

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

**PLAINTIFF'S WRITTEN SUBMISSIONS
CERTIFICATION**

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PART 1 – INTRODUCTION

1. This is an application to certify this action as a class proceeding pursuant to the *Class Proceedings Act*, RSBC 1996, c 50 (the “**Certification Application**”).
2. The Defendant, Facebook, Inc. (“**Facebook**”), is a publicly traded company incorporated pursuant to the laws of the State of Delaware in the United States of America. Facebook is an internet advertising company. It operates a social networking website located at *www.facebook.com* (the “**Facebook Website**”).
3. The Plaintiff, Deborah Louise Douez, is a videographer and owner of Video4Web Productions. She is a resident of Vancouver, British Columbia. She has been a member of the Facebook Website since June 6, 2007.
4. The Plaintiff alleges that Facebook acted on behalf of paying advertisers to create advertisements called “**Sponsored Stories**” featuring the names or portraits of the Plaintiff and over 1.8 million British Columbia residents (the “**Class Members**”) together with advertisers’ logos or other distinguishing marks, slogans, names, or product or service information.
5. Facebook displays the Sponsored Stories advertisements on the Facebook Website. The Plaintiff says Facebook does so without obtaining consent from her or Class Members, and in breach of the *Privacy Act*, RSBC 1996, c 373. In particular, the Plaintiff relies upon section 3(2) of the *Privacy Act*, which provides as follows:

It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.
6. At the trial of the common issues, the Plaintiff will ask the Court to determine whether Facebook obtained requisite consent from Class Members prior to using their names or portraits in Sponsored Stories advertisements.

7. The factors relevant to resolve this issue are common to all Class Members. These facts concern the interpretation and application of the *Privacy Act*, and the interpretation and enforceability of standard form contracts that Facebook may claim constitute requisite consent for Facebook's use of Class Members' names or portraits in Sponsored Stories advertisements.
8. The platform Facebook uses to create and display Sponsored Stories advertisements is the same for all Class Members, being the Facebook Website. Therefore, to the extent certain individual issues arise, such issues can be resolved through an automated analysis of the wealth of information Facebook has amassed respecting the Class Members, including Class Member identity, the number of Sponsored Stories advertisements featuring Class Member names or portraits, and the number of "Friends" to whom the Sponsored Stories advertisements were displayed.
9. In sum, the Plaintiff's claim raises common issues that are ideal for resolution on a class basis.

Litigation history

10. On March 29, 2012, the Plaintiff commenced this Action by filing a Notice of Civil Claim.¹
11. At a judicial management conference held on July 30, 2012, Facebook's counsel noted Facebook's intention to apply to have this Court decline jurisdiction over the Action (the "**Jurisdiction Application**"). Facebook sought to have its Jurisdiction Application heard before the Certification Application.
12. On December 14, 2012 this Court ordered that the Jurisdiction Application proceed as a part of this Certification Application. The Court directed that the Plaintiff first present her Certification Application; that Facebook then respond to the Certification Application and present its Jurisdiction Application; and that the

¹ Notice of Civil Claim, filed March 29, 2012 – Certification Record ("CR") Volume 3, Tab 16.

Plaintiff respond to Facebook's Jurisdiction Application and reply to Facebook's arguments respecting the Plaintiff's Certification Application.²

US litigation

13. Similar litigation has been advanced against Facebook in the United States, alleging violations of the California Code, which prohibits use of a person's name or portrait in advertising without consent.
14. On August 17, 2012, the US Court refused to approve a proposed settlement agreement. Then on December 3, 2012, the U.S. Court provided preliminary approval respecting a revised settlement proposal.³
15. Notice of the proposed US settlement has been delivered to the estimated 180 million members of the proposed class across the United States.⁴
16. A Fairness Hearing for final US settlement approval is currently scheduled to be heard on June 28, 2013.

PART 2 – NATURE OF THE APPLICATION

17. The Plaintiff brings this action as a proposed class proceeding pursuant to the *Class Proceedings Act* (the "**CPA**"). On this application she seeks the following related relief:

- (a) An order appointing the Plaintiff, Deborah Douez, as the representative plaintiff for the Class;
- (b) An order defining the "**Class**" (or "**Class Members**") as follows:

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

² Order made after application dated December 16, 2012.

³ Affidavit #1 of Emily Unrau, affirmed April 23, 2013 (the "Unrau Affidavit") at Exhibit A at pp 2 to 9 – CR Vol 2, Tab 12.

⁴ Unrau Affidavit at Exhibit B at pp 11 to 24 – CR Vol 2, Tab 12.

- (c) An order staying any other British Columbia proceeding relating to this proposed class action;
- (d) An order stating the nature of the claims asserted on behalf of the Class is a breach of the *Privacy Act*;
- (e) An order stating that the relief sought by the Class is as set out in Part 2 of the Notice of Civil Claim;
- (f) An order stating the common issues to be those set out in the Appendix to the Litigation Plan at **Schedule "A"** to the Notice of Application dated July 5, 2012;
- (g) An order setting the form and content of the notice program for the certification of this action (the "**Notice Program**"),
- (h) An order that the defendant and the Plaintiff share the costs of the Notice Program, as set out in the Notice Program;
- (i) An order stating that:
 - (i) Members of the Class may opt out of this class proceeding by sending a written election by regular mail to Class Counsel within 90 days from the date in which this action is certified (the "**Opt Out Date**");
 - (ii) No person may opt out of this proceeding after the Opt Out Date; and
 - (iii) Within one month from the Opt Out Date, Class Counsel will report to the Court the names of the persons who have opted out of this class proceeding; and

- (j) Orders providing for such further and other relief and directions as Class Counsel may request and this Honourable Court may deem just.

PART 3 - BACKGROUND FACTS

Facebook

18. The Facebook Website commenced operations in February 2004. As of March 4, 2013, Facebook's British Columbia membership totalled approximately 3.5 million people ("**Members**").⁵
19. Facebook generates an income by contracting with advertisers. The advertisers pay Facebook to display advertisements to Members on the Facebook Website.⁶ Facebook reported receipt of nearly \$4.28 billion in revenue through its advertising business in 2012, with \$2.06 billion of that income being generated within North America.⁷

Registering for the Facebook Website

20. To use the Facebook Website and become Members, potential users enrol through an online registration process. Facebook requires its prospective members to provide their real name, a valid email address, their gender, and their date of birth.⁸
21. On completing the initial registration process, Members create a unique personal profile page (a "**Profile**") by providing certain additional personal information. Facebook prompts Members to upload their portrait (a "**Profile Picture**"), in addition to their residential address, telephone number, education, employment history, religious affiliation, relationship status, sexual orientation,

⁵ Affidavit #1 of James C. Squires, sworn March 26, 2013 ("Squires Affidavit") at para 3 – CR Vol 1, Tab 6.

⁶ Notice of Civil Claim at Part 1, para 9 – CR Vol 3, Tab 16; Squires Affidavit at para 6 – CR Vol 1, Tab 6.

⁷ Unrau Affidavit at Exhibit E, pp 163 and 170 (pp 40 and 47 in Exhibit E) – CR Vol 2, Tab 12.

⁸ Notice of Civil Claim at Part 1, para 9 – CR Vol 2, Tab 13.

political opinions, hometown, activities, interests, and favourite books, films, music, and games.⁹

22. Facebook requires Members to use their real names on the Facebook Website, insisting that “[a]uthentic identity is core to the Facebook experience”.¹⁰ Facebook takes steps to enforce its real name requirement, sometimes denying access to the Facebook Website to Members entering a name that seems irregular. Facebook sometimes requires copies of government-issued photo identification to prove prospective members’ identity.¹¹
23. In addition to creating a personal Profile, Members may also create “**Pages**” for businesses, organizations, products, causes, or services.¹²

The Facebook Website environment

24. Facebook encourages Members to establish connections with other Members. Such connections are made by Members offering or accepting invitations to become “Facebook Friends” with other Members. Members may include true friends amongst their Facebook Friends, but they may also include family, colleagues, acquaintances, co-workers, members of scholastic, political or other organizations, or anyone else. According to Facebook, the average Member has 190 Facebook Friends.¹³
25. Facebook encourages Members to use the Facebook Website as a communications medium. To this end the Facebook Website enables Members to communicate and interact with one another by creating content in a number of ways. For example, Members can send public or private messages to one

⁹ Notice of Civil Claim at Part 1, paras 10-11 – CR Vol 3, Tab 16.

¹⁰ Affidavit #1 of Greg McMullen, affirmed July 5, 2012 (“McMullen Affidavit #1”) at Exhibit C, p 16 – CR Vol 1, Tab 4.

¹¹ Unrau Affidavit at Exhibit F, p 261 – CR Vol 2, Tab 12. For example, news reports indicate that Facebook deactivated author Salman Rushdie’s Facebook account in 2011 pending receipt of a scanned image of his passport. The media report indicates that Facebook then temporarily changed his Facebook Profile name to “Ahmed Rushdie”, the name appearing on his passport (Unrau Affidavit at Exhibit G, p 263 - 266).

¹² Squires Affidavit at para 12 – CR Vol 1, Tab 6; Notice of Civil Claim at Part 1, para 14 – CR Vol 3, Tab 16.

¹³ Squires Affidavit at para 10 – CR Vol 1, Tab 6.

another, upload photographs or videos to the Facebook Website, or share other information on the Facebook Website. Interactions with the Facebook Website generate a posting known as a “**Story**” on the Member’s Profile.

Social Actions

26. In addition to basic communication features discussed above, Facebook encourages Members to interact with content on the Facebook Website in various ways, which Facebook calls “**Social Actions**”. Social Actions include “Liking” a Page or a Story from a Page, sharing a hyperlink to other web pages, commenting on a Story on a Page, responding to a poll on a Page, “Checking In” to a physical location, “RSVPing” to an Event, or interacting with and sharing applications such as computer games developed by third parties for use through the Facebook Website.¹⁴ We discuss these Social Actions below.
27. Members can “**Like**” a Story or a Page by clicking a control widget called a “**Like Button**”¹⁵ within the Facebook Website, an action called “**Liking**” a Story or Page. The “Like Button” within the Facebook Website is often simply a button containing the word “Like”, but it is sometimes a button marked with a stylized “F” with the word “Like” next to it, or a button marked with a drawing of a hand with the thumb extended vertically upward (a “thumbs-up” gesture), or the thumbs-up gesture next to the word “Like”.¹⁶ Facebook first introduced the concept of Liking and the Like Button in February 2009.¹⁷
28. A Member may click the Like Button associated with a Story to indicate their support for or agreement with a Story – for example, clicking the Like Button associated with a Facebook Friend’s vacation photos or a Facebook Friend’s announcement on a new job – but this is not necessarily the case. Members may also click the Like Button associated with a Story or Page to receive

¹⁴ Affidavit #1 of Dr. Catherine Tucker, sworn March 26, 2013 (the “Tucker Affidavit”) at para 36 – CR Vol 1, Tab 7; Squires Affidavit at para 74 – CR Vol 1, Tab 6.

¹⁵ A “button” is a small box that appears on the computer screen, and that appears to be depressed when selected and clicked by the user. Control widgets such as buttons are not unique to Facebook, although Like Buttons are Facebook proprietary control widgets.

¹⁶ Notice of Civil Claim at Part 1, para 17 – CR Vol 3, Tab 16.

¹⁷ Squires Affidavit at para 41 – CR Vol 1, Tab 6.

business offers, enter contests, gain access to content, comment on a Page, or sign up to receive announcements of promotions or events.¹⁸ For example, the Plaintiff's affiant, Petre Capota, clicked the Like Button on the Collective POS Page on the Facebook Website in order to express his displeasure with Collective POS. Mr. Capota could not leave a comment on the Page to voice his displeasure without first clicking the Like Button.¹⁹

29. The Like Button is also used on third party websites. For example, if a Member clicks the Like Button on a third party website such as an article of news on a third party media website, a link to the article will be posted to that Member's Profile as a Story. On these third party websites, the Like Button operates in much the same way as similar control widgets provided by other social networking services such as Google's "+1" button or Twitter's "Tweet" button.²⁰
30. Members can also share a link to a third party website by copying and pasting the internet address of that website to a status update on the Facebook Website. Sharing a link in this manner will create a Story displaying the link, often accompanied by the title of the third party webpage and an image previewing the page.²¹
31. Members can "**Check In**" to a physical location on the Facebook Website by clicking a Check In control widget button. This will create a Story which reveals the Member's physical location to their Facebook Friends.²²
32. Members can also interact with "**Apps**", software packages developed by third parties that are accessible through the Facebook Website. There are a wide variety of Apps that serve a number of purposes, from playing games with

¹⁸ Notice of Civil Claim at Part 1, para 18 – CR Vol 3, Tab 16; Squires Affidavit at para 51 – CR Vol 1, Tab 6.

¹⁹ Affidavit #1 of Petre Capota, affirmed July 5, 2012 ("Capota Affidavit") at para 8 – CR Vol 1, Tab 5.

²⁰ Squires Affidavit at para 41 – CR Vol 1, Tab 6.

²¹ Squires Affidavit at para 39 – CR Vol 1, Tab 6.

²² Squires Affidavit at paras 53-54 – CR Vol 1, Tab 6.

Facebook Friends to streaming music. When a Member interacts with or uses an App, a Story may be created detailing the Member's use of that App.²³

33. Members can post "**Events**" (a meeting, party, gathering, etc.) to the Facebook Website, and then invite other Members to attend those Events. Members can respond by clicking "**RSVP**" if they plan to attend the Event. RSVPing to an Event can create a Story.²⁴
34. Members receive a constantly updated stream of Stories from their Facebook Friends and from Pages to which they subscribe. These updates appear within a "**News Feed**" which is by default the first page a Member is presented with upon logging into the Facebook Website. The News Feed displays Stories that Facebook has determined are relevant to that particular Member based upon its own algorithms.²⁵ Stories are also displayed in the "**Ticker**", a rapidly scrolling list of Stories that appears in a narrow column to the right of the News Feed. The Ticker displays Stories in close to real time as they are generated.²⁶
35. Because of the dynamic nature of the News Feed and the transient nature of the Ticker, not every Story will be seen by every other Member who could have seen the Story. A Story may have scrolled off the Ticker before it is viewed, or the algorithm which determines Stories to be featured in the News Feed may never place the Story in the Member's News Feed. According to one article, only about 12% of a Member's Facebook Friends will see any given Story about a Social Action such as clicking the Like Button.²⁷
36. It is important to keep in mind that a Member's consent is only required in relation to use of the Member's name or portrait "for the purpose of advertising or promoting the sale of, or other trading in, property or services" (*per* section 3 of the *Privacy Act*). A Member's Social Actions may cause his or her name or

²³ Squires Affidavit at paras 55-56 and Exhibit D – CR Vol 1, Tab 6.

²⁴ Tucker Affidavit at para 36 – CR Vol 1, Tab 7.

²⁵ Squires Affidavit at paras 21-22 and Exhibit G – CR Vol 1, Tab 6; Unrau Affidavit at Exhibit H – CR Vol 2, Tab 12.

²⁶ Squires Affidavit at para 18 – CR Vol 1, Tab 6.

²⁷ Unrau Affidavit at Exhibit H – CR Vol 2, Tab 12.

portrait to be displayed in non-advertising uses that are not challenged by the Plaintiff.

37. The Plaintiff's complaint relates only to instances in which Facebook has been paid by advertisers to display the Member's name or portrait for the purpose of advertising or promoting the sale of, or other trading in, an advertiser's property or services without the consent of the Member.
38. Particularly, the Plaintiff's complaint focuses on Facebook's Sponsored Stories advertising campaign, which "co-opts"²⁸ the power of a Member's social network to create targeted advertisements featuring the subject Member's name or portrait, without the Member's consent.

Facebook advertising

39. As a for-profit entity, Facebook seeks to harness the Facebook Website in order to generate revenue for itself. It does so, at least in part, through the sale of three kinds of advertising:
 - (a) Display advertising. Display advertising is traditional internet advertising, typically displaying "advertiser creative", which is an industry term for the advertiser's chosen text or image.²⁹
 - (b) "**Social Ads**". Social Ads pair a Member's Social Action, name, and portrait with "advertiser creative."³⁰ Facebook allows Members to opt out of having their names and portraits appear in Social Ads.³¹
 - (c) Sponsored Stories, which we detail below.

²⁸ Facebook's deponent, Dr. Tucker, explains in her paper "Social Advertising", that social advertising "represents a radical technological development for advertisers, because it means that potentially they can co-opt the power of an individual's social network to target advertising and engage their audience." See Unrau Affidavit, Exhibit D, p 90 – CR Vol 2, Tab 12.

²⁹ Squires Affidavit at para 64, Figure 29 – CR Vol 1, Tab 6.

³⁰ Squires Affidavit at paras 63 and 65, Figure 30 – CR Vol 1, Tab 6.

³¹ Squires Affidavit at para 67 – CR Vol 1, Tab 6.

40. Facebook displays advertisements, including Social Ads and Sponsored Stories, in many places on the Facebook Website. Social Ads and Sponsored Stories appear in Members' News Feeds in the same manner as Stories from their Facebook Friends. But unlike typical Stories, the advertisements also appear in a static position in a bar on the right-hand side of the Facebook Website.³² Advertisements are also shown on Members' News Feeds when they access the Facebook Website through their mobile devices, or on the Facebook Website's "logout" screen. Examples of Facebook advertising placements are depicted below:³³



³² Affidavit #2 of Greg McMullen, affirmed April 23, 2013 (“McMullen Affidavit #2”) at Exhibit C – CR Vol 2, Tab 11; Squires Affidavit at para 20 (Figures 5 and 6 – Example of Right-Hand Side), 64 (Figure 29 – Facebook Ads), para 66 (Figure 30 – Social Ads), para 73 (Figure 32 – Examples of Sponsored Stories) – CR Vol 2, Tab 11.

³³ McMullen Affidavit #2 at Exhibit C – CR Vol 2, Tab 10.

Social Ads and Sponsored Stories

41. Facebook launched its Sponsored Stories advertising program in January 2011.³⁴ That same month, a news report quoted one of its executives claiming Facebook had achieved “*the Holy Grail of marketing: making your customers your marketers.*”³⁵ A research paper published in 2012 by Facebook’s deponent, Dr. Catherine Tucker, offers support for that statement. Dr. Tucker studied “social ads” and concluded that such advertisements are more effective than other forms of internet advertising:³⁶

[...] A social ad is an online ad that [...] displays [certain user] interactions along with the user’s personal (picture and/or name) within the ad content’ [citation omitted]. This represents a radical technological development for advertisers, because it means that potentially they can co-opt the power of an individual’s social network to target advertising and engage their audience.

[...]

[...] This field experiment compared the performance of social ads [which display a user’s personal (picture or name) within the ad content] with conventionally targeted and untargeted ads. The social ads were targeted to the friends of ‘fans’ of [a] charity on Facebook. The ads featured that fan’s name and the fact that they had become a fan of this charity. We find that on average these social ads were more effective than demographically targeted or untargeted ads. Further, this technique is useful for improving both the performance of demographically targeted and untargeted campaigns. [...] We present results that suggest that as well as being more effective at gathering clicks, social advertising is also more effective at promoting actual subscription to the newsfeed and is more cost effective.

42. Facebook rebroadcasts Stories connected to Social Actions taken by Members as paid “**Sponsored Stories**” advertising.³⁷ All of the Social Actions described above – clicking the Like Button associated with a Story or Page, sharing a link to a website, RSVPing to an Event, Checking In, and so on – can result in a

³⁴ Notice of Civil Claim at Part 1, para 25 – CR Vol 3, Tab 16; Squires Affidavit at para 70 – CR Vol 1, Tab 6.

³⁵ McMullen Affidavit #1 at para 17, Exhibit D – CR Vol 1, Tab 4.

³⁶ Unrau Affidavit at Exhibit D, pp 90 to 91 – CR Vol 2, Tab 12.

³⁷ Squires Affidavit at para 71 – CR Vol 1, Tab 6.

Sponsored Story.³⁸ In other words, Facebook co-opts the Member's Social Actions for use in advertisements. When a Member engages in a Social Action, Facebook gives the benefit of the Member's name or portrait to the paying advertiser by creating a Sponsored Story advertisement for the advertiser.

43. A Sponsored Story is substantially the same as a Social Ad. It typically pairs an advertiser's Profile Picture (such as the advertiser's logo) with a Member's Social Action, name, and portrait. The only purported difference between a Social Ad and a Sponsored Story is the Sponsored Story's use of the advertiser's Profile Picture from the advertiser's Page, rather than "advertiser creative" designed specifically for the subject advertisement.³⁹
44. This is a distinction without a difference. In some cases (as seen in the illustration below), Sponsored Stories include "Body Copy" text, photos, or even video from the advertiser, all of which is indistinguishable from advertiser creative.⁴⁰ Furthermore, the advertiser creates its own Profile Picture for incorporation in the Sponsored Story advertisement. Facebook encourages advertisers to design their Page, including their Page's Profile Picture, "to effectively express your brand identity" when displayed in advertisements, including Sponsored Stories advertisements.⁴¹

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³⁸ Tucker Affidavit at para 36 – CR Vol 1, Tab 7.

³⁹ Squires Affidavit at para 72 – CR Vol 1, Tab 6.

⁴⁰ McMullen Affidavit #2 at Exhibit A, p 3 – CR Vol 2, Tab 10.

⁴¹ McMullen Affidavit #2 at Exhibit C – CR Vol 2, Tab 10.

45. Examples of a three Sponsored Stories and two Social Ads are depicted below:

Sponsored Stories ⁴²	Social Ads ⁴³
<p>“Page Like Sponsored Story”</p> 	<p>Democrats</p> 
<p>“Event RSVP Sponsored Story”</p> 	<p>Destination Wedding</p> 
<p>“Page Post (Video)”</p> 	

⁴² McMullen Affidavit #2 at Exhibit A, pp 3, 5 and 6 – CR Vol 2, Tab 10.

⁴³ Squires Affidavit at para 66 (Figure 30 – Social Ads) – CR Vol 1, Tab 6. Black boxes conceal names of Members.

46. In its own “Premium and Marketplace Products” materials, Facebook makes no distinction between what it terms “premium ads” and Sponsored Stories, except that a Sponsored Stories advertisement appears in place of a premium ad if the Member the advertisement will be displayed to has a Facebook Friend who has interacted with the advertiser’s Page (Facebook calls such interacting Members “Fans” of the particular advertiser). As Facebook explains: ⁴⁴

Premium ads and sponsored stories from Page posts put your Page’s voice in the most prominent placements on Facebook, on the homepage. A user not connected to your business will see an **ad**, which appears on the right-hand side of their homepage and gives them the option to like your page. Fans of your business or their friends see a **sponsored story**, which appears either on the right-hand side or in the news feed (on both desktop and mobile) and gives them the option to like the Page (if they are a friend of a fan) or like and comment (if they’re a fan) on the Page post. When they appear on the right hand side, sponsored stories expand to show a friend’s profile photo and names of friends connected to your brand alongside your message, all in one. This social context appears at no additional cost to you.

[...]

Your stories are most effective when they start from Page posts. Marketplace ads and sponsored stories from Page posts can appear anywhere on Facebook. A user not connected to your business will see an **ad**, which gives them the option to like your page. Fans of your business or their friends see a **sponsored story**. Friends of fan are also given the option to like the Page.

47. Facebook emphasizes to its advertising customers that Members’ names and portraits will “always” appear in Sponsored Stories in connection with the “*voice of a friend*”. As Facebook explains:

Premium sponsored stories also include stories shown to users about their friend’s interaction with your brand on Facebook. These “voice of friend” sponsored stories also put your brand in the most prominent placements on Facebook, on the right-hand side of the

⁴⁴ McMullen Affidavit #2 at Exhibit A, pp 3 and 8 (pp 2 and 7 in Exhibit A) [emphasis in original] – CR Vol 2, Tab 10.

homepage or in news feed (on both desktop and mobile). These stories **always** show the friend's profile photo and name.⁴⁵

48. Mr. Squires attempts to characterize the appearance of a Sponsored Story as a direct result of actions taken by Members, arguing that "*it is the User's Liking that generates the Sponsored Story*".⁴⁶ In fact, this is not the case. Sponsored Stories advertisements are not triggered simply by a Member clicking the Like Button or taking another Social Action. Facebook only creates, displays, and rebroadcasts Sponsored Stories advertisements when "[a]n advertiser has paid to show the activity as a sponsored story".⁴⁷ It is Facebook's own software algorithms that result in the appearance of a Class Member in a Sponsored Story advertisement upon Facebook receiving payment from the advertiser.
49. The Facebook Website does not enable Members to determine whether their names or portraits have been used in a Sponsored Story advertisement because the Sponsored Story is not displayed to the Member featured in the Sponsored Story.⁴⁸ Thus, while the Member will know they engaged in a Social Action, they do not know their name or portrait have been used in a paid advertisement. Facebook does not take any steps to alert the Member before or after using the Member's name or portrait in a Sponsored Stories advertisement. Furthermore, Social Actions taken by Members long in the past could re-appear as a Sponsored Story in the future if the advertiser pays Facebook to create a Sponsored Story advertisement, with no further actions taken by the Member.
50. For this reason the Plaintiff was unaware that her name and portrait had been used in Sponsored Stories advertisements until she was informed by a Facebook Friend that a Sponsored Story advertisement featuring her name and portrait had been displayed in that Friend's Page. Similarly, Mr. Capota learned

⁴⁵ McMullen Affidavit #2 at Exhibit A, p 5 (p 4 within Exhibit A) [emphasis in original] – CR Vol 2, Tab 10.

⁴⁶ Squires Affidavit at para 74 – CR Vol 1, Tab 6.

⁴⁷ Squires Affidavit at Exhibit A, p 3 [emphasis added] – CR Vol 1, Tab 6.

⁴⁸ Absent being informed by a Facebook Friend. See Notice of Civil Claim at Part 1, paras 35-37 – CR Vol 3, Tab 16; Affidavit #1 of Deborah Douez, affirmed July 3, 2012 ("Douez Affidavit") at para 11 – CR Vol 1, Tab 3.

he had appeared in a Sponsored Story advertisement only after his wife told him he had appeared in an advertisement displayed to her through her own Facebook Page.⁴⁹

51. Given the above, Sponsored Stories advertisements differ from links Facebook facilitates between Members and commercial entities.⁵⁰ While from the Member's point of view Social Actions are the Member's means of communicating with or about commercial entities, Sponsored Stories are advertisements delivered by Facebook for the commercial use of paying customers. To accomplish the advertisers' purposes, Facebook displays Members' names or portraits prominently and repeatedly to other Members, all without disclosing to the Member appearing in the advertisement the fact that their name or portrait has appeared in a Sponsored Story advertisement.

52. Facebook seeks to render its Sponsored Stories advertisements in a manner that seeks to avoid having these advertisements appear to be too obviously commercial.⁵¹ Facebook's own research indicates [REDACTED]

[REDACTED]⁵²

[REDACTED]

53. The author of the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵³

⁴⁹ Douez Affidavit at paras 5-8 and 12 – CR Vol 1, Tab 3; Capota Affidavit at para 10 – CR Vol 1, Tab 5.

⁵⁰ Dr. Tucker discusses Facebook Pages in the Tucker Affidavit at para 19 – CR Vol 1, Tab 7.

⁵¹ See Dr. Tucker's paper, "Social Advertising", Unrau Affidavit at Exhibit D, p 93 – CR Vol 2, Tab 12: "[...] This [paper] is, to our knowledge, the first piece of empirical support for emerging managerial theories that emphasize the need for firms to not appear too obviously commercial when exploiting social media."

⁵² Squires Affidavit at Exhibit J, p 42 – CR Vol 1, Tab 6.

⁵³ Squires Affidavit at Exhibit J, p 43 – CR Vol 1, Tab 6.



Members have no control over use in Sponsored Stories

54. Mr. Solanki and Mr. Squires say that in registering for Facebook, Members agree to the Facebook Statement of Rights and Responsibilities (the “**Statement**”).⁵⁴ Facebook will likely argue that the Statement constitutes consent for Facebook to use Members’ names and portraits in advertising.
55. The Plaintiff says that neither she nor the Class Members consented to Facebook’s use of their names and portraits in Sponsored Stories advertising, by way of the Statement or otherwise.⁵⁵
56. The Statement referenced by Mr. Solanki and Mr. Squires has been amended over the years. The current version of the Statement contains the following language respecting advertising:⁵⁶

10. About Advertisements and Other Commercial Content Served or Enhanced by Facebook

Our goal is to deliver ads and commercial content that are valuable to our users and advertisers. In order to help us do that, you agree to the following:

1. You can use your privacy settings to limit how your name and profile picture may be associated with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. You give us permission to use your name and profile picture in connection with that content, subject to the limits you place.
2. We do not give your content or information to advertisers without your consent.
3. You understand that we may not always identify paid services and communications as such.

⁵⁴ Squires Affidavit at para 6 - CR Vol 1, Tab 6; Affidavit #2 of Sandeep N. Solanki (“Solanki Affidavit”) at para 3 and Exhibit G - CR Vol 2, Tab 8.

⁵⁵ Notice of Civil Claim at Part 1, paras 39, 41, and 45 – CR Vol 3, Tab 16; Douez Affidavit at para 9 – CR Vol 1, Tab 3; Capota Affidavit at para 12 – CR Vol 1, Tab 5.

⁵⁶ Solanki Affidavit at Exhibit G, p 58 – CR Vol 2, Tab 8.

57. Since introducing Social Ads featuring Members' names or portraits in connection with advertisements, Facebook has allowed Members to completely opt out of Facebook's use of their names and portraits in Social Ads. Users are able to opt out by visiting their Social Ads privacy settings (the "**Ad Settings**") within the Facebook Website and choosing to "*Pair my social actions with ads for 'No one'*".⁵⁷ Clicking on the words "privacy settings" in the Statement takes a Member to the Ad Settings page.⁵⁸
58. Despite the fact that Sponsored Stories advertisements are essentially the same as the Social Ads already offered by Facebook, and despite the language in the Statement at clause 10(1) (see above), Facebook does not enable Members to opt out of or limit Facebook's use of their names or portraits in Sponsored Stories.⁵⁹
59. Pursuant to the Statement at clause 10(2), Facebook tells Members that it will not give their "content or information to advertisers" without first obtaining their consent. Members are therefore led to believe that if Facebook wants to give to an advertiser the benefit of a Member's name or portrait, Facebook will first seek the Member's consent. Yet to the Plaintiff's knowledge, Facebook never seeks Member's consent before creating Sponsored Stories advertisements, which are bought and paid for by advertisers and then displayed by Facebook. Thus, the Plaintiff says Facebook gives its advertising customers the beneficial use of Members' content or information – names or portraits – through the vehicle of Sponsored Story advertisements, without first obtaining Member's consent.
60. Despite the fact that the Statement does not advise Members that clicking the Like Button or performing other Social Actions provides consent to use in advertising, Dr. Tucker argues that Members demonstrate their consent to Facebook's use of their names or portraits in Sponsored Stories advertisements

⁵⁷ Squires Affidavit at para 67 – CR Vol 1, Tab 6.

⁵⁸ Unrau Affidavit at para 11 and Exhibit I – CR Vol 2, Tab 12.

⁵⁹ Squires Affidavit at Exhibit A, p 3 – CR Vol 1, Tab 6.

when they engage in whatever Social Actions Facebook deems eligible for rebroadcast as Sponsored Stories advertisements.⁶⁰ This misses the point. A person may like a service or product (in the real sense of the word), but clearly this does not mean they consent to use of their names and portraits in paid advertising.

61. The absurdity of the argument may be demonstrated by a real world social action. Imagine a woman attending a real world party. When asked what she would like to drink, she loudly replies, "I like 22 Oaks Winery." The other partygoers hear her, and then continue with their own conversations, etc. Another partygoer records her statement. He then moves about the room replaying the woman's "like" repeatedly to promote 22 Oaks Winery. The winery pays the broadcaster each time the recording is played. This behavior is clearly advertising in violation of the *Privacy Act*. Making the initial statement "I like 22 Oaks Winery", however loudly, does not constitute the partygoer's consent to record and reuse her statement in advertising.

Explaining Social Ads and Sponsored Stories advertisements to Members

62. To add to the confusion, the Statement, the Ad Settings page, and the Facebook Data Use Policy do not inform Members that they cannot opt out of Facebook's use of their names and portraits in Sponsored Stories advertisements.
63. Rather, Facebook at best hints at this by using ambiguous and complicated language that requires a deep understanding of Facebook's services and terminology to decipher, and by posting information in counterintuitive or unlikely locations on the Facebook Website.
64. For example, the following text appears on the Ad Settings page that allows users to choose to have their Social Actions, names, and portraits displayed in ads to "No one":

⁶⁰ See for example Tucker Affidavit at paras 7, 8, 54, 58, and 59 – CR Vol 1, Tab 7.

This setting only applies to ads that we pair with news about social actions. So independent of this setting, you may still see social actions in other contexts, like in Sponsored Stories or paired with messages from Facebook. You can learn more about how social ads, Sponsored Stories, and messages from Facebook work in the Help Center.⁶¹

65. Members are not required to view the Ad Settings page when signing up for Membership, or before engaging in Social Actions that Facebook might later use to create Sponsored Stories advertisements for its advertising customers.
66. Mr. Squires says Facebook added the above noted Ad Settings language in January 2011 to “*make it clear that [the choice to have Social Actions displayed to “No one” as Social Ads] did not apply to other types of sponsored and non-sponsored content on the site.*”⁶²
67. In fact, a plain reading of the above excerpt fails to make clear that a Member’s selection of “*No one*” will *not* preclude Facebook from using Member’s name or portrait in Sponsored Story advertisements. It simply states that “*you may still see social actions in other contexts*” [emphasis added], suggesting that the Member will still see advertising on the Facebook Website, not that the Member’s Social Actions may be displayed to other Members in Sponsored Stories advertising. This is particularly confusing because, as discussed earlier, Facebook prevents Members from seeing Sponsored Stories advertisements featuring their own names or portraits.
68. Leaving aside the notion that “consent” requires a positive affirmation by the Member, and the additional question of whether consent can even be obtained from the numerous minor Class Members, Members cannot exercise their purported right to “limit” their appearance in Sponsored Stories except by abstaining from activity deemed to be a Social Action by Facebook.
69. As described by Mr. Squires in his affidavit, Members may reduce the size of the audience of Sponsored Stories advertising featuring the Member by

⁶¹ Squires Affidavit at para 68, Figure 31 – CR Vol 1, Tab 6.

⁶² Squires Affidavit at para 67 – CR Vol 1, Tab 6.

navigating through a maze of counterintuitive privacy settings that are frequently modified by Facebook.⁶³ However, these settings do not limit how a Member's name or portrait can be used in advertising, only the audience of persons to whom the advertisement may be displayed.

70. And of course, because Facebook fails to notify the Members when they are featured in Sponsored Stories advertisements it becomes virtually impossible for Members to identify which of their Social Actions have been transformed by Facebook into Sponsored Stories advertisements, let alone limit the audience for the Social Actions that have been used for Sponsored Stories advertisements or delete those Social Actions entirely.⁶⁴
71. Facebook further confuses the issue through its definitions of Social Ads (which allow opt outs) and Sponsored Stories advertisements (which do not allow opt outs). The confusing definitions are found in the Facebook Help Center, which Members are not taken to during the signup process, and which is not even mentioned in the Statement.
72. The Help Center mischaracterizes Sponsored Stories advertisements as "*messages coming from friends*" and suggests that advertisers have simply "*paid to highlight*" Sponsored Stories advertisements or to have the Sponsored Story "*[shown] more prominently*" as opposed to rebroadcasting the Sponsored Story advertisement repeatedly. Only in the context of this mischaracterization does Facebook acknowledge that Members cannot opt out of use in Sponsored Stories advertising. Yet in the same breath Facebook claims the Member can somehow utilize their "activity log" to limit persons who may see a Sponsored Story advertisement based on any particular Social Action. This claim is asserted even though, as emphasized earlier, the Member is unable to know whether any particular Social Action has been or will be used by Facebook to

⁶³ Squires Affidavit at paras 76-84 – CR Vol 1, Tab 6; See also Unrau Affidavit at Exhibit J – CR Vol 2, Tab 12.

⁶⁴ See for example Douez Affidavit at paras 11-12 – CR Vol 1, Tab 3.

create a Sponsored Story advertisement. The section of the Help Center provides as follows:

What are Sponsored Stories?

Sponsored stories are messages coming from friends about them engaging with a Page, app or event that a business, organization or individual has paid to highlight so there's a better chance people see them.

[...]

Why am I seeing Sponsored Stories?

When your friends interact with Pages on Facebook (ex: they like a Page or Check In to a business) you may see stories about their activity in News Feed. Sponsored Stories are the same, except that a business or organization has paid to show the stories more prominently by displaying them higher in the News Feed or on the right-hand side of Facebook.

Who can see Sponsored Stories about me?

Sponsored Stories respect your privacy settings. This means only the people you're already sharing your activity with on Facebook can see Sponsored Stories about you.

For example, this is a possible Sponsored Stories for Jane whose privacy settings allowed her friends to see News Feed stories about Pages she likes.

- Jane likes the Starbucks Page.

Jane's friend John can see a story about Jane liking the Starbucks Page in his News Feed or as a Sponsored Story.

You can't opt out of being featured in Sponsored Stories, but you can visit your activity log to make sure that only the people you want to share with can see your activity.

How are Sponsored Stories different from Facebook Ads?

Sponsored Stories are messages from your friends about them engaging with Pages, apps, or websites on Facebook – stories that are already eligible to be in your News Feed. An advertiser has paid to show the activity as a sponsored story so there's a better chance you will see it.⁶⁵

73. To access this language on the Facebook Help Center website, a Member must click the top level heading "Manage Your Account" and then click the sub-

⁶⁵ Squires Affidavit at Exhibit A, p 2 [underline added, bold in original] – CR Vol 1, Tab 6.

heading “Interacting With Ads”, and then click any of the listed questions to view the response.⁶⁶ Similar information was previously located in the Facebook Help Center under the “Build Your Brand With Facebook Pages” subheading of the “Ads and Business Solutions” top level heading.⁶⁷

74. It is notable that while information about Facebook’s use of Members in Sponsored Stories advertising is located under a heading titled “Manage Your Account”, described above, the primary Facebook Help Center page has other top level headings labelled “Ads & Sponsored Stories” and “Privacy”.⁶⁸ Clicking the top level heading “Ads & Sponsored Stories” displays information intended for advertisers rather than information on how Members can be used in Sponsored Stories advertising.⁶⁹
75. As with the Ad Settings page, it is unnecessary to review the Help Center documents before signing up as a Member, or to engage in Social Actions that could be rebroadcast as a Sponsored Story advertisement.
76. Similarly opaque and misleading language is found in the Facebook Data Use Policy. In one section, Facebook details “Ads + social context”, explaining how “*Facebook Ads are sometimes paired with social actions*” and provides information on the opt out tool located on the Ad Settings page. In the subsequent section, the Data Use Policy explains that “*there’s a lot to read in News Feed. That’s why we allow people to ‘sponsor’ your stories to make sure your friends and subscribers see them*”, and states that such content will “*appear in the same place ads usually do or in your News Feed under the heading ‘Sponsored’ or something similar*”.⁷⁰ The Data Use Policy does not reveal that Sponsored Stories are in fact paid advertisements, that controls on the Ad Settings page do not apply to Sponsored Stories, and that Members cannot opt out of Sponsored Stories at all.

⁶⁶ Unrau Affidavit at paras 13 and 16-17, and Exhibits K, N, and O – CR Vol 2, Tab 12.

⁶⁷ McMullen Affidavit #2 at para 6 and Exhibit D – CR Vol 2, Tab 10.

⁶⁸ Unrau Affidavit at Exhibit K – CR Vol 2, Tab 12.

⁶⁹ Unrau Affidavit at para 14 and Exhibit L – CR Vol 2, Tab 12.

⁷⁰ Squires Affidavit at Exhibit H1, p 30 – CR Vol 1, Tab 6.

77. One of Facebook's deponents, Dr. Catherine Tucker, suggests that the numerous news reports discussing Sponsored Stories advertising can be understood to mean that Members were aware that Facebook intended to use their names, portraits, and Social Actions in Sponsored Stories advertisements.⁷¹
78. This conclusion is not supported by the evidence. Rather, if anything the news reports tendered as exhibits by Facebook reveal widespread confusion concerning Sponsored Stories advertisements and Members' ability (or inability) to opt out of being used in advertising. For example, one comment left in response to the CBC News article attached to the Affidavit of Katherine Mulherin erroneously claims that "*it takes mere seconds to opt out of being in a facebook ad*".⁷²
79. Comments attributed to individuals described as "social media experts" in stories concerning this very Action fail to appreciate that Members cannot opt out being featured in Sponsored Stories advertising, and use the terms "Social Ads" and "Sponsored Stories" interchangeably. For example, in a blog post attributed to Dave Teixeira, host of a technology and media program on the talk radio station CFX, Mr. Teixeira wrote that it is possible to opt out of being used by Facebook in any and all advertising by following the Social Ads opt out procedure set out above. Mr. Teixeira wrote that he made comments to the same effect on his radio program. The same mistake is made by "Social Media Expert" Tod Maffin in the CBC News story embedded in the post on Mr. Teixeira's blog, asserting "*you can even opt out of those Social Ads, as they call them, if you want to.*"⁷³
80. Even Facebook's own purported expert, Dr. Tucker, made no distinction between Social Ads and Sponsored Stories advertisement in a paper she wrote titled "Social Advertising", written by her over one year after Facebook launched

⁷¹ Tucker Affidavit at para 49 – CR Vol 1, Tab 7.

⁷² See for example the Affidavit of Katherine Mulherin, sworn March 26, 2013 ("Mulherin Affidavit") at Exhibit A, p 3 (comment attributed to "jane johnson") – CR Vol 2, Tab 10.

⁷³ Mulherin Affidavit at Exhibit G, p 2/4 – CR Vol 2, Tab 10.

Sponsored Stories advertisements. In her paper, Dr. Tucker claims Members are able to “[select] a privacy setting which restricts the use of their image and name. The interface which users use to do this is displayed [in a depicted table]; all users do is simply select the ‘No One’ rather than the ‘Only my friends’ option.”⁷⁴ Dr. Tucker neglects to point out this setting applies to Social Ads but not to Sponsored Stories Advertising.

The Plaintiff and Class Members

81. Facebook used approximately 1.8 million British Columbia resident Members in Sponsored Stories advertisements between September 9, 2012, and March 10, 2013.⁷⁵ Facebook has not disclosed the total number of British Columbia residents used in its Sponsored Stories advertisements since the January 2011 launch of the Sponsored Stories advertising program.

82. According to Facebook, the Plaintiff’s name or portrait has been used in numerous Sponsored Stories advertisements, including Sponsored Stories advertisements for companies, products, and services such as [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁷⁶ By filing this Action the Plaintiff clearly objected to Facebook’s conduct in giving her name and portrait to advertisers by preparing Sponsored Stories advertisements for those advertisers’ marketing purposes. Yet despite her objections, Facebook continued to use the Plaintiff’s name and portrait in Sponsored Stories advertisements until at least as recently as March 10, 2013.⁷⁷

⁷⁴ Unrau Affidavit at Exhibit D, p 102 – CR Vol 2, Tab 12.

⁷⁵ Affidavit #1 of Christopher Plambeck, sworn March 26, 2013 (“Plambeck Affidavit”) at para 10 – CR Vol 2, Tab 9.

⁷⁶ Plambeck Affidavit at para 24 – CR Vol 2, Tab 9.

⁷⁷ Plambeck Affidavit at para 24 – CR Vol 2, Tab 9.

83. Facebook utilized Mr. Capota's name and portrait in at least one Sponsored Story advertisement.⁷⁸ Mr. Capota supports certification of this action as a class proceeding.
84. Counsel for the Plaintiff has maintained a list of other individuals who have contacted them asking to be included as Class Members.
85. Facebook allows individuals aged 13 and older to become Members.⁷⁹ The Class will therefore include both adults (18 years of age and older) and infants (17 years of age and younger).

PART 4 – CERTIFICATION

General principles

86. Applications for certification are governed by section 4(1) of the *CPA*, which requires certification if the following certification requirements are met:⁸⁰
 - (a) the pleadings disclose a cause of action;
 - (b) there is an identifiable class of two or more persons;
 - (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
 - (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
 - (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class;
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on

⁷⁸ Capota Affidavit at para 10 – CR Vol 1, Tab 5.

⁷⁹ Squires Affidavit at para 8 – CR Vol 1, Tab 6; Solanki Affidavit at Exhibit G, p 56, s 4(5) – CR Vol 2, Tab 8.

⁸⁰ *CPA* at [s 4\(1\)](#) – CA Vol 4, Tab 97; See also [Pro-Sys v Infineon, 2009 BCCA 503](#) (“*DRAM Appeal*”) at [para 28](#) – CA Vol 3, Tab 74.

behalf of the class and of notifying class members of the proceeding; and

- (iii) does not have, on the common issues, and interest that is in conflict with the interests of the other class members.

87. The proper approach to be taken by the court is summarized by the BC Court of Appeal in the *DRAM Appeal*:⁸¹

- (a) The *CPA* should be construed generously in order to achieve its objects: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby making economical the prosecution of otherwise unaffordable claims); and behaviour modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation).
- (b) The certification hearing does not involve an assessment of the merits of the claim. Rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding. The central question is: “Can the claims be appropriately prosecuted as a class proceeding?”⁸² The burden is on the plaintiff to show “some basis in fact” for each of the certification requirements, other than the requirement that the pleading disclose a cause of action. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one – it requires only a “minimum evidentiary basis”.

⁸¹ *DRAM Appeal*, *supra*, at [paras 64-65](#) – CA Vol 3, Tab 74; see also [Jones v Zimmer, 2013 BCCA 21](#) at [para 5](#) – CA Vol 2, Tab 49.

⁸² [Hollick v Toronto \(City\), 2001 SCC 68](#) (“*Hollick*”) at [para 16](#) – CA Vol 2, Tab 45.

(c) On a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

88. Another useful summary of the approach is described by the B.C. Court of Appeal in *Knight v Imperial Tobacco Canada Limited*, as follows:⁸³

[20] . . . class proceedings legislation ought to be construed generously. Class actions serve judicial economy by avoiding unnecessary duplication in a multiplicity of actions, improve access to justice and serve to modify wrongful behaviour. It is necessary that the statement of claim disclose a cause of action, but the certification stage is not a test of the merits of the action. What the certification stage focuses on is the form of the action. The key question is whether the suit or portions of it are appropriate for the trial of common issues.

89. Even if common issues contain elements of novelty and difficulty, they should be “left to be worked out in the laboratory of the trial court”. This warning against delving too far into the merits at the certification stage is particularly important in British Columbia because of the limits on pre-certification discovery. The Court must be careful not to prejudge the issues before giving the Plaintiff a chance to prove her case after full discovery. Any other approach is procedurally unfair and violates the underlying purposes of the *CPA*.⁸⁴

90. The role of evidence at the certification hearing is confined to a burden on the plaintiff to adduce “some” evidence in support of each of the requirements of certification under section 4 of the *CPA* (with the notable except section 4(1)(a), which involves no evidence).⁸⁵

⁸³ [Knight v Imperial Tobacco Canada Limited, 2006 BCCA 235](#) (“*Knight*”) at [para 20](#) – CA Vol 2, Tab 53.

⁸⁴ *Knight*, *supra* at [paras 20, 37](#) and [40](#) – CA Vol 2, Tab 53; *DRAM Appeal*, *supra* at [paras 65-68](#) – CA Vol 3, Tab 74; [Steele v Toyota Canada Inc, 2011 BCCA 98](#) (“*Steele*”) at [paras 60-61](#) and [68-69](#) – CA Vol 4, Tab 87.

⁸⁵ [Stanway v Wyeth Canada Inc, 2012 BCCA 260](#) (“*Stanway*”) at [para 7](#) – CA Vol 4, Tab 86.

91. This burden reflects the fact that certification is a pre-discovery application that is intended to be the first step in the litigation. It produces an interlocutory procedural order that may be amended, varied, or set aside at any time.⁸⁶

The pleadings disclose a cause of action (section 4(1)(a) of the CPA)

92. Section 4(1)(a) mandates that the pleadings must disclose a cause of action.
93. Evidence is not to be considered in the section 4(1)(a) analysis. The question is purely whether the pleadings disclose a cause of action.
94. The Plaintiff must clear a very low threshold to show a cause of action.⁸⁷ The applicable test is described in the Supreme Court of Canada's decision in *Hunt v Carey Canada Inc.* In determining the issue, the court assumes the facts alleged in the notice of civil claim can be proved. With this assumption in mind, the court determines whether it is "plain and obvious" that the plaintiff's notice of civil claim fails to disclose a reasonable cause of action. As the Supreme Court of Canada explained in *Hunt* at p 980:⁸⁸

If there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect . . . should the relevant portions of a plaintiff's statement of claim be struck out. . . .

95. In this case, the Plaintiff relies upon a statutory cause of action set out in section 3(2) of the *Privacy Act*:

(2) It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

⁸⁶ CPA, *supra* at [ss 5\(7\)](#), [10\(1\)](#) and [10\(2\)](#) – CA Vol 4, Tab 97.

⁸⁷ [Endean v Canadian Red Cross Society, 1997 CanLII 2079](#) (BCSC) ("*Endean*") at [paras 26-27](#) – CA Vol 1, Tab 25.

⁸⁸ [Hunt v Carey Canada Inc. \[1990\] 2 SCR 959](#) at 980 – CA Vol 2, Tab 48.

96. The Plaintiff is not aware of any other class actions in Canada that have advanced claims under 3(2) of the *Privacy Act*, other similar provincial statutory provisions, or their common law equivalents. This must not prevent certification.
97. The claim in this case is not novel. It is premised upon a statutory cause of action.
98. However, class proceedings have not been utilized to advance such claims. The necessity of a class proceeding is particularly important in this case, which involves rapidly changing technology and the capacity for social network providers to exploit individuals' names or portraits in targeted advertising in a manner that was unavailable only a few years ago. This point is made by Dr. Tucker in her 2012 paper, "Social Advertising".⁸⁹
- [Social advertising] represents a radical technological development for advertisers, because it means that potentially they can co-opt the power of an individual's social network to target advertising and engage their audience.
99. The elements of this statutory cause of action are plainly covered in the Plaintiff's pleadings. As set out above, the Plaintiff alleges in her Notice of Civil Claim that:
- (a) Facebook has used her name or portrait, and those of the Class Members;
 - (b) The use was made for the purpose of advertising;
 - (c) The use occurred without her consent or the consent of the Class Members.
100. Additionally, the *Privacy Act* provides that a claim under section 3(2) is "actionable without proof of damage". In *Poirier v Wal-Mart Canada Corp*, the Court confirmed that this language means that to make out a claim under the

⁸⁹ Unrau Affidavit at Exhibit D, p 90 – CR Vol 2, Tab 12.

section: “[95] . . . it is not required that the plaintiff prove damages arising from the misappropriation of his identity and image for a commercial purpose”.⁹⁰

101. The Plaintiff has properly pled a recognized cause of action. It is not plain and obvious that the action will fail. Therefore the first element of the certification test is met.

There is an identifiable class of two or more persons (section 4(1)(b) of the CPA)

102. The Plaintiff seeks certification of the following class:

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

103. In this section of the test, the inquiry is limited to determining whether two or more people qualify within the proposed class definition, and whether the class has been defined by reference to objective criteria.⁹¹

104. The Plaintiff has proven the existence of two or more qualifying people. The evidence reveals Facebook’s use of at least 1.8 million Members in British Columbia in at least one Sponsored Story advertisement.⁹² Two people – the Plaintiff and Mr. Capota – have identified themselves as meeting the proposed class definition and sworn affidavits supporting the Certification Application.⁹³

105. The proposed class is defined by reference to plainly objective criteria that will identify Class Members: whether the Class Member is or was a Member and whether the person’s name, portrait, or both have been used by Facebook in a Sponsored Story advertisement.

106. The Plaintiff has clearly met the section 4(1)(b) requirement for certification.

⁹⁰ [Poirier v Wal-Mart Canada Corp, 2006 BCSC 1138](#) (“Poirier”) at [para 95](#) – CA Vol 3, Tab 72.

⁹¹ [Western Canadian Shopping Centres Inc v Dutton, 2001 SCC 46](#) at [para 38](#) – CA Vol 4, Tab 94; *Hollick, supra* at [para 17](#) – CA Vol 2, Tab 45.

⁹² Plambeck Affidavit at para 10 – CR Vol 2, Tab 9.

⁹³ Douez Affidavit at paras 5-6 and 25 – CR Vol 1, Tab 3; Capota Affidavit at paras 10 and 16-18 – CR Vol 1, Tab 5.

The claims raise common issues (section 4(1)(c) of the CPA)

107. A central component of the certification test is whether proceeding as a class action will avoid duplication of fact-finding or legal analysis. Two questions should be asked to determine whether issues are common.
- (a) Is it necessary to resolve the issue in order to resolve each class members' claim?
 - (b) Is the issue a substantial ingredient of each of the class members' claims?
108. The latter question is satisfied if resolution of a common issue (either for or against the class members) will advance the case or move the litigation forward, and is capable of extrapolation to all class members.⁹⁴ In *Cloud v Canada (Attorney General)* the Ontario Court of Appeal explained that the test represents a “low bar”, and that it can be met even if “after the trial of the common issue the many remaining aspects of liability and the question of damages would have to be decided individually.”⁹⁵ (Although the Plaintiff submits that in this case, such resolution will determine liability).
109. The Plaintiff proposes the list of common issues attached as **Schedule “A”** to this argument (the “**Common Issues**”). The Plaintiff submits that each of the Common Issues will advance the case and move the litigation forward, and that Class-wide answers to each of the common issues will be possible at the trial of the common issues.

Common Issue #1 - Liability

Did the Defendant commit the statutory tort set out in section 3(2) of the Privacy Act by featuring Class members' names or portraits in connection with its Sponsored Stories advertising program?

⁹⁴ [Harrington v Dow Corning Corp, 2000 BCCA 605](#) at [paras 20-24](#) – CA Vol 2, Tab 38. See also *Stanway, supra* at [paras 8](#) and [15-16](#) – CA Vol 4, Tab 86.

⁹⁵ [Cloud v Canada \(Attorney General\), 2004 CanLII 45444](#) (ONCA) at [para 52](#) – CA Vol 1, Tab 18.

110. Common Issue #1 addresses liability. It asks whether Facebook violated section 3(2) of the *Privacy Act* by using the Plaintiff's and Class Members' names and portraits in its Sponsored Stories advertisements without obtaining their consent.
111. Common Issue #1 involves two determinations applicable to the Plaintiff and across the Class:
 - (a) whether Sponsored Stories make use of the name or portrait of the Class Members for the purpose of advertising or promoting the sale of, or other trading in, property or services; and
 - (b) whether by joining and using the Facebook Website the Plaintiff and Class Members consented to Facebook's use of their names and portraits in Sponsored Stories.
112. The above issues are central to the claims advanced on behalf of the Plaintiff.⁹⁶ Determining any one of the questions will clearly advance the case and move the litigation forward.
113. The facts necessary to prove the Plaintiff's claims are the same facts necessary to prove all Class Members' claims. Facebook applies a systemic, uniform process to all Members: from the sign-up process through to mechanisms employed by Facebook to facilitate use of Members' names and portraits in Sponsored Stories advertising.
114. Resolving Common Issue #1 will determine liability in this action. A finding on Common Issue #1 will clearly advance the case and move the litigation forward.

Common Issue #2 - Remedies

If the Defendant committed the statutory tort referred to in Common Issue #1, then:

⁹⁶ Similarly, see *Knight, supra* at [para 26](#) – CA Vol 2, Tab 53, in which the court noted that determining whether the issue the defendant's conduct and whether the same amounted to deceptive practices was central to the plaintiff's claim.

- a. Is the Defendant liable to pay damages to the Class? If so, in what amount?***
- b. Does the Defendant's conduct justify an award of punitive damages in favour of the Class? If so, in what amount?***
- c. Is the Class entitled to damages assessed in the aggregate pursuant to section 29(1) of the Class Proceedings Act, RSBC 1996, c 50? If so, in what amount?***
- d. Is the Defendant liable to pay interest pursuant to the Court Order Interest Act, RSBC 1996, c 79? If so, in what amount?***
- e. Is the Class entitled to an Order enjoining the Defendant from future use of Class members' names or portraits to advertise or promote goods or services without Class members' express consent to such use?***

115. Common Issue #2 combines a number of questions involving remedies which will be answered if there is a finding of liability on Common Issue #1. Again, each of the sub-questions will advance the case and move the litigation forward.

Common Issue #2 (a)

116. **Common Issue #2 (a)** asks whether the Plaintiff and Class Members are entitled to damages if Common Issue #1 is answered in the affirmative. The availability of damages for a breach of section 3(2) of the *Privacy Act* is a question that can be answered in common for the entire Class.
117. As discussed below, Class Members' basic entitlement to an award does not require evidence from individual Class Members. It can be assessed through a review of Facebook's data and consideration of Facebook's conduct generally. This analysis can and should be performed once on a common basis for the entire Class.

Common Issue #2 (b)

118. **Common Issue #2 (b)** asks whether, if Common Issue #1 is answered in the affirmative, Facebook's conduct justifies an award of punitive damages.

119. The availability and quantum of punitive damages are regularly certified as common issues in British Columbia.⁹⁷
120. Class proceedings are “particularly well-suited for the hearing of a claim for punitive damages”.⁹⁸ As the B.C. Court of Appeal held in *Rumley v British Columbia*:⁹⁹

Any award for punitive damages should reflect the overall culpability of the defendant. It does not have to be linked to the harm caused to any particular claimant and does not require individualized assessment. A global award can be assessed for the successful class members as a group, and allocated among them as the trial judge considers appropriate.

121. As in *Chace* and *Rumley*, it is appropriate to treat the availability and quantum of punitive damages as a question properly answered at the trial of the common issues with the benefit of a full evidentiary record.¹⁰⁰

Common Issue #2 (c)

122. **Common Issue #2 (c)** asks whether damages or punitive damages payable to the Plaintiff or the Class can be assessed in the aggregate, pursuant to the aggregation provisions in section 29(1) of the CPA.
123. British Columbia courts routinely certify as common issues the availability and assessment of aggregate damages.¹⁰¹
124. The standard of proof in an aggregate damages assessment does not require “mathematical accuracy.” In providing the foundation for the CPA’s aggregate damages provisions the Ontario Law Reform Commission adopted the

⁹⁷ See for example [Jones v Zimmer GMBH, 2011 BCSC 1198](#), aff’d [2013 BCCA 21](#) – CA Vol 2, Tab 49; [Stanway v Wyeth Canada Inc, 2011 BCSC 1057](#), aff’d [2012 BCCA 260](#) – CA Vol 4, Tab 86.

⁹⁸ [Chace v Crane Canada Inc, 1997 CanLII 4058](#) (BCCA) (“Chace”) at [para 24](#) – CA Vol 1, Tab 14.

⁹⁹ [Rumley v British Columbia, 1999 BCCA 689](#) at [para 48](#); aff’d [2001 SCC 69](#) – CA Vol 4, Tab 80.

¹⁰⁰ *Chace*, supra at [para 27](#) – CA Vol 1, Tab 14.

¹⁰¹ *DRAM Appeal*, supra at [paras 34-35](#), and 64 – CA Vol 3, Tab 74; *Steele*, supra at [para 70-74](#) – CA Vol 4, Tab 87; *CPA*, supra at [ss 29-34](#) - CA Vol 4, Tab 97.

approach set out in *Story Parchment Co v Paterson Parchment Paper Co*, wherein the U.S. Supreme Court held as follows:¹⁰²

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts. In such cases, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. ...[T]he risk of uncertainty should be thrown upon the wrongdoer instead of the injured party.

125. In *Knight* the plaintiffs sought to certify a class of hundreds of thousands of purchasers of “light” or “mild” cigarettes from the defendant. The plaintiffs relied upon the aggregate damages provisions of the *CPA*.
126. The defendant sought to avoid certification under the aggregate damages provisions (section 29(1) of the *CPA*), arguing that each plaintiff would need to individually establish liability, including causation and damages, before section 29(1) could be applied. The B.C. Court of Appeal found in the plaintiff’s favour, as follows:¹⁰³

[40] Although there may be elements of novelty and difficulty with the proposed methodology of damages calculation advanced by the respondent, it seems to me that it is appropriate for this issue to be left to be worked out in the laboratory of the trial court. Then, if and when the issue reaches this Court, we will have the benefit of a full record upon which to assess the appropriateness of any damages award that may be made pursuant to the proposed methodology.

[41] I would be reluctant at this stage of this proceeding to foreclose the respondent from litigating this issue as he proposes before the trial court. Accordingly, I would afford deference to the decision of the learned chambers judge to permit this damages issue to be litigated as a common issue. I would not accede to the arguments advanced under this head by the appellants.

¹⁰² [Story Parchment Co v Paterson Parchment Paper Co, 282 US 555 \(1931\)](#) at 563, cited in Ontario LRC at 554-555 – CA Vol 4, Tab 88.

¹⁰³ *Knight*, *supra* at [paras 40-41](#) – CA Vol 2, Tab 53.

127. Aggregate damages have been certified as a common issue in cases requiring complex economic analysis of the effect of cartel agreements between conspirators or consideration of aggregate harm suffered by smokers as a result of reliance on cigarette advertising.¹⁰⁴ In contrast, an assessment of damages under the *Privacy Act* is straightforward and, *a fortiori*, well suited for an aggregate damages assessment.
128. Few cases have considered section 3(2) of the *Privacy Act*, but this Court recently offered guidance for the assessment of such damages in *Poirier v Wal-Mart Canada Corp.* In that case, Wal-Mart fired the manager of a new store shortly before the store was set to open. Nevertheless, Wal-Mart used the manager's personality in an advertisement for the new store, distributed by flyer to 29,000 homes in New Westminster.
129. After reviewing other cases awarding damages for misappropriation of personality or violations of section 3(2) of the *Privacy Act*, the Court set out the following factors to be considered in assessing damages:

[104] In fixing the quantum of damages for the defendant's violation of the plaintiff's privacy by the misappropriation of his identity and image in these unique circumstances I note the previous cases consider whether embarrassment, humiliation and distress was caused to the person whose privacy was violated, whether the actions of the responsible party were flagrant and callous, and the extent to which the responsible party gained a commercial advantage.

[105] In addition, the plaintiff's authorities, irrespective of the cause of action brought, reflect two prominent factors which influence the amount of damages awarded, being: (1) the injury to the plaintiff, the greater the injury the greater the damages; and (2) the nature of the defendant's conduct, the higher the degree of carelessness or callousness, the higher the damages. The cases reflect a range of damages from \$300 to \$35,000. In *Mazatti*, *Racine*, *Athans* and *Somosh*, the court essentially awarded nominal damages as result of there being little or no injury to the plaintiff. Conversely, in *P.R.C.*, *Hollinsworth* and *St. Pierre*, the plaintiffs were awarded much higher damages on account of considerable

¹⁰⁴ See for example *DRAM Appeal*, *supra* – CA Vol 3, Tab 74, *Steele*, *supra* at [paras 73-74](#) – CA Vol 4, Tab 87, and *Knight*, *supra* at [paras 37-41](#) – CA Vol 2, Tab 53.

injury to each of them in terms of humiliation and damage to their reputations and, very careless or callous behaviour on the part of the defendants.¹⁰⁵

130. At present, there is no evidence to show any Class Members suffering extraordinary humiliation, damage to reputation, or distress caused by the use of their name or portrait in Sponsored Stories advertisements, beyond damages common to the Class as a whole. As such, after the Plaintiff establishes that Facebook breached section 3(2) of the *Privacy Act*, the Court will be able to assess aggregate damages by focussing upon Facebook's conduct. The damages question will centre upon whether Facebook's conduct was flagrant and callous, and the degree of commercial advantage gained by Facebook as a result of its conduct.
131. Facebook holds a wealth of statistical data about Class Members and their use in Sponsored Stories advertisements that can be used to inform the Court's aggregate damages analysis.¹⁰⁶ Facebook has already evidenced the number of Sponsored Stories advertisements it created to feature the Plaintiff and Mr. Capota.¹⁰⁷ It is reasonable to expect that Facebook can do the same for other Class Members. Facebook also has evidence of the number of Friends each Class Member has,¹⁰⁸ which will allow for further refinement.
132. Facebook retained Dr. Tucker to provide, among other things, her opinion on whether damages could be assessed on an aggregate basis in this case.¹⁰⁹ She was also retained by Facebook to provide an expert opinion in the US Action (the "**Tucker Declaration**") on many of the same issues she covers in the Tucker Affidavit in this action.¹¹⁰

¹⁰⁵ *Poirier, supra* at [paras 104-105](#) – CA Vol 3, Tab 72.

¹⁰⁶ Plambeck Affidavit at para 3 – CR Vol 2, Tab 9.

¹⁰⁷ Plambeck Affidavit at paras 24 and 25 – CR Vol 2, Tab 9.

¹⁰⁸ Squires Affidavit at para 10 – CR Vol 1, Tab 6.

¹⁰⁹ Tucker Affidavit at para 4 – CR Vol 1, Tab 7.

¹¹⁰ Unrau Affidavit at Exhibit C – CR Vol 2, Tab 12.

133. In the Tucker Declaration, Dr. Tucker does not opine on the aggregate assessment of damages.¹¹¹ There is no evidence that Dr. Tucker has ever been qualified as an expert in the aggregate assessment of damages. There is no evidence that Dr. Tucker has any expertise that would allow her to comment on the aggregate assessment of damages for misappropriation of personality generally, and especially in the context of B.C. privacy law. This is especially concerning as the opinions offered in the Tucker Affidavit largely mirror her opinions in the Tucker Declaration, which was presumably based upon California law. She has also failed to provide the required certification on her duties as an expert pursuant to Rule 11-2 of the Supreme Court Civil Rules. The Plaintiff submits that Dr. Tucker's opinion evidence on any matters considering aggregate assessment of damages or British Columbia law should be given no weight.¹¹²
134. Dr. Tucker concludes in her Affidavit that an aggregate assessment of damages is impossible in this case.¹¹³ She bases her conclusion on apparent misapprehensions of the Plaintiff's claim, the Sponsored Stories advertising program, and factors to be considered in assessing a claim under the *Privacy Act*. Dr. Tucker suggests an incredible degree of precision is required to assess damages. She argues that it will be necessary to consider every Class Member's motivation in relation to each click of a Like Button, any benefit they may have derived from the Like Button click, etc.¹¹⁴ There are two errors with this approach, discussed below.
- (a) The criteria that Dr. Tucker suggests require individual analysis have no basis in British Columbia law and are irrelevant to the assessment of damages for a violation of section 3(2) of the *Privacy Act*. For example, Dr. Tucker says the analysis must

¹¹¹ Unrau Affidavit at Exhibit C, p 28-29 (para 5 of Exhibit C) – CR Vol 2, Tab 12.

¹¹² See discussion of a similar situation in *Martin v Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744 at paras 66-67 – CA Vol 3, Tab 63.

¹¹³ Tucker Affidavit at para 73 – CR Vol 1, Tab 7.

¹¹⁴ Tucker Affidavit at paras 76-79 – CR Vol 1, Tab 7.

account for any benefit the Class Member obtained for clicking the Like Button, the Class Member's motivations for clicking the Like Button, or the Class Member's Facebook Friends' perceptions of the Class Member – all factors that were not considered in *Poirier* or other *Privacy Act* cases.¹¹⁵ Dr. Tucker even proposes an individual assessment of whether Class Members were harmed at all, despite the fact that the *Privacy Act* recognizes that a violation of section 3(2) is harm in and of itself by creating a cause of action without proof of damage.¹¹⁶

- (b) Dr. Tucker proposes a degree of precision and a microscopic level of inquiry that is not required even in individual cases like *Poirier*, where the Court held that detailed evidence of harm suffered was not required for the Court to establish quantum of damages and in fact explicitly noted the scant evidence of harm suffered by Mr. Poirier.¹¹⁷

135. Dr. Tucker also suggests an aggregate assessment of damages is impossible because some Class Members have been used in more Sponsored Stories than other Class Members, and because some Class Members have changed their name or Profile Picture on the Facebook Website since the Sponsored Stories advertising program was launched.¹¹⁸ These issues can be addressed by reference to data Facebook collected and holds, and should not pose any barriers to certification of aggregate damages as a common issue.
136. Given the focus on the conduct of the defendant in the assessment of damages under the *Privacy Act* and the vast quantities of information collected by Facebook about Members and the display of Sponsored Stories advertisements, the level of “mathematical accuracy” in the aggregate

¹¹⁵ Tucker Affidavit at para 76 – CR Vol 1, Tab 7.

¹¹⁶ Tucker Affidavit at para 76 – CR Vol 1, Tab 7.

¹¹⁷ *Poirier*, *supra* at [para 95](#) – CA Vol 3, Tab 72.

¹¹⁸ Tucker Affidavit at para 75 – CR Vol 1, Tab 7.

assessment of damages in this case could be far greater than in other cases that have certified aggregate damages as a common issue.

137. There is no reason that the question of the availability and quantum of aggregate damages should not be addressed at the trial of the common issues, with a full record to rely on in determining what assessments are possible on an aggregate basis.

Common Issue #2 (d)

138. **Common Issue #2 (d)** asks whether Facebook is liable to pay interest on any judgment against it, and the amount of that interest. Whether damages are assessed in aggregate or individually, this is an issue that can be tried in common for the class as a whole.

Common Issue #2 (e)

139. **Common Issue #2 (e)** asks whether Facebook should be enjoined from using the Class Members' names and portraits in future advertising without their express consent to use in same. Such an order would apply to the Class as a whole, and is appropriately dealt with on a full evidentiary record at the trial of the common issues.

Potential additional common issues once Facebook files a Response to Claim

140. Although Facebook has provided sparse detail of its arguments against certification in its Application Response, the Plaintiff anticipates that Facebook will attempt to shield itself from liability or demonstrate consent by relying on its Statement. To the extent Facebook relies on the Statement in its Response to Claim, questions of whether the Statement is binding on the Plaintiff and Class Members, whether the terms of the Statement are enforceable, and the interpretation of those terms are common to the entire Class and should be certified as a common issue.

141. Questions of the interpretation and enforceability of standard form contracts are regularly certified as common issues by B.C. courts, and this case should be no exception.¹¹⁹

Conclusion on common issues

142. The Plaintiff says that each of the above Common Issues should be certified, and the test under section 4(1)(c) has been met.

A class action is the preferable procedure (section 4(1)(d) of the CPA)

143. The overarching question at the preferability stage of the certification test may be expressed as follows: *preferable to what?* That question is examined through the lens of the three goals of class proceedings: access to justice, judicial economy and behaviour modification, and also by reference to the statutory criteria in section 4(2) of the CPA.¹²⁰
144. A class proceeding can “provide access to justice to claimants whose claims would be otherwise uneconomical if they were to proceed by way of individual trial”.¹²¹ Neither the Plaintiff nor Mr. Capota could afford to pursue this claim on their own absent a class action, nor would it be economical for them to do so if they could.¹²² As the Ontario Superior Court of Justice held in *Nantais v Teletronics Proprietary*.¹²³

[...] [T]his is the kind of case for which the *Class Proceedings Act, 1992* was designed. The stupendous financial burden of a case such as this would consume all or almost all of the proceeds of the judgment of any single plaintiff. The defendants (if responsible) would likely therefore be insulated from any of these claims because of financial consequences alone. It is only by spreading

¹¹⁹ See for example [Lam v University of British Columbia, 2010 BCCA 325](#) at [paras 55-60](#) – CA Vol 3, Tab 59; [Scott v TD Waterhouse Investor Services \(Canada\) Inc, 2001 BCSC 1299](#) (“*Scott*”) at [para 96-100](#) – CA Vol 4, Tab 83; and [Dominguez v Northland Properties Corp, 2012 BCSC 328](#) at para 149 – CA Vol 1, Tab 24.

¹²⁰ *Steele*, *supra* at [para 78](#) – CA Vol 4, Tab 87; *DRAM Appeal*, *supra* at [para 71](#) – CA Vol 3, Tab 74.

¹²¹ [Bodnar v Cash Store Inc, 2009 BCSC 74](#) at para 14 – CA Vol 1, Tab 10.

¹²² Douez Affidavit at para 23 – CR Vol 1, Tab 3; Capota Affidavit at para 15 – CR Vol 1, Tab 5.

¹²³ [Nantais v Teletronics Proprietary \(Canada\) Ltd, 1995 CanLII 7113](#) (ONSC) at [para 91](#) – CA Vol 3, Tab 69.

out the cost that the members of the class have any chance of success. Not only is the class proceeding preferable, it is the only procedure whereby the members of the class will have any real access to the courts.

145. Judicial economy will also be served by allowing all of these claims to be heard at the same time, avoiding duplication in fact-finding and legal analysis.¹²⁴ Judicial economy is also served given that Class Members will not have to participate in the initial discovery process or the trial of the common issues.
146. Finally, this action serves the goal of behavior modification. Facebook denies that its Sponsored Stories advertising program violates the *Privacy Act*. It has continued to use Class Members in Sponsored Stories advertisements on a massive scale even after this Action was filed. Most troubling, Facebook has continued to use the Plaintiff in Sponsored Stories advertisements even though she clearly articulated her opposition to such conduct by commencing this Action.¹²⁵ A class proceeding is the only effective means to disabuse Facebook “of the assumption that minor but widespread harm will not result in litigation”.¹²⁶
147. Pursuant to section 4(2) of the *CPA*, in determining whether a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including, but not limited to:
- (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
 - (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
 - (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;

¹²⁴ *DRAM Appeal, supra* at [para 64](#) – CA Vol 3, Tab 74.

¹²⁵ Plambeck Affidavit at para 10 – CR Vol 2, Tab 9.

¹²⁶ *DRAM Appeal, supra* at [para 64](#) – CA Vol 3, Tab 74.

(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.

Section 4(2)(a) - Predominance

148. Common Issue #1 addresses the predominant liability issues facing any potential claimant who brings an action against Facebook regarding the Sponsored Stories advertising program.
149. Where the common issues are at “the heart of the litigation”, as in this case, concerns about the relative weight of individual issues are much less troubling.¹²⁷ Even if the court concludes that some individual participation should occur to determine the appropriate damages for each individual, that evaluation is driven by the finding on liability that can be assessed commonly. As the Court held in *Scott* at para 113: “The court must not refuse to certify a proceeding as a class proceeding merely because the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues: s. 7 (a) of the Act.”

Section 4(2)(b) – Valid interest in individual control of action

150. There is no evidence that any Class Members have an interest in advancing or controlling separate actions. One would expect such evidence to be adduced if it exists.
151. Rather, the Class Members will benefit from this action advancing as a class action. Courts have recognized the numerous advantages to class proceedings, which apply in the present case:
- (a) Whatever limitation period is found to be applicable to the claim is tolled for the entire class;
 - (b) A formal notice program is created which will alert all interested persons to the status of the litigation;

¹²⁷ *Scott*, *supra* at [paras 117, 120-122, 130-137](#) – CA Vol 4, Tab 83.

- (c) The class is able to attract counsel through the aggregation of potential damages and the availability of contingency fee arrangements;
- (d) A class proceeding prevents the defendant from creating procedural obstacles and hurdles that individual litigants may not have the resources to clear;
- (e) Class members are given the ability to apply to participate in the litigation if desired;
- (f) The action is case managed by a single judge;
- (g) The court is given a number of powers designed to protect the interests of absent class members;
- (h) Class members are protected from any adverse cost award in relation to the common issues stage of the proceeding;
- (i) In terms of the resolution of any remaining individual issues, a class proceeding directs and allows the court to create simplified structures and procedures; and
- (j) Through the operation of statute, any order or settlement will accrue to the benefit of the entire class, without the necessity of resorting to principles of estoppel.¹²⁸

Section 4(2)(c) – Claims that are or have been the subject of other proceedings

152. To the best of the Plaintiff's knowledge, no single Member has been able to justify the solitary exercise and expense of challenging Facebook's Sponsored Stories advertising program.

¹²⁸ [Nanaimo Immigrant Settlement Society v BC, 2001 BCCA 75](#) at [paras 20-21](#) – CA Vol 3, Tab 68; *Scott, supra* at [paras 115-116](#) – CA Vol 4, Tab 83.

Section 4(2)(d) – Other means of resolving the claims

153. A class proceeding is the preferable procedure in this case because it provides a fair, efficient, and manageable method to determine the common issues and because it will advance the action in accordance with the goals of judicial economy, access to justice, and behaviour modification. Without this action, it is unlikely that the Plaintiff's and Class Members' claims would be advanced at all.

154. The essence of this stage of the preferability analysis was captured by the BC Court of Appeal in the *DRAM Appeal*:

[75] The chambers judge did not consider whether there were any other more practical or efficient means of resolving the appellant's claims and the respondents did not propose any. Thus, the only apparent alternative to a class action is no action at all. Therefore, if this action does not proceed as a class action there is the potential for an unconscionable result – that the respondents will be allowed to retain their unlawful gains. This potential unconscionability also weighs in favour of certifying this action as a class proceeding.¹²⁹

155. As the Court of Appeal pointed out at paragraph 46 in *Hoy v Medtronic*, “s. 4(1)(d) requires a court to be satisfied that a class proceeding would be the preferable way of resolving the common issues” as opposed to some other viable alternative.¹³⁰ As Winkler J. (as he then was) stated in *1176560 Ontario Ltd v Great Atlantic & Pacific Co of Canada Ltd*, the comparison is not to be made between a class proceeding and hypothetical means of resolving the claims.¹³¹

It would be antithetical to permit the defendants to defeat certification by simple reliance on bald assertions that joinder, consolidation, test cases or similar proceedings are preferable to a class proceeding. This is a simple shopping list of procedures that may be available in all cases. Mere assertion that the procedures exist affords no support for the proposition that they are to be preferred. The defendant must support the contention that another procedure is to be preferred with an evidentiary foundation.

¹²⁹ *DRAM Appeal*, *supra* at [para 75](#) – CA Vol 3, Tab 74.

¹³⁰ *Hoy v Medtronic*, [2003 BCCA 316](#) (“*Hoy*”) at [para 46](#) – CA Vol 2, Tab 47.

¹³¹ *1176560 v Great Atlantic & Pacific Co of Canada Ltd*, [2002 CanLII 6199](#) (ONSC) at [para 27](#) – CA Vol 1, Tab 1.

156. Facebook has not proposed any other means of resolving the claims. Instead, it has argued in its Jurisdiction Application that whatever procedures or remedies that may be available to the Plaintiff and the Class Members must be sought in California and not British Columbia.¹³²
157. Facebook brought its Jurisdiction Application on two key grounds:
- (a) This action should be stayed because of the forum selection clause in the Statement; and
 - (b) This action should be stayed because California is the more appropriate forum.
158. The Plaintiff disagrees, and adopts and incorporates her submissions on the Jurisdiction Application.¹³³

Section 4(2)(e) – Whether the administration of a class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means

159. There is no indication that this class proceeding will create any greater difficulties than any hypothetical alternatives. All of the same issues would need to be considered in any individual litigation, but in a less controlled procedural environment.
160. This is particularly so in light of the proposed use that the Plaintiff will make of the aggregation provisions of the *CPA*.

The representative plaintiff is appropriate (section 4(1)(e) of the CPA)

161. Section 4(1)(e) of the *CPA* requires that the representative plaintiff be able to fairly and adequately represent the class, has developed a plan for proceeding, and does not have a conflict with the class on the common issues. The

¹³² Facebook's Notice of Application filed October 1, 2012 at Part 3, paras 1-3 – Jurisdiction Record ("JR"), Vol 1, Tab 1.

¹³³ Plaintiff's Argument on Jurisdiction; Plaintiff's Reply on Jurisdiction.

representative plaintiff must be prepared and able to vigorously represent the interests of the class.¹³⁴

Fair and adequate representation

162. Deborah Douez clearly meets the requirements for a representative plaintiff set out under the *CPA*.
163. Ms. Douez meets the proposed Class definition. Ms. Douez has claimed, and Facebook has confirmed, that her name and portrait have been used in Sponsored Stories advertisements.¹³⁵
164. Ms. Douez is familiar with the substance of the issues and has taken the time to understand and commit to the role of representative plaintiff.¹³⁶

Litigation plan

165. At the certification stage, a litigation plan assists the Court by providing a framework within which the case may proceed, and to demonstrate that the Plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and that they have presented a plan to address those complexities.
166. The Court does not scrutinize the plan at the certification hearing to ensure that it is capable of carrying the case through to trial and resolution of the common issues without amendment. Courts anticipate that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members.¹³⁷
167. The proposed litigation plan sufficiently addresses the requisite issues and demonstrates that the representative plaintiff and class counsel have thought

¹³⁴ *Scott, supra* at [para 154](#) – CA Vol 4, Tab 83; *Endean, supra* at [paras 65-68](#) – CA Vol 1, Tab 25.

¹³⁵ Douez Affidavit at paras 5-7 – CR Vol 1, Tab 3; Plambeck Affidavit at para 24 – CR Vol 2, Tab 9.

¹³⁶ Douez Affidavit at paras 14-18 – CR Vol 1, Tab 3.

¹³⁷ *Fakhri v Alfalfa's Canada, Inc (cob Capers Community Market)*, 2003 BCSC 1717 at [para 77](#) aff'd on appeal, [2004 BCCA 549](#) – CA Vol 1, Tab 26.

through the process of the proceeding. It even contemplates the potential for any individual proceedings that may be required if the Defendant is correct on this point.

Notice Plan

168. The Plaintiff has, in consultation with counsel, developed a plan for providing notice of certification of the action to Class Members (the “**Notice Plan**”). Given the size of the Class and the nature of the case, the Notice Plan focuses primarily on delivering notice via the internet. The Notice Plan leverages the ability of Facebook to identify and contact Class Members directly through the Facebook Website and through email. It also proposes the purchase of Google AdWords for various terms associated with the action, a 30 second YouTube video explaining the notice, and the broadcast of notice of the certification of the action by Facebook and class counsel on Twitter.
169. The Notice Plan also proposes the distribution of a press release, which given earlier media coverage of the initiation of the action should reach a considerable number of Class Members.
170. The Plaintiff submits that it is fair and reasonable that the costs of the Notice Plan be shared in the manner set out in the Litigation Plan.

Opting out

171. The Plaintiff does not anticipate that many Class Members will opt out of the proceeding. The Plaintiff proposes an opt out period of 90 days.

No conflict with the Class

172. The Plaintiff has no conflict of interest with the other Class Members with respect to the issues advanced in this litigation.¹³⁸
173. With respect to the issues pertaining to adequately and appropriately representing class members and potential conflicts of interest, the court’s inquiry into this issue is focused on the proposed common issues. If differences

¹³⁸ Douez Affidavit at para 22 – CR Vol 1, Tab 3.

between the representative plaintiff and the proposed class do not impact the common issues, they do not impact the representative plaintiff's ability to adequately and fairly represent the class, nor do they create a conflict of interest.¹³⁹

174. Dr. Tucker says in her Affidavit that the injunctive relief sought by the Plaintiff creates a number of conflicts with the other Class Members. Many of these purported conflicts are nonsensical, and none constitute true conflicts that impact the Plaintiff's ability to advance the Class Members' interests with respect to the Common Issues:

- (a) Dr. Tucker first claims that Facebook may not be able to generate enough revenue to support itself or continue to offer Members free access to the Facebook Website if it is forced to obtain Class Members' consent to their use in Sponsored Stories advertisements.¹⁴⁰ This hypothetical outcome is not supported in evidence. Furthermore, this *in terrorem* argument ought to be rejected out of hand. If Facebook's conduct is wrong, it ought to be stopped even though doing that might cause Facebook to lose revenue or seek out other revenue sources.
- (b) Dr. Tucker then suggests that Class Members who for whatever reason wish to have their Social Actions rebroadcast as Sponsored Stories advertisements may not be able to do so if the relief sought is granted.¹⁴¹ This is not the case. The Plaintiff seeks an order enjoining Facebook from using Class Members' names and portraits in advertising without their consent. If Facebook obtains properly informed consent from the Class Members, Facebook may continue to use their names or portraits in Sponsored Stories advertising.

¹³⁹ Hoy, *supra* at [paras 83-85](#) – CA Vol 2, Tab 47.

¹⁴⁰ Tucker Affidavit at para 84 – CR Vol 1, Tab 7.

¹⁴¹ Tucker Affidavit at para 86 – CR Vol 1, Tab 7.

- (c) Dr. Tucker argues that requiring Facebook to obtain consent to use the Class Members' names and portraits in Sponsored Stories advertisements would deny those Class Members continued access to discounts or promotions they currently receive for clicking the Like Button on certain content.¹⁴² This claim is again hypothetical and unsupported by evidence, and conflates Stories resulting from a Social Action with Sponsored Stories advertisements.
- (d) Dr. Tucker further argues that any limitation on rebroadcasting Social Actions as Sponsored Stories advertising could deny a Class Member's Facebook Friends the opportunity to see what that Class Member has Liked.¹⁴³ Dr. Tucker forgets that it is the Class Member who is made the subject of the Sponsored Story, not the viewer of that Sponsored Story. It is the Class Member who has an interest in and ownership of the use of their own name or portrait in Sponsored Stories advertising, not the viewer.
- (e) Dr. Tucker claims that obtaining Class Members' consent before using their names and portraits in Sponsored Stories may "*introduce new screens and extra hurdles and interruptions for the user experience*"¹⁴⁴, or that that imposing new "*European-style restrictions*" on online advertising would somehow slow technological innovation as a whole.¹⁴⁵ Dr. Tucker ignores that pursuant to the *Privacy Act*, Facebook and other internet advertising companies are already required to obtain the consent of individuals before using their names and portraits in advertising. That it may not be easy or convenient for Facebook to obtain consent is irrelevant to whether such consent is required by statute.

¹⁴² Tucker Affidavit at para 87 – CR Vol 1, Tab 7.

¹⁴³ Tucker Affidavit at paras 88-89 – CR Vol 1, Tab 7.

¹⁴⁴ Tucker Affidavit at para 90 – CR Vol 1, Tab 7.

¹⁴⁵ Tucker Affidavit at paras 91-92 – CR Vol 1, Tab 7.

- (f) The articles cited by Dr. Tucker address the impact of restrictions on advertisers' ability to collect information about individuals on the effectiveness of advertising or investment in online advertising companies. These papers reveal that privacy regulation has a negative impact on the advertising industry both in terms of new investment in advertising companies and the effectiveness of advertisements delivered to consumers.¹⁴⁶ Whether this is the case or not is irrelevant to the issue in these proceedings, which is whether Facebook violated section 3(2) of the *Privacy Act*.

175. In sum, Dr. Tucker argues that Class Members would be better off if Facebook did not have to comply with the *Privacy Act*, and that as such the Plaintiff (and presumably any person) seeking to enforce Facebook's compliance with the *Privacy Act* is in conflict with the interests of the Class Members. This cannot be the case. It is in the Class Members' interest to see that companies doing business in British Columbia respect the laws of British Columbia.

PART 5 - CONCLUSION

176. Certification in this case is consistent with the underlying purposes of the *CPA*: access to justice, judicial economy, and behavior modification. The questions at the heart of this litigation are common across the Class, and the only means of resolving the Plaintiff's claim is through a class proceeding, for the reasons expressed by this Court in *Cooper v Merrill Lynch Canada*:¹⁴⁷

The practical reality is that absent certification, the issues may go unresolved because of the relatively insignificant quantum of any individual claim. That would be unfair and should be discouraged when the claims in the aggregate are substantial.

¹⁴⁶ Tucker Affidavit at paras 91 and 92, fn 49 and 50 – CR Vol 1, Tab 7.

¹⁴⁷ [Cooper v Merrill Lynch Canada Inc., 2006 BCSC 1905](#) at [para 89](#) – CA Vol 1, Tab 19.

177. The Plaintiff submits that she has met the standard for certification set out in the *CPA*, and therefore this claim must be certified as a class proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, British Columbia this 30th day of April, 2013.



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