at paras 35-36

noted in *Clark*, the Defendant "will not be unduly burdened by the certification application itself". The same is true in the present case.

65. Of course, even in cases when the proposed pre-certification application could dispose of the entire action through a jurisdictional challenge, the potential savings in preparing for a certification application are only realized if the defendant is successful or if a protracted appeal does not result.[23]

66. On the other side of the costs ledger, there will be substantial costs associated with hearing a severed application in advance of the Certification Application. This Sequencing Application, with the need for factums and a separate attendance, is the initial instalment of these expenses.

G. The costs threat

67. In terms of prejudice to the Plaintiff, by effectively severing the section 4 certification test, the Defendant undermines costs protection granted by the *Class Proceedings Act*. Those protections were clearly intended to apply to an examination of whether the pleadings disclose a cause of action and whether a British Columbia class action is the preferable procedure for the resolution of the common issues, as the inquiry was deliberately included in the cost-exempt certification process.

68. Prior to certification, the Plaintiff remains exposed to costs for any interlocutory application. Those costs can be substantial.[24]

69. In this case, the risk is not merely hypothetical. The Defendant has explicitly sought costs of both the Sequencing Application and the Jurisdiction Application.[25]

70. Exposing the Plaintiff to the risk of costs on a pre-certification application that is identical to an element of the certification test directly undercuts the access to justice mandate of the *Class Proceedings Act*.[26]

H. The merits of the Jurisdiction Application

71. The merits of the competing applications typically are not considered when determining the question of sequencing. However, in *Lieberman* the court indicated that the relative strength of a defendant's jurisdictional arguments should

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[23] *Lieberman, supra,* at para 19(1)

[24] *Edmonds v Actton Super-Save Gas Stations Ltd*, 1996 CanLII 1628 (BCSC) at para 8; *The Consumers' Association of Canada et al v Coca-Cola Bottling Company et al*, 2006 BCSC 1233, aff'd 2007 BCCA 356

[25] Written Argument of Facebook, Inc. (Sequencing) at para 26 and (Jurisdiction) at para 59

[26] *Samos Investments Inc v Pattison*, 2002 BCCA 442, paras 23-28

be considered.[27] Without exploring these issues in great detail, the Plaintiff notes the following.

72. The law in British Columbia, and across Canada generally, is that where a statute confers exclusive jurisdiction on the superior court of a province, jurisdiction cannot be displaced by a forum selection clause in a contract.[28] The Plaintiff's action relies on the *Privacy Act*, which confers exclusive jurisdiction over actions certain statutory torts upon the B.C. Supreme Court. The Plaintiff submits that it is plain that the Defendant's jurisdictional challenge must fail on these grounds.

73. Even if the *Privacy Act* did not confer exclusive jurisdiction on this Court, the *forum non conveniens* analysis under the *CJPTA* weighs in the Plaintiff's favour. Although the existence of a forum selection clause does carry great weight in the analysis under the *CJPTA*,[29] it is not the only factor that must be considered. The Court must also consider the following factors.

    a. The comparative convenience and expense for the parties to the proceedings and their witnesses in litigating in one forum or another. The Plaintiff says this factor weighs in her favour, as the inconvenience and expense faced by the Defendant in litigating in British Columbia is far outweighed by the inconvenience and expense that would be faced by a proposed class that may number in the hundreds of thousands in advancing the litigation in another country.

    b. The law to be applied to the proceeding. The Plaintiff says British Columbia law must be applied in this case (the *Privacy Act*), which a Court in British Columbia is better equipped to deal with than a California court.

    c. The threat of a multiplicity of proceedings and conflicting decisions. This case involves both adults, which the Defendant submits are bound by its Forum Selection Clause, and infants, which pursuant to the *Infants Act*, are not so-bound. It is undesirable to split the class into those who can pursue a claim in British Columbia and those who cannot, and the Plaintiff and proposed class should not be denied the economies of scale allowed by a unified proceeding.[30]

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[27] *Attis*, *supra*, at para 6; but see also *Lieberman, supra*, at para 17

[28] *GreCon Dimter inc v JR Normand inc*, 2005 SCC 46 (dealing with similar provisions in the Quebec CCQ; see also *Zi Corp v Steinberg*, 2006 ABQB 92 (dealing with a substantially identical challenge from a defendant and summarizing the law across the rest of the country) and *Seidel v TELUS Communications Inc*, 2011 SCC 15 (considering similar language in the B.C. *Business Practices and Consumer Protection Act* in the context of a mandatory arbitration clause)

[29] *Viroforce Systems Inc v R&D Capital Inc*, 2011 BCCA 260 at paragraph 14

[30] *Frey v Bell Mobility Inc*, 2011 SKCA 136 at paras 116-117; *Magill v Expedia Canada Corp*, 2010 ONSC 5247 at para 53

d. The enforcement of an eventual judgment. The Defendant has not provided any evidence to suggest that a California court would not enforce a judgment from British Columbia.

e. The fair and efficient working of the Canadian legal system as a whole. Canadian courts have found that forum selection clauses may not be enforced if "enforcing the clause in the particular case would frustrate some clear public policy."[31] This is particularly the case when the party seeking to enforce the clause has "made no attempt to bring an onerous condition to the attention of the other contracting party" and where the parties are of unequal bargaining power, as is the case here.[32]

74. In any event, and as discussed above, the analysis under the *CJPTA* requires a full assessment of the preferable procedure, which properly includes elements of the test for certification.

III. CONCLUSION

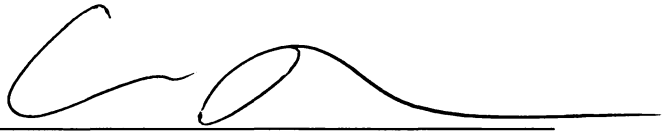
75. The Plaintiff acknowledges that in some instances Courts have allowed applications to proceed prior to certification. The Plaintiff submits that those cases involved exceptional circumstances justifying a departure from the well-established norm of proceeding with the certification application as the first substantive step in a proposed class action.

76. In this case, an overlap between the Jurisdiction Application and the Certification Application dictates that the two applications should proceed concurrently. Proceeding otherwise will lead to inevitable delays and waste of resources, both judicial and otherwise, especially since even a successful Jurisdiction Application may not dispose of the entirety of the Plaintiff's claims.

77. For the reasons outlined above, the Plaintiff submits that the Jurisdiction Application and the Certification Application should be heard concurrently.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: November 30, 2012



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[31] *Frey*, *supra*, at para 115

[32] *Roy v North American Leisure Group Inc* (2002), 9 CPC (6th) 270 at paras 28-31