Court of Appeal File No. CA041917
Vancouver Registry

ON APPEAL FROM: The Order of the Honorable Madam Justice Griffin, pronounced on May 30, 2014

COURT OF APPEAL

BETWEEN:

DEBORAH LOUISE DOUEZ

RESPONDENT
(Plaintiff)

AND:

FACEBOOK, INC.

APPELLANT
(Defendant)

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

RESPONDENT'S FACTUM
[Redacted]

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I

CHRONOLOGY OF THE RELEVANT DATES IN THE LITIGATION

DATE	EVENT
February 2004	The defendant starts operating the Facebook website
June 6, 2007	The plaintiff becomes a member of the Facebook website.
March 21, 2012 to March 10, 2013	The defendant features the plaintiff's name and portrait in various Sponsored Stories Advertisements (potentially also during other periods). The plaintiff says the ads were placed without her consent.
March 29, 2012	This Action is commenced.
July 5, 2012	The plaintiff files and serves her notice of application and materials seeking certification.
September 9, 2012 to March 10, 2013	The defendant features approximately 1,800,000 British Columbia residents in Sponsored Story Advertisements during this period (no evidence provided outside this period).
December 3, 2012	The U.S. District Court provisionally approves a revised settlement proposal in a U.S. action similar to the within Action: Fraley v. Facebook, Case3:11-cv-01726-RS (Doc. 252) (U.S. Dist. Ct., Northern Dist. California, San Francisco Division). Thereafter, notice of the provisional U.S. certification and proposed settlement is delivered to about 180 million members of the class across the United States.
December 14, 2012	The Honourable Madam Justice Griffin orders the defendant to proceed with its jurisdiction application as a part of the plaintiff's certification application (2012 BCSC 2097).
March 4, 2013	The defendant's B.C. membership reaches approximately 3.5 million people. Also in March 2013, the defendant announces that in May 2013 it will open an office in Vancouver, B.C.

II

DATE	EVENT
September 19, 2013	The U.S. District Court grants final certification, for purposes of settlement, including a subclass of minors (persons under age 18): *Fraley v. Facebook*, Case3:11-cv-01726-RS (Doc. 368) (U.S Dist. Ct., Northern Dist. California, San Francisco Division).
November 25 – 27, 2013 and April 17, 2014	Oral argument proceeds before the B.C. Supreme Court respecting the plaintiff's certification application and defendant's jurisdiction application.
May 30, 2014	The B.C. Supreme Court makes the orders under appeal: 2014 BCSC 953.

III

OPENING STATEMENT

Facebook, Inc., is sued for alleged misappropriation of class members' names and portraits for use in advertisements called "Sponsored Stories". The plaintiff says Facebook's actions constitute a statutory misappropriation of personality in breach of the *Privacy Act*, R.S.B.C. 1996, c. 373, entitling the class to statutory damages.

Facebook argues that British Columbia courts lack jurisdiction. It points to its terms of use ("Terms"). It says that pursuant to the Terms, its members agreed to bring action in California. However in the same Terms, Facebook promises to respect local laws: "*We [Facebook] strive to create a global community with consistent standards for everyone, but we also strive to respect local laws*. . . ." Facebook attempts to avoid application of the *Privacy Act* (a local law) by arguing against the British Columbia court's jurisdiction.

In any event, pursuant to the *Privacy Act*, this Action must be brought before the British Columbia Supreme Court. Ample case law supports the plaintiff's position: a private jurisdiction clause cannot trump a statutory grant of exclusive court jurisdiction. Further, in reality the individual quantum of damages are too low to justify class members proceeding in California. As such, dismissing this Action on jurisdictional grounds will avoid a hearing on the merits: the jurisdiction clause will become an exclusion clause.

Although a certification application does not determine the merits, Facebook claims it did no wrong. It argues, first and foremost, that pursuant to its Terms, class members consented to Facebook's use of their personality in the subject advertisements. Alternatively, it says class members' consent – express or implied – may be gleaned from the limited number of acts undertaken by them on its website.

The plaintiff disputes Facebook's interpretation of the Terms and the notion that class members' online activities constitute consent for Facebook's use of their names or portraits in the subject advertisements. Regardless, deciding these obviously common and uniform issues will determine whether Facebook breached the *Privacy Act*. The issue of aggregate damages and other certified common issues will similarly advance the class members' claims to final determination on the merits.

PART 1 – STATEMENT OF FACTS

A. Background

1. Facebook is an advertising company. It operates the social networking website *www.facebook.com* (the "Website") through and on which it sells advertising.

2. Facebook allegedly committed a statutory tort by misappropriating class members' personality. In particular, it used their names and portraits in advertisements called "Sponsored Stories" ("Advertisements" or "Sponsored Stories").

3. The statutory tort is set out in the *Privacy Act* as follows:

> 3(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.

4. Facebook invites persons age 13 and older to become "Members" of the Website by uploading their name and portrait and registering a personal profile page (a "Profile"). It invites Members to become "Friends" (in Facebook's parlance) with other Members, by inviting and accepting invitations communicated through the Website. The average Member has 190 Facebook "Friends".[1]

5. Facebook displays the Advertisements on the Website to a depicted Member's Friends, but not to the Member featured in the subject Advertisement.

6. Facebook claims the British Columbia courts lack jurisdiction over this dispute because of uniform Terms which it says bind prospective Members (Facebook calls this document a "Statement of Rights and Responsibilities"). According to Facebook, the Terms require Members to present their disputes exclusively to the courts in California. Alternatively, it says this Action is not suited to a class proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*").

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[1] Squires Affidavit at para. 10 (Appeal Book ("AB"), Vol. 2, p. 614)

7. On May 30, 2014, the Honourable Madam Justice Griffin rejected Facebook's argument (2014 BCSC 953). She refused to decline jurisdiction and certified the Action as a class proceeding. Facebook appeals both orders.

B. The Plaintiff and Class Members

8. Facebook admits to featuring approximately 1.8 million British Columbia Members' names and portraits in Advertisements between September 9, 2012 and March 10, 2013.[2]

9. Facebook's 1.8 million person estimate likely underestimates the class size. It has not disclosed the number of British Columbia residents featured in the Advertisements between the January 2011 (Sponsored Stories start-date) and September 9, 2012, or after March 10, 2013.

10. The plaintiff, Deborah Douez, is a videographer and owner of Video4Web Productions. She lives in Vancouver, British Columbia. She has been a member of the Website since June 6, 2007. Facebook admits to featuring her name or portrait in numerous Advertisements even after she commenced this Action.[3]

11. The class necessarily includes minors. Facebook invites people age 13 and older to become Members,[4] and it is a notorious that many teens are Members. Facebook knows the ages of the Members it featured in Sponsored Stories. The age of majority for contract is 19 years: *Age of Majority Act*, R.S.B.C. 1996, c. 7.

C. Similar U.S. Action

12. A similar class action was brought against Facebook in the United States, alleging Facebook violated the *California Code*, which prohibits use of a person's name or portrait in advertising without consent. See the second amended class action complaint filed in U.S. District Court: *Fraley v. Facebook* [AB Vol. 2, p. 222].

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[2] Plambeck Affidavit para. 24 (AB, Vol. 2, p. 548)
[3] Plambeck Affidavit, para. 24 (AB, Vol. 2, p. 551)
[4] Squires Affidavit, para. 8 (AB, Vol. 2, p. 613); Solanki Affidavit, Exhibit G, s. 4(5) (AB, Vol. 2, p. 540)

13. On December 3, 2012, the U.S. District Court granted provisional certification and preliminary approval of a revised settlement proposal.[5] Notice of the provisional U.S. certification and proposed settlement was delivered to an estimated 180 million members of the proposed class across the United States.[6]

D. Facebook Website and Social Actions

14. In February 2004, Facebook started operating the Website. As of March 4, 2013, Facebook's British Columbia Members totalled approximately 3.5 million people.[7]

15. Facebook is paid by customers to display their ads to Members on the Website.[8] In 2012, Facebook reported nearly $4.28 billion in revenue from its advertising business, including $2.06 billion generated in North America.[9]

16. To become Members, users follow an online registration process. Facebook requires that the prospective Member provide his/her real name, valid email address, gender and birthdate.[10] Facebook sometimes takes steps to enforce its real name requirement.[11] Members create their unique Profile page on registering. At that point, Facebook prompts them to upload their portrait to their Profile page.

17. Facebook enables Members to communicate and interact with one another through the Website. Such interactions generate postings on the Member's Profile called a "Story" or "Stories".

18. Facebook encourages Members to interact with content on the Website in various ways, which Facebook calls "Social Actions", and which become Stories. These include "Liking" (clicking a "Like Button"), commenting on a Story, sharing a hyperlink, responding to a poll, clicking a "Check In" button to share a physical location, "RSVPing" to an Event, or interacting with computer games.[12]

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[5] Unrau Affidavit at Exhibit A (AB, Vol. 3, pp 813 to 820).
[6] Unrau Affidavit at Exhibit B (AB, Vol. 3, pp 822 to 835)
[7] Squires Affidavit, para. 3 (AB, Vol. 2 p. 612)
[8] Squires Affidavit, para. 19 (AB, Vol. 2, p 617)
[9] Unrau Affidavit, Exhibit E (AB, Vol. 3, pp 974 and 981)
[10] Squires Affidavit, paras 7 and 8 (AB, Vol. 2, p. 613)
[11] Unrau Affidavit, Exhibit F (AB, Vol. 3, p 1072) and Exhibit G (AB, Vol. 3, pp 1074 to 1077)
[12] Tucker Affidavit at para. 36 (AB, Vol. 2, p 574)

19. A popular Social Action is the “Like” button. Members can “Like” a Story by clicking a control widget called a “Like Button” on the Website or on third party websites. The “Like Button” takes various forms including the image of a button marked with a drawing of a hand with the thumb extended vertically (a “thumbs-up” gesture). Facebook introduced Liking and the Like Button in February 2009.[13]

20. Members may click a Like Button associated with a Story to show their approval or to receive business offers, enter contests, gain access to content, leave a comment, or sign up to receive announcements of promotions or events.[14] The plaintiff’s affiant, Petre Capota, clicked the Like Button on a company’s Facebook page to leave a comment voicing his displeasure with that company. He could not leave his comment without first clicking the Like Button.[15]

21. Members receive a constantly updated stream of Stories from their Friends and other subscription services. These appear on a “News Feed” which is, by default, the first page presented to a Member on logging onto the Website. The News Feed displays Stories that Facebook determines to be relevant to that particular Member based upon its algorithms. Stories are also displayed in the “Ticker”, a rapidly scrolling list of Stories that appears in a column to the right of the News Feed. The Ticker displays Stories in close to real time.[16]

22. Because of Facebook’s algorithms, the dynamic nature of the News Feed and transient nature of the Ticker, Members may not see all Stories. About 12% of a Member’s Friends see any given Story about a Social Action.[17]

E. Facebook Advertising

i. Types of Advertising

23. A Member’s Social Actions may cause his or her name or portrait to be displayed for non-advertising purposes. These non-advertising uses are not challenged by

[13] Squires Affidavit, para. 41 (AB, Vol. 2, p. 628)
[14] Squires Affidavit, para. 51 (AB, Vol. 2, p. 636)
[15] Capota Affidavit, para. 8 (AB, Vol. 1, p. 179)
[16] Squires Affidavit, paras. 18, 21 to 22 and Exhibit G (AB, Vol. 2, pp. 617, 619, 677)
[17] Unrau Affidavit, Exhibit H (AB, Vol. 3, p. 1079)

the Plaintiff, as they do not fit within the *Privacy Act*'s statutory protection.

24. Facebook harnesses the Website to generate revenue for itself in various ways, including 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.[18]

    b. "Social Ads". Social Ads pair a Member's Social Action, name, and portrait, with "advertiser creative." Facebook allows Members to opt out of having their names and portraits appear in Social Ads.[19]

    c. Sponsored Stories. These are similar to Social Ads, except that the Member cannot opt out of these Advertisements.

25. As noted, the case at bar concerns only the Sponsored Stories Advertisements, which, to use the term used by Facebook's affiant, Dr. Tucker, "co-opts" the power of a Member's social network to create targeted advertisements featuring the subject Member's name or portrait (see para. 28, below).[20]

26. Facebook displays Social Ads and Sponsored Stories to Members in their News Feeds in the same manner as Stories. But unlike typical Stories, such advertisements also appear in a static position in a bar on the right-hand side of the Website. The Sponsored Story Advertisements are also shown on Members' News Feeds on mobile devices and on the Website's "logout" screen.

ii. Sponsored Stories

27. Facebook launched Sponsored Stories in January 2011.[21] That month a news report quoted one of the defendant's executives claiming Facebook had achieved "*the Holy Grail of marketing: making your customers your marketers*."[22]

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[18] Squires Affidavit, para. 64, Fig. 29 (AB, Vol. 2, pp. 640, 641)
[19] Squires Affidavit, paras. 63, 65, 67, Fig. 29 (AB, Vol. 2, pp. 639 to 641)
[20] Unrau Affidavit, Exhibit D (AB, Vol. 3, p. 901)
[21] Squires Affidavit, para. 69 (AB, Vol. 2, p. 642)

28. A research paper published in 2012 by Facebook's affiant, Dr. Tucker, supports that statement. Dr. Tucker opines that social advertisements are more effective than other forms of internet advertising, explaining as follows (emphasis added):[23]

> . . . 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.

29. Facebook may turn any one of the Social Actions described above into a Sponsored Story Advertisement. When a Member engages in a Social Action, Facebook gives the benefit of the Member's name or portrait to its paying advertising customers by creating the Advertisement. No compensation is paid to the Member for the Member's participation in the advertising campaign.

30. 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*". In Facebook's own words (bold in original):[24]

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

31. Facebook repeatedly characterizes Sponsored Story Advertisements as arising due to actions taken by Members, arguing that "*it is the User's Liking that generates the Sponsored Story*".[25] But, in fact, the Advertisements are not triggered simply by a Member taking a Social Action (*i.e.* "Liking"). Facebook only creates, displays, and rebroadcasts Sponsored Stories Advertisements when (to use its words) "*[a]n advertiser has paid to show the activity as a sponsored*

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[22] McMullen Affidavit #1, para. 17 (AB, Vol. 1, p. 190)
[23] Unrau Affidavit, Exhibit D, (AB, Vol. 3, pp. 901 to 902)
[24] McMullen Affidavit #2, Exhibit A (AB, Vol. 3, p. 1118)
[25] Squires Affidavit, para. 74 (AB, Vol. 2 at p. 645)

story".[26] It is Facebook's own algorithms that place a Member in Advertisements on Facebook, and this only happens when Facebook is paid by its advertising customer. This is not a passive non-commercial activity by Facebook.

32. Facebook does not enable Members to determine whether their names or portraits have been used in a Sponsored Story because such Advertisements are not displayed to the Member featured therein.[27] Thus, while the Member will know they engaged in a Social Action, they will not know whether Facebook used their name or portrait 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 such Advertisements. Furthermore, the plaintiff says Social Actions taken by Members long in the past could re-appear as a Sponsored Story in the future if the advertising customer pays Facebook to create a Sponsored Story advertisement, with no further actions taken by the Member.

33. As such, Ms. Douez was unaware that her name and portrait had been used in such Advertisements until she was told by another person that a Sponsored Story featuring her name and portrait had been displayed on that individual's Page.[28]

34. Redacted [29]

iii. Facebook Consent Defence

35. Facebook argues that Members agreed to Facebook's Terms on registering as Members of the Website. It claims the Terms allow it to use Members' names and portraits in the Advertisements.

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[26] Squires Affidavit, Exhibit A (AB, Vol. 2 at p. 658)
[27] Douez Affidavit, paras. 11 and 12 (AB Vol. 1, p. 131)
[28] Douez Affidavit, paras. 5 to 8, 12 (AB Vol. 1, pp. 130, 131)
[29] Squires Affidavit, Exhibit H (AB Vol. 2, p. 697)

36. Ms. Douez says neither she nor the class members consented to Facebook's use of their names and portraits in the Advertisements, by way of the Terms or otherwise.[30]

37. The Terms have been amended over the years. The current version contains the following language respecting advertising (emphasis added):[31]

> 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.

38. At sub-clause 10.2 above, Facebook promises not to give a Member's content or information to advertisers without the Member's consent (a sub-clause omitted by Facebook in its factum at para. 27). The plaintiff says such consent was neither solicited nor granted respecting the Advertisements.

39. Facebook has always 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 Social Ads privacy settings within the Website (Facebook calls this section the "Ad Settings") and choosing to "*Pair my social actions with ads for 'No one'*."[32]

40. Despite the fact that Sponsored Stories Advertisements are essentially the same

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[30] Douez Affidavit, para. 9 (AB Vol. 1, p. 131)
[31] Solanki Affidavit #2, Exhibit G (AB Vol. 2, p. 542)
[32] Squires Affidavit, para. 67 (AB Vol. 2, p. 641)

as Social Ads, and despite the language in the Terms at clause 10.1, Facebook does not enable Members to opt out of their appearance in Sponsored Stories.[33] Contrary to clause 10.2 of the Terms, to the plaintiff's knowledge Facebook never seeks Member's consent before creating such Advertisements featuring their names or portraits.

41. Despite the Terms' failure to advise Members that Facebook deems clicking a Like Button or performing other Social Actions as consent for it to use Members' personality in advertising, Facebook (through affiant Dr. Tucker) argues that Members demonstrate such consent when they engage in whatever Social Actions Facebook deems eligible for rebroadcast as these paid Advertisements.[34] This misses the point: a person may like a product (in the real sense of the word), but this does not mean the person consents to allow use of their personality in paid advertising.

iv. Jurisdictional Issues

42. Clause 15(1) of Facebook's Terms includes the following: "you will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provision. . . ."[35]

43. The Terms also include the following clauses relevant to jurisdiction:[36]

> [16] We [Facebook] strive to create a global community with consistent standards for everyone, but we also strive to respect local laws. . . ."
>
> [18(8)] Nothing in this Statement shall prevent us from complying with the law.

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[33] Squires Affidavit, Exhibit A (AB Vol. 2 at p. 658)
[34] Tucker Affidavit, paras. 7, 8, 54, 58 and 59 (AB Vol. 2, pp. 559, 560, 580, 581)
[35] Solanki Affidavit, Exhibit D (AB Vol. 1, p. 88)
[36] Solanki Affidavit, Exhibit D (AB Vol. 1, p. 88)

PART 2 – ISSUES ON APPEAL

44. Did the chambers judge properly find the Supreme Court has jurisdiction over the plaintiff's and class members' claims, notwithstanding a jurisdiction clause in Facebook's online Terms of Service?

45. Did the chambers judge exercise her discretion appropriately in certifying this Action as a class proceeding pursuant to the *Class Proceedings Act*?

PART 3 – ARGUMENT

A. Jurisdiction

i. Overview

46. The chambers judge's decision on jurisdiction was informed by her conclusions with respect to public policy considerations at play in the context of the true nature of the allegations and the realities of the Internet era. Thus, she explained in her reasons for judgment ("Reasons"):

> [360] Given the almost infinite life and scope of internet images and corresponding scale of harm caused by privacy breaches, BC residents have a significant interest in maintaining some means of policing privacy violations by multi-national internet or social media service providers.
>
> [361] Working together the *CPA* and the *Privacy Act* provide practically the only tools for BC residents to obtain some access to justice on these issues.

47. Facebook challenges two aspects of the chambers judge's decision on jurisdiction. First, it says she erred in finding that the *Privacy Act*, section 4, determines jurisdiction. That section provides that "an action under this Act must be heard and determined by the Supreme Court." Relatedly, it argues that there is no "strong cause" permitting the courts to disregard its forum selection clause.

48. Second, Facebook says the chambers judge was required to decide which law applied to the Action, and failed to do so.

ii. The Effect of Section 4

49. Section 4 of the *Privacy Act* stipulates that "an action under this Act must be heard and determined by the Supreme Court." The *Interpretation Act*, section 29, provides that in any enactment "'Supreme Court' means the Supreme Court of British Columbia."

50. Facebook argues that section 4 does not confer jurisdiction over the Action on the British Columbia Supreme Court to the exclusion of all other courts in the world. Rather, it determines which level of B.C. court may adjudicate the statutory tort.

51. Facebook's argument has been advanced in a number of analogous cases. But it has always failed. The case most precisely on point is the decision of Associate Chief Justice Wittmann in *Zi Corp v. Steinberg*, 2006 ABQB 92. There, the plaintiff brought a number of claims in contract and for breach of Alberta statute law. The statute in question conferred exclusive jurisdiction on the "Court of Queen's Bench", which, according to that province's *Interpretation Act*, meant the Alberta Court of Queen's Bench. The defendant, as here, sought to enforce a forum selection clause to have the matter heard in another jurisdiction. The Court described the issue in terms strikingly similar to that at bar:

> [64] Because section 180 designates the "Court of Queen's Bench" as the court to which an application under the section is to be brought, Zi submits that this Court is the only court with jurisdiction to grant the relief claimed under that section. Zi, thus, argues that a stay of proceedings in favour of Florida would deny Zi its substantive rights against the Lancer Entities. It states further that Alberta legislation regulating securities for the benefit of the public, should constitute "strong cause" why the Court should not stay this action in favour of the Florida Federal Court.

52. Wittmann A.C.J. accepted that the designation of the "Court of Queen's Bench" as the appropriate forum for the application was conclusive of the question of territorial jurisdiction. His decision on the issue is consistent with every other decision on point (see *Voyage Co. Industries v. Craster*, 1998 CanLII 1776 (BCSC); *Incorporated Broadcasters Ltd v. Canwest Global Communications Corp.*,

2001 CanLII 28395 (ONSC); *Nord Resources Corp v. Nord Pacific Ltd*, 2003 NBQB 201; *Ironrod Investments Inc. v. Enquest Energy Services Corp.*, 2011 ONSC 308; *Gould v. Western Coal Corp.*, 2012 ONSC 5184. See also the American case, *Taylor v. LSI Logic Corp.*, 715 A.2d 837 (U.S. Del. Super. 1998)).

53. In *Incorporated Broadcasters*, Killeen J. stayed an action commenced in Ontario on the basis that Manitoba had jurisdiction on similar grounds. Killeen J. held:

> [116] Section 234 (1) [of The Corporations Act of Manitoba] provides that "[a] complainant may apply to a court for an order under this section." Section 1(1) defines "court" as "the Court of Queen's Bench" and no other.
>
> [117] Thus, it seems inescapable but to conclude that only the Manitoba Court of Queen's Bench has jurisdiction to grant a remedy for oppression brought in respect of a Manitoba corporation such as Broadcasting.

54. Were any further support required, it is found in the Supreme Court of Canada's decision, *Seidel v. TELUS Communications Inc.*, 2011 SCC 15. There, the Supreme Court held that a statutory conferral of jurisdiction upon the British Columbia Supreme Court precluded a stay of proceedings in the face of an exclusive arbitration clause. The cause of action in *Seidel* arose pursuant to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, which provides at s. 172 that a person "may bring an action in Supreme Court" for breach of that Act. Telus's contract, on the other hand, provided that "[a]ny claim, dispute or controversy" shall be referred to private and confidential mediation" and thereafter, if unresolved, to "private, confidential and binding arbitration".

55. Binnie J., writing for the Court in *Seidel*, preferred to give effect to the legislative intent over the autonomy of the parties to contract out of the court process.

56. Facebook seeks to distinguish *Seidel* arguing that the case did not concern issues of territorial jurisdiction, but only the type of proceeding the plaintiff was bound to pursue. Facebook suggests, at para. 51 of its factum, that the Court was concerned about upholding a legislative intention to ensure an additional measure

of notoriety by means of civil action, which would be defeated by private and confidential mediation or arbitration. This is no basis for distinguishing *Seidel*, which in fact stands for quite the opposite proposition.

57. As the chambers judge observed in the case at bar, at para. 75, "[t]he legislature's intention in establishing privacy causes of action for individuals through the *Privacy Act* can be seen as aligned with an objective in conferring exclusive jurisdiction on this Court". The chambers judge provided several examples of such alignment, including that: "[75(c)] Ensuring that such claims are brought locally . . . increases the likelihood that there will be notoriety and a general deterrent effect locally, thus furthering the public policy goal of protecting the privacy rights of British Columbians."

58. Binnie J. wrote in *Seidel* at para. 3: "The Court's job is to give effect to the intent of the legislature as manifested in the provisions of its statutes." The legislative intent is manifest in the words of the *Privacy Act*: proceedings alleging breach of the *Privacy Act* must be brought before the British Columbia Supreme Court.

59. Facebook says in its factum, para. 49, that its interpretation is consistent with that reached by the courts of Saskatchewan and Newfoundland in *Billingsley v. CEP, Local 481*, 2010 SKQB 297 and *Dawe v. Nova Collection Services (Nfld) Ltd*, 1998 CarswellNfld 270. These cases do not assist Facebook.

60. In *Billingsley*, the defendants moved to have the Court decline jurisdiction over a number of claims, including claims under Saskatchewan's *Privacy Act*, in favour of an arbitration process agreed to in a collective bargaining agreement. The Court dismissed the application, saying only this with respect to the statutory exclusive jurisdiction clause (at para. 23): "[I]t is abundantly clear that this Court has exclusive jurisdiction to try and determine actions for violation of privacy."

61. In *Dawe*, a Provincial Court Judge in Newfoundland considered an action brought by an irate former tenant against a landlord which included a common law claim for invasion of privacy. Orr, Prov. Ct. J., dismissed the claim, including the privacy

claim, as baseless. In the course of his reasons he observed (at para. 10) that if a claim was brought under the statute, it would have to be brought in the Supreme Court Trial Division.

62. At best, *Billingsley* and *Dawe* stand for the proposition that a grant of exclusive jurisdiction, such as that in section 4 of the *Privacy Act*, bars other tribunals within the jurisdiction from hearing the statutory claim (something not disputed by Ms. Douez). But they do not support the argument Facebook seeks to advance.

iii. "Strong Cause"

63. Facebook says that "The appellant failed to show a strong cause or, indeed, any cause" for failing to enforce the forum selection clause.

64. To the contrary, strong cause for avoiding Facebook's forum selection clause is found in the *Privacy Act* itself, and throughout the Reasons. Justice Griffin observes that the *Privacy Act*'s conferral of exclusive jurisdiction is sufficient to overcome the forum selection clause, and she identifies two further reasons in support of "strong cause": juridical advantage and public policy. (Reasons, paras. 86-106).

65. In particular, the chambers judge explains, at para. 85, that "if the Forum Selection Clause was applied it would have the effect of being an exclusion of liability clause." This is the result of the chambers judge's recognition that the prospect of class members being able to pursue their *Privacy Act* claims in another jurisdiction is simply farfetched.

66. Facebook's protest that a similar claim could be pursued in California cannot stand with its simultaneous assertions that the *Privacy Act* does not, as a matter of choice of law, apply, and that in any event such a claim has never been certified in another jurisdiction (not entirely correct in light of the California class action, which was provisionally certified at the time of settlement) and is not amenable to a class proceeding. The chambers judge concluded that it was a combination of the

Privacy Act and the *CPA* that made vindication of the public policy enshrined in the *Privacy Act* a meaningful possibility. The chambers judge's analysis is correct.

iv. Choice of Law Under the CJPTA

67. Facebook argues that the chambers judge should have decided the applicable law governing the plaintiff's and class members' claims as part of the analysis, and that her failure to do so constitutes an error of law.

68. Yet the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, ("*CJPTA*") does not require a decision on the applicable law. Section 11 of the *CJPTA* says only that a "court . . . must consider the circumstances relevant to the proceeding, including . . . (b) the law to be applied to the issues in the proceeding".

69. Certainly, the chambers judge did consider the question of choice of law: she considered the question at some length before deciding the issue should best be determined in the context of the common issues trial (Reasons, paras. 116 to 125). She found that the court could, and should, take jurisdiction over the claim regardless of the law that may eventually apply.

70. In any event, Facebook's argument on this point assumes that if the choice of law is found to be the law of California, this will dispose of the *CJPTA* analysis. Clearly this is not so.

71. Further, even if the chambers judge was obliged to decide choice of law and failed to do so, the outcome would be the same: the choice of law on the merits would be British Columbia's law and, in particular, the *Privacy Act*.

72. The common law treats choice of law and forum selection clauses with the same level deference: they are observed where they are found to be "bona fide, legal and not contrary to forum public policy." *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277 (P.C.).

73. The proper choice of law will be British Columbia's law, for the same reasons articulated by the chambers judge with respect to jurisdiction.

B. Certification

i. Standard of Review for Certification

74. In *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Ministry of Agriculture & Lands*, 2012 BCCA 193 at paras. 21 and 22 , this Court summarized the standard of review on the appeal of a certification order. In short, the legislation should be construed generously to avoid impeding realization of the statute's intended benefits: judicial economy, access to justice and modification of the behavior of wrongdoers. Furthermore, "[22] A chambers judge has broad discretion in determining whether a class proceeding has met the criteria for certification and an appellate court should not interfere unless the chambers judge has erred in law or is clearly wrong. . . .".

75. In *Kwicksutaineuk* this Court cited its earlier decision, *Pro-Sys Consultants v. Infineon Technologies*, 2009 BCCA 503 at para. 28, where this Court held:

> [28] Section 4 of the *CPA* states that an action "must" be certified if all of the statutory criteria are satisfied. Accordingly, a judge on a certification application is not exercising a discretionary power in granting or refusing certification of an action as a class proceeding. However, the judge has a measure of discretion in the assessment of the statutory criteria and, absent an error of law, this Court will not interfere with an exercise of judicial discretion unless it is persuaded the chambers judge erred in principle or was clearly wrong . . .

76. It is important to refrain from delving too far into the merits at the certification stage. This is particularly apposite in British Columbia because of limits on pre-certification discovery. Thus, 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 underlying purposes of the *CPA* (see *Pro-Sys* at paras. 65 to 68; *Steele v. Toyota Canada*, 2011 BCCA 98 at paras. 60, 61, 68, 69).

ii. The Class Definition is Suitable

77. The plaintiff sought to define 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."

78. The chambers judge found that some class members may have used false names or images that did not represent them. She therefore refined the class definition as follows (Reasons at para. 159):

> All British Columbia Resident natural persons who are or have been Members of Facebook at any time in the period from January 1, 2011, to May 30, 2014 and
>
> (a) who at any time during this period registered with Facebook using either their real name or a portrait that contained an identifiable self-image or both;
>
> (b) whose name, portrait, or both have been used by Facebook in a Sponsored Story; and
>
> (c) and who do not seek to prove individual loss as a result.

79. Facebook complains about this definition, arguing it is unworkable and unsuitable. For the reasons that follow, Facebook's complaints are unjustified.

(a) Self-Identification

80. To support its argument, Facebook first claims in its factum that class members lack information necessary to determine whether they belong to the class and that, as such, "[72] . . . the class is not identifiable."

81. Facebook holds a mass of information necessary to enable self-identification. It knows which Members were featured in the Advertisements. As such, the chambers judge disposed of Facebook's argument at paragraphs 200 and 205 to 208 of the Reasons. She accepted the plaintiff's submission that "[207] . . . once Facebook produces in the course of this lawsuit the data as to users featured in Sponsored Stories, then class membership will be objectively determinable. . . .".

(b) Subjective Criteria

82. Facebook next argues the class definition includes subjective criteria. However, it points to only one aspect of the class definition that is supposedly "subjective". At paragraph 74 of its factum, Facebook notes the class definition's exclusion of persons seeking to prove individual loss caused by Facebook's alleged breach of the *Privacy Act*.

83. The plaintiff is not seeking to prove individual loss. As the chambers judge noted, "[320] . . . the *Privacy Act* makes it optional for a plaintiff to prove loss." Rather, the plaintiff seeks nominal damages in the aggregate. For this reason, the chambers judge refined the class definition such that it excludes persons seeking to prove individual loss (see Reasons at paragraphs 316 to 320).

84. Facebook erroneously argues that the class definition is improper for including claims-based membership criteria. In fact, British Columbia courts have accepted sufficiently objective claims-based criteria. See this Court's detailed discussion in *Kwicksutaineuk* at paras. 80 to 101; *Burnell v. Canada*, 2014 BCSC 1071 at para. 62; and *Rumley v. British Columbia*, 2001 SCC 69 at para. 21.

85. This issue can be satisfactorily dealt with in the notice to class members, which will advise the class about the type of damages sought in this Action. If certain class members wish to claim damages for individual losses they can opt out and proceed on their own. The chambers judge identified this point as follows: "[331] . . . notice to class members will have to explain that class members will be forsaking proving individual damage and instead will be seeking class-wide damages."

86. The *CPA*, s. 19(6)(d) and (e), requires that notice to the class "describe the possible financial consequences of the proceeding to class members and subclass members" and "give any other information the court considers appropriate" (subject to the court's discretion).

87. In *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C.S.C.),[37] the B.C. Supreme Court noted that persons with, among other things, very significant damages may wish to opt out. But that this "[68] . . . should not preclude a class action for the vast majority of claimants who have the potential for only modest awards and for whom individual actions are not feasible. . .".

(c) Clear Definition

88. Facebook argues the class definition is vague because it uses the word "registered": *i.e.*, that the class consists of persons who, during the period January 1, 2011 to May 30, 2014, *registered* with Facebook using either their real name or a portrait that contained an identifiable self-image or both.

89. While Facebook complains about the word "registered", it coined the term itself. In its written brief before the chambers judge, under a heading marked "User Registration and Consent", Facebook argued: "[14] . . . *While Facebook's terms of use require that users provide their real names during the registration process in order to promote authenticity and safety on the Facebook website . . . . [some] users have registered with the following names [examples listed] . . .*" (see also Facebook's factum, paragraphs 14 and 23). [emphasis added]

90. The word "registered" is of course not difficult to grasp. The chambers judge simply sought to limit class membership to those persons registered as Members with their real name or an identifiable portrait during the noted period (January 1, 2011 to May 30, 2014).

91. Facebook also argues that use of the terms "real name" and "identifiable self-image" in the class definition creates uncertainty. It asks whether a "real name" is the person's "legal name" or a name their friends know them by, and argues that the definition "[81] . . . *arbitrarily excludes individuals who are identifiable by some name other than their real name*." It asks whether the image must be "[82] *. . .*

[37] Appeal allowed on the issue of whether the cause of action concerning spoliation should proceed: 157 D.L.R. (4th) 465 (B.C.C.A.).

objectively or subjectively identifiable . . ." If a person's name and image are not "objective", it is difficult to come up with facts that would be. Facebook's arguments belong in a first-year philosophy class, not a practical discussion of a workable class definition. Facebook apparently had no trouble with these terms when it entered the provisional settlement certification in the United States and sent notice to some 180 million U.S. class members.

92. Before the chambers judge, Facebook failed to argue that the class definition was defective for confining the class to persons whose names or portraits it used in the Advertisements. Rather, it argued that determining whether it had used a class member's name or portrait in an Advertisement requires an individual assessment. In this regard it argued (in its written brief before the chambers judge) that a hypothetical class member must prove that "[141] . . . *she used her real name in her Facebook profile (as opposed to a fake name or pseudonym) or her profile picture was a recognizable likeness of her (as opposed to a picture of another person, a landscape, a pet, an object or no picture at all)*. . . .". [emphasis added]

93. Facebook now attacks the class definition by claiming it is uncertain for use of the qualifier (underlined) "real name" and "portrait that contained an identifiable self-image", terms that it injected into the argument. Common sense must prevail.

94. A pseudonym is a "false or fictitious name": *Shorter Oxford English Dictionary*, 5th Ed. (Oxford University Press, 2002). A person's "real name" is the name they normally use. A "portrait" is "a representation or delineation of a person or animal, esp. of the face or head and shoulders . . ." (*Shorter Oxford English Dictionary*) and it is a "likeness" *per* the *Privacy Act*, s. 3(1).

95. Even without the qualifiers "real" before "name" and "recognizable likeness" before "portrait" the class excludes those persons using false names and non-portraits. The chambers judge acceded to Facebook's argument by adding these qualifiers, but the qualifiers are actually unnecessary.

96. When Facebook supplies its British Columbia Members with the Advertisements, they (or anyone else) will be able to determine whether Facebook used their names or portraits in the same. If Facebook questions whether a given class member used a false name or non-portrait, the issue can be determined by affidavit attaching appropriate identification to prove the same. The *CPA* gives the court flexibility to resolve individual issues in creative ways (see *Scott v. TD Waterhouse*, 2001 BCSC 1299 at paras. 132-141). Facebook already uses such processes with prospective Members, sometimes requiring proof of name.

(d) Revised Class Definition Appropriately Narrow

97. Facebook argues the class definition is "over-inclusive" because it includes persons featured in "non-commercial" Advertisements. It says the *Privacy Act* only prohibits use of a person's name or portrait in commercial advertisements (Facebook's factum, paragraphs 84 to 86). Facebook criticizes the chambers judge because she allegedly "[86] . . . brushed aside any distinction among potential types of Sponsored Stories . . .". This misinterprets the Reasons.

98. Whether the prohibitions in s. 3(2) of the *Privacy Act* are limited to "commercial" advertisements is an issue for the trial judge at the common issues trial. The chambers judge discussed the competing theories (see her Reasons at paras. 161 to 170) and she found that the question is "[169] . . . better answered on the merits in the course of the lawsuit and not at the stage of the class definition."

99. The chambers judge's approach is correct. The *CPA* does not require the court, at certification, to determine whether every class member will prove a viable claim. In *Haghdust v. B.C. Lottery Corp*, 2013 BCSC 16 the Court held that "[81] The fact that the claims of some class members may be defeated by a valid defence and others may prevail does not mean the class is inappropriate; a class may be comprised of members who ultimately succeed in their claim and members who ultimately fail, providing that all share the same interest in the common issues . . ."

iii. The Chambers Judge Acted Within her Role as Certification Judge

(a) Discretion to Amend Class Definition and Common Issues

100. Facebook left the plaintiff to guess at its possible defences as it filed no response to civil claim. The chambers judge pointed this out (Reasons, para. 237), and derived Facebook's potential defences from its submissions. She then refined the class definition and certain of the common issues to accord with the reality of the case as it would apparently be defended. She found that doing so was entirely fair to Facebook, explaining as follows:

> [242] In my view the important question for the certification judge in deciding whether or not issues are common issues, when they have not been precisely identified in the plaintiff's notice of application, is whether the parties have had the opportunity to address these issues in their submissions.
>
> [243] Here Facebook argued extensively that the issue of whether or not a class member consented to being featured in a Sponsored Story is an individual issue. Facebook cannot therefore be prejudiced if I reject that argument, and find to the contrary that the question of consent gives rise to one or more common issues.

101. In its factum at para. 87, Facebook cites *Kumar v. Mutual Life Assurance* (2003), 170 O.A.C. 165 (C.A.) for the supposed proposition that ". . . *It was the Respondent's burden alone to establish that an identifiable class existed for this proceeding*." But *Kumar* stands for the opposite: the court has discretion to modify both the class definition and common issues to accord with the *CPA*. As explained by Rosenberg J.A. for the Court of Appeal in *Kumar* (emphasis added):

> [30]. . . I can see no reason in principle why the motions judge cannot modify the definition of the class or the common issues if the judge is of the view that such modification is required to accord with the Act. Further, in my view, it was open to the Divisional Court, in this case, to modify the definition of the class or the common issue. . . .
>
> [31] While I would not go so far as to suggest that there is a duty on the motions judge to modify the definitions, the class or the common issue, it is certainly open to the judge to do so. . . .

102. Facebook also erroneously cites *Rumley v. British Columbia*, 2001 SCC 69, for the same proposition. In that case the Supreme Court upheld a class definition crafted by this Court, explaining as follows (emphasis added): "[25] . . . The only question is whether, given the Court of Appeal's redefinition of the class and common issues, the certification requirements were met. . . .". Furthermore, in *Caputo v. Imperial Tobacco* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.) (cited by the defendant at para. 88 of its factum), although the Court rejected the plaintiffs' request to redefine the class, it did not foreclose the possibility of doing so in appropriate cases: "[41] . . . In some circumstances, it may be appropriate for the court to alter or amend a class definition to be consistent with other findings made on a certification motion. . . .". And in *Andriuk v. Merrill Lynch*, 2013 ABQB 422 at para. 121 (cited by the defendant at para. 87 of its factum), the Court did not allow amendment to the class definition on the facts of that particular case, but did not foreclose doing so in appropriate cases.

103. Additionally, the common issues are not necessarily static as first presented by the plaintiff. In *Rumley v. British Columbia*, 1999 BCCA 689, this Court observed the potential for modification: "[53] The definition of the common issues may be modified by the judge charged with the management of these proceedings if the judge considers modification to be appropriate as the case proceeds."

104. Other courts have noted the potentially fluid nature of common issues. In *Brogaard v. Canada (AG)*, 2002 BCSC 1149 the Court held: "[114] . . . It is not uncommon to refine the list of common issues as the litigation progresses: *Hoy v. Medtronic Inc*., 2001 BCSC 1343." And in *Cooper v. Merrill Lynch*, 2006 BCSC 1905: "[132] . . . The *CPA* contemplates flexibility in the litigation procedure. As the Ontario Court of Appeal noted in *Hickey-Button* [*v. Loyalist College* (2006), 267 DLR (4th) 601] at para. 59, 'the certification process is sufficiently flexible to react to changes in the litigation landscape that occur in the course of the class proceeding.'"

105. In the present case, the chambers judge did not revise the class definition or create common issues that were not already raised by Facebook in argument as

defences to the plaintiff's first proposed common issue. The certified class and common issues will allow the trial judge to determine whether Facebook breached s. 3(2) of the *Privacy Act*, by considering defences asserted by Facebook in its argument. Once Facebook issues its response to civil claim, it may be necessary to further refine the common issues.

(b) Plaintiff Established an Identifiable Class

106. Contrary to Facebook's submissions, the plaintiff met the burden resting upon her to show "some basis in fact" that the class is identifiable. In particular, she pointed to Facebook's evidence identifying a sizeable class. The chambers judge accepted this evidence, finding that "[206] . . . From the evidence filed by Facebook it is clear that Facebook is able to identify which users identify themselves as having a BC address, and which ones were featured in Sponsored Stories."

107. It is immaterial whether evidence establishing an identifiable class comes from the plaintiff or defendant. This is particularly so in B.C. where the defendant is obliged to file all material relevant to certification: *CPA*, s. 5(4) and (5). Obviously, the legislature intended such information to be available to the court in determining whether a class exists. There is no need for further evidence to establish the class.

(c) Some Evidence of a Class of Two or More People

108. Facebook claims "careful scrutiny" of the affidavit of one of the plaintiff's affiants, Mr. Caputo, fails to reveal his inclusion in a Sponsored Story. It argues that to the extent the chambers judge found the plaintiff met the burden to show a class of two or more people, "[93] . . . this was a palpable and overriding error."

109. During the hearing of the certification application, Facebook did not raise any issues respecting Mr. Caputo's appearance in a Sponsored Story. The chambers judge raised the question herself, seeking further submissions post-hearing. Only then did Facebook ask the Court to draw an "inference" that Mr. Caputo was not featured in a Sponsored Story (Reasons, para. 219). Facebook has the ability to determine with certainty whether any particular Member has been featured in a

Sponsored Story. It is therefore curious for Facebook to seek an "inference" when it could have proven the issue with direct evidence, particularly given its statutory obligation to provide all evidence material to certification.

110. Furthermore, Facebook's own affiants did not contest Mr. Caputo's appearance in a Sponsored Story. For example, Facebook affiant Mr. Solanki [AB, Vol. 2, p. 477] confirmed that he read Mr. Caputo's Affidavit (para. 26), went on to discuss Mr. Caputo's past "liking" activities, did not state that Mr. Caputo had never appeared in a Sponsored Story (para. 26), and swore that he knew of "[27] . . . no fact material to the application for certification that has not been disclosed in this affidavit." Furthermore, Facebook tendered evidence acknowledging Mr. Capota's appearance in a Sponsored Story. See the affidavit of Facebook affiant, Dr. Catherine Tucker [AB, Vol. 2 at p. 585] (emphasis added):

> [70] On occasions, another motivation for interacting with a company on Facebook is that the user wishes to express disapproval of how an organization has behaved. This was evidently the motivation of Petre Capota, who is a member of the proposed class, when he put a negative comment about Collective Point of Sale Solutions Ltd. on its Facebook page that later was part of a Sponsored Story. . .

111. Even if Mr. Caputo was not featured in a Sponsored Story, the chambers judge had ample evidence before her to support the existence of a class of two more people. As noted above, Facebook admitted that it had used 1.8 million other British Columbians in Sponsored Story Advertisements.

112. The chambers judge found this evidence sufficient to meet the low threshold resting upon the plaintiff to show an identifiable class of "two or more" persons. Her reasons on the issue are detailed and thorough: see at paras. 209 to 231, discussing *Wakelam v. Wyeth Consumer Healthcare*, 2014 BCCA 36; *Keatley Surveying Ltd. v. Teranet Inc.*, 2014 ONSC 1677 (Div. Ct.); and *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58.

113. In rejecting the notion that the plaintiff must prove the existence of two or more persons "desirous" of proceeding with the class proceeding, the chambers judge

discussed *Keatley*, wherein the Divisional Court gave the following compelling reasons to reject adding the word "desirous" to the legislation:

> [75] Nowhere, in *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158, is there any mention of the need to demonstrate the existence of two or more persons who are desirous of pursuing the claim as part of the identifiable class criterion. *Hollick* concerned persons living in the vicinity of a landfill. The court considered evidence about whether persons other than the representative plaintiff had complained to governmental agencies about the landfill. Notably, these complaints were not required for the identifiable class analysis to be satisfied. . .
>
> . . .
>
> [82] [In *Sun-Rype* at] paragraphs 72, 73 and 77, Rothstein J. repeatedly articulates the identifiable class requirement without reference to any need for evidence that two or more class members are desirous of proceeding via a class action. . .
>
> [83] In this case, it is not open to dispute that there are at least two persons who could, using objective criteria, establish that they are members of the class. Nor is the class unlimited.
>
> [84] Section 5(1)(b) of the CPA does not explicitly require evidence of a desire among class members to pursue an action. It simply requires that "there is an identifiable class of two or more persons that would be represented by the representative plaintiff or the defendant".
>
> [85] In short, the "desirous" component of the identifiable class criterion is not mentioned in the legislation, not required to achieve the purposes of the criterion and not mentioned in the Supreme Court of Canada jurisprudence that discusses the issue.

114. In the present case, approximately 1.8 million people can likely establish that they are members of the class. This is sufficient to meet the *CPA* requirement to provide some evidence of a class of two or more people.

(d) Preferable Procedure

115. Facebook seeks to apply a "correctness" standard to review the chambers judge's finding that the class proceeding is the preferable procedure. In fact, the chambers judge exercised discretion on this point, which entails a deferential review.

116. Facebook relies upon *Frey v. Bell Mobility*, 2011 SKCA 136 at paras 12 to 13, in which the Saskatchewan Court of Appeal set out ten issues raised by the appellant, one of which concerned preferable procedure, noting "[13] For the most part, the way in which these issues have been cast, they raise questions of law, reviewable on a standard of review of correctness . . .". (emphasis added)

117. In this province the law is set out in *Lam v. University of British Columbia,* 2010 BCCA 325. There, Finch C.J. held that "[77] The chambers judge concluded that a class action was not the preferable procedure. Such a discretionary decision is generally afforded considerable deference. . . .". The chambers judge had erred in failing to find certain contractual interpretation issues to be common issues. As such, the Court of Appeal had to "[77] . . . consider whether or not the preferable procedure conclusion was wrong as a result of those errors."

118. In the case at bar, the chambers judge found a class proceeding to be the preferable procedure based upon a nuanced consideration of the evidence. Her decision represents the exercise of her discretion. It is entitled to deference.

119. While Facebook claims the chambers judge did not analyze the importance of the common issues in relation to the claims as a whole (para. 98), it only points to the extent to which she considered the consent and damages issues.

120. As discussed, Facebook's defence will apparently turn largely upon the issue of whether class members consented to Facebook's use of their names and portraits in the Advertisements. This will require the trial judge to consider of the written Terms. As Facebook argued before the chambers judge in its written submission: "[19] . . . Most importantly . . . Facebook's terms of use expressly provided that users consent . . . This is a full answer to the claim asserted in this action. . . ."

121. The plaintiff disputes Facebook's argument that class members gave express consent. The chambers judge, quite properly, did not weigh the merits of the parties' arguments, but simply found that "[259] . . . there is a basis in fact for the claim that Facebook did not obtain the express consent of Facebook users to use

of their names or portraits in Sponsored Story." (see her Reasons at paras. 249 to 258, in which she outlines the parties' positions).

122. Determining whether the Terms constitute express consent for purposes of s. 3(2) of the *Privacy Act* is a matter of uniform contract interpretation, which is ideal for resolution as a common issue. See *Lam v. UBC* at paras 55 to 60, and the chambers judge's Reasons at para. 261 to 263.

123. Facebook also argued that certain alternate actions taken by Members on its website constitute express or implied consent under s. 3(2) of the *Privacy Act*. But, as noted by the chambers judge, only "[268] . . . a limited number of online actions . . . could be taken by a [Member] to support Facebook's argument that a user [expressly or] implicitly consented to the use of his or her name or portrait in a Sponsored Story. . ." Such actions consist of specific online acts such as "[265] . . . setting or not setting certain 'privacy settings' and in clicking on a 'like' icon." The chambers judge therefore concluded that "[268] . . . The question of whether or not these online actions can constitute implied consent will be the same for each Facebook user who took the same online actions. . . .".

124. Determining whether any of the online acts constitute express or implied consent is a matter of interpretation that is the same for each member. This is ideal for resolution at a single trial. See the Reasons at paras. 267 to 275.

125. Finally, Facebook argues that apart from the Terms and online actions, Members may consent as a result of their individual motives for taking Social Actions (*i.e.*, clicking a "Like Button"). It derives this argument from a misinterpretation of the *Privacy Act*, arguing that ss. 1(2) and (3) (violations of privacy) must be imported into the interpretation of s. 3(2) (misappropriation of personality) (Reasons, para. 276 to 277).

126. The chambers judge was clearly unconvinced by Facebook's arguments, finding that "[282] A plain-reading as well as the history of the *Privacy Act* does not support Facebook's attempt to make elements of s. 1 part of the requirements of s.

3(2) of the *Privacy Act*." She provided further detailed reasons which underscore the weakness of Facebook's arguments (paras. 283 to 289), but she ultimately concluded that "[290] . . . this hearing is not the final place to determine the merits of Facebook's argument. . . ." She included this additional weak defence as a common issue for determination by the trial judge.

127. With respect to certification of the consent defence generally, see *Scott v. TD Waterhouse*, 2001 BCSC 1299. There the plaintiffs alleged TD made undisclosed profits when it set foreign exchange rate on trades. As the plaintiffs' agent, it was not entitled to make profit absent the plaintiffs' consent. The action, which the Court certified under the *CPA*, included the following common issue (para. 170): "who has the onus of proving that there was disclosure and informed consent." The issue of "consent" has thus been certified in this province.

128. Facebook also argues that the court must embark on an individual inquiry to assess damages. It cites *Poirier v. Wal-Mart*, 2006 BCSC 1138, to support this argument. But in that case the Court noted that very little evidence had been adduced as to the damage suffered by the plaintiff following the defendant's statutory misappropriation of his personality (para. 95). To assess damages, the Court focused largely on the defendant's misconduct (paras. 106 – 109). In any event, even if the damages determination requires individual assessment that is not a reason to refuse certification (see the *CPA*, s. 7(a)). For example, most product liability actions certified as class proceedings in British Columbia have been designed to address the personal injury claims at the individual issues stage.

129. Regardless, the plaintiff seeks only nominal damages. Class members will have notice of the nominal nature of the damages, and the fact that their individual circumstances are irrelevant to the matter. They can opt out if they so choose.

130. Facebook also argues against aggregate damages as a common issue claiming in its factum that "[119] . . . the plaintiff must provide supporting evidence to show there is a workable methodology for determining such issues on a class-wide basis". But at the certification stage, the court only decides whether the question of

aggregate damages should be answered in common and not whether aggregate damages are in fact available (see *Knight v Imperial Tobacco Canada Limited*, 2006 BCCA 235 at para. 40). Further, Facebook relies upon price-fixing cases that involve complex multi-level damages. As the chambers judge explained, such analysis is certainly not required in this proposed simple nominal damages case. She further held that "[328] . . . the *Privacy Act* expressly contemplates that claims can be made without proof of damage. Surely the plaintiff does not need expert evidence on how damage is going to be proved when the plaintiff's position is that damage is not going to be proved."

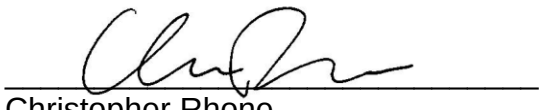
131. Facebook also attempted to rely upon Dr. Tucker's affidavit during the certification hearing, arguing damages could not be proved in the aggregate (Reasons, para. 322). The chambers judge found the plaintiff's objections to Dr. Tucker's affidavit to be warranted (Reasons, paras. 322 to 325) concluding: "[325] I do not find the Tucker Affidavit helpful on the question of whether or not an aggregate damages award is possible . . ."

132. Facebook argues that the common issues will not substantially advance the proceedings, and that they are threshold or minor issues. To the contrary, the common issues trial will resolve the issue of Facebook's liability (whether the supposed 'consent' defences are meritorious) and the issue of nominal damages.

PART 4 – NATURE OF ORDER SOUGHT

133. The plaintiff seeks an Order dismissing the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Christopher Rhone
Counsel for the Respondent

Dated: November 14, 2014

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