COURT OF APPEAL FILE NO. CA041918
SUPREME COURT FILE NO.: VLC-S-S-122316

COURT OF APPEAL

ON APPEAL FROM the order of the Honourable Madam Justice S. Griffin of the Supreme Court of British Columbia pronounced May 30, 2014, at Vancouver, British Columbia

BETWEEN:

DEBORAH LOUISE DOUEZ

RESPONDENT
(Plaintiff)

AND:

FACEBOOK, INC.

APPELLANT
(Defendant)

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

APPELLANT'S SUPPLEMENTAL REPLY FACTUM

(Pursuant to the Order of Groberman J.A. dated August 25, 2017)

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PART 1 – REPLY ARGUMENT

1. The Appellant, Facebook, Inc. ("Facebook") makes the following submissions in reply to the Respondent's Supplemental Factum delivered on October 21, 2017. Unless otherwise defined, all capitalized terms used in this reply factum have the same meanings as in Facebook's Supplemental Factum of September 22, 2017 ("Supplemental Factum").

A. Supreme Court of Canada Decision

2. The Respondent's submissions regarding the SCC Jurisdiction Decision amount to parsing words attempting to find "findings of [...] commonality" that do not exist.[1] The Respondent urges this Court to look closely at the way in which the Justices wrote their reasons – a plural here, a general observation there – as if it were a coded certification decision.[2] It was not. As Facebook submitted in its Supplemental Factum, the Certification Appeal was not at issue before the Supreme Court of Canada. No aspect of certification was argued, not even by way of preview. The Respondents' suggestion that the SCC Jurisdiction Decision somehow reached "findings" of "commonality" is simply not correct.[3]

3. Beyond parsing words to discover "findings", the Respondent's Supplemental Factum is built on conflating the issues on the Certification Appeal (which is before this Court) with the Jurisdiction Appeal (which was at issue in the SCC Jurisdiction Decision).

4. ***First***, the Respondent states repeatedly that the reasons for the SCC Jurisdiction Decision "ignored" or were "unconcerned" with her "personal circumstances". From this premise, she concludes that "[t]he [proposed common] issues are thus ***all*** amenable to class wide determination".[4] This submission is incorrect in both premise and conclusion.

5. The premise is incorrect because, contrary to the Respondent's argument, the SCC Jurisdiction Decision did not address the enforceability of the forum selection clause on a class wide basis, or anything similar. The ***only*** circumstances relevant on the

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1 Respondent's Supplemental Factum (Pursuant to the Order of Groberman J.A. dated August 25, 2017) ("Respondent's Supplemental Factum"), para 13.
2 See *e.g.*, Respondent's Supplemental Factum, paras 7-9.
3 Respondent's Supplemental Factum, para 13.
4 *E.g.*, Respondent's Supplemental Factum, paras 2, 10, 12-13 (emphasis added).

Jurisdiction Appeal were those of the Respondent. As this Court stated in its decision on the Jurisdiction Appeal, "[a]t this point in the analysis [*i.e.*, the Jurisdiction Appeal] there is no class; there is only Ms. Douez."[5] The other putative class members were not parties.

6. Contrary to the Respondent's argument, the reasons of the Plurality did not – and could not – "abound with treatment of the issues from a common perspective", at least not in any sense relevant to certification.[6] The Jurisdiction Appeal was the Respondent's individual appeal regarding a preliminary issue, not an appeal from a common issues trial.

7. Furthermore, the SCC Jurisdiction Decision only addressed the enforceability of the forum selection clause. This is not one of the proposed common issues. The Court's treatment of jurisdiction says nothing about whether any of the merits issues – including the overwhelmingly individual issue of implied consent – are capable of similar treatment.

8. ***Second***, the Respondent incorrectly conflates the contractual interpretation issues on the Jurisdiction Appeal with Facebook's argument on the Certification Appeal that implied consent is an overwhelming individual issue. The SCC Jurisdiction Decision addressed the enforceability of the forum selection clause as a component of a standard form contract,[7] but this is unrelated to the merits issue of whether any given individual impliedly consented to being featured in a Sponsored Story. Contrary to the Respondent's attempt to conflate these issues, implied consent to participating in a Sponsored Story turns on factors specific to each individual and is not limited to the bare legal interpretation of a standard form contract.[8] The SCC Jurisdiction Decision does not suggest otherwise.

9. The Respondent refers to the dissent's statement that "Facebook's defense [on the merits] is that Ms. Douez consented, not by her actions in British Columbia, but by agreeing to the terms of use", which is a "legal matter of construing the contract."[9] Contrary to the Respondent's argument, this *dictum* does not "undermine" Facebook's

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5 BCCA Jurisdiction Decision, para 44.
6 Respondent's Supplemental Factum, para 8.
7 SCC Jurisdiction Decision, paras 50, 55 (Plurality), and para 98 (Abella J.).
8 Respondent's Supplemental Factum, para 16. See para. 104 of the Main Factum. The Respondent's reliance on *Finkel v Coast Capital*, 2017 BCCA 361 is thus misplaced.
9 Respondent's Supplemental Factum, para 4; SCC Jurisdiction Decision, para 163.

position.[10] As the Certification Appeal was not before the Supreme Court of Canada, Facebook's argument that implied consent would be an overwhelmingly individual issue – which it has maintained throughout the certification proceedings – was not at issue. It is hardly surprising that the dissent would not avert to an argument not before the Court.

10. ***Third***, the Respondent argues that the SCC Jurisdiction Decision decided that "the contract ('Terms') are [sic] a product of gross inequality of bargaining power."[11] This is definitively not what any combination of Justices reasoned in the SCC Jurisdiction Decision. On the contrary, the Plurality, Abella J., and the dissent each restricted their respective analyses to the forum selection clause at issue.[12] There was no determination that the Terms of Use as a whole were the product of gross inequality of bargaining power.

11. ***Fourth***, the "Supreme Court majority" (by which the Respondent appears to mean the Plurality) did not "view this case" as "one crying out for access to justice and behaviour modification."[13] The only reference to the *Class Proceedings Act* was in the context of noting the availability of class proceedings in B.C.[14] The Plurality in no way commented on whether a class action was appropriate ***in this case*** (nor did Abella J. or the dissent).

12. In sum, the Respondent improperly parses the SCC Jurisdiction Decision in search of "findings" of commonality that are nowhere to be found within the reasons. As set out in Facebook's Supplemental Factum, the Certification Appeal was not at issue and not addressed in the SCC Jurisdiction Decision. To the extent that there was any intersection, the SCC Jurisdiction Decision is consistent with Facebook's position against certification.

B. Overstepping Role as Certification Judge

13. The Respondent characterizes Facebook's position as "startling", but does not deny that judicial discretion on a certification motion does not extend to making wholesale changes on the Court's own motion to correct deficiencies with the plaintiff's case. This

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10 Respondent's Supplemental Factum, para 4.
11 Respondent's Supplemental Factum, para 2.
12 SCC Jurisdiction Decision, paras 50-75, 99, and 134-150.
13 Respondent's Supplemental Factum, para 19.
14 SCC Jurisdiction Decision, para 61.

was the holding in *Lee v Transamerica Life Canada*, on which Facebook relies (in addition to the cases standing for this proposition cited at paras 87 to 90 of the Main Factum).[15]

14. The Respondent's only substantive answer – that the modifications in this case were "not wholesale" – lacks consonance with the fact that the Chambers Judge added six new common issues and substantially revised the class definition, including by adding a purely subjective element regarding whether the person seeks to prove individual loss.[16]

15. The Respondents' reliance on *Berg v Canadian Hockey League* is misplaced.[17] The "minor amendments" in that case consisted of adding a temporal limitation to the class definition (which the Chambers Judge also did in this case) and revising the class definition to reflect the motions judge's decision not to certify the action against certain of the defendants.[18] Unlike in the present case, the amendments in *Berg* did not include adding entirely new common issues or adding subjective elements to the class definition.

C. Subjective Criteria in the Class Definition

16. In defending the Chambers' Judge's addition of purely subjective elements to the class definition, the Respondent states that "[putative class members] will know whether they seek to prove individual loss."[19] This statement proves too much. If an essential element of a person's class membership exists solely in that person's own mind – which he or she alone can know (or change) – this is wholly subjective and cannot satisfy this Court's requirement that the "class must be defined with reference to objective criteria."[20]

17. It is telling that the Respondent suggests so easily the alternative of "remov[ing] [this *proviso*] from the class definition."[21] However, the Chambers Judge erroneously added this *proviso* because she considered it necessary to address her concern that, without qualifying the class definition, the class could be overly broad insofar as it could

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15 *Lee v Transamerica Life Canada*, 2017 BCSC 843.
16 Certification Decision, para 330 (AR at 79).
17 *Berg v Canadian Hockey League*, 2017 ONSC 2608, cited at para 26 of the Respondent's Supplemental Submissions.
18 *Berg*, *id*, paras 13, 162-165 and 247.
19 Respondent's Supplemental Submissions, para 32.
20 *Jiang v Peoples Trust Company*, 2017 BCCA 119, para 82.
21 Respondent's Supplemental Submissions, para 32.

include members "who might otherwise want to prove they suffered unique individual losses".[22] The Respondent cannot both jettison this element ***and*** claim (as she does) that the Chambers Judge's determination of the class definition is entitled to deference.[23]

D. Class of Two or More Persons

18. Regarding the Respondent's reliance on the chambers decision in *Finkel v Coast Capital Saving Credit Union* for a relaxed standard to show a class of two or more hypothetical class members (without proving the actual existence of at least two persons sharing an interest in the litigation), the chambers judge in *Finkel* relied for this point entirely on the Chamber's Judge's decision in this case.[24] As set out in paras 93 to 95 of the Main Factum, the Chambers Judge erred on this issue. *Finkel* is, accordingly, equally erroneous. Although this Court heard an appeal in *Finkel*, this point was not addressed.[25]

E. Preferable Procedure

19. Downplaying the individuality of her action, the Respondent states that "[t]here is no issue [...] concerning any particular person's placement in a Sponsored Story."[26] This misses the point. The complexity of determining whether the person was ***in*** a Sponsored Story is eclipsed by the question of whether the person ***impliedly consented***. As set out in paras 97 to 109 of the Main Factum, this raises overwhelmingly individualized issues.

20. All of which is respectfully submitted.

Dated at the City of Calgary, Province of Alberta, this 27th day of October, 2017.

Tristram J. Mallett / W. David Rankin

For the Appellant

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22 Certification Decision, paras 329-330 (AR at 79).
23 Respondent's Supplemental Submissions, para 21.
24 *Finkel v Coast Capital Savings Credit Union*, 2016 BCSC 561, para 76, cited at Respondent's Supplemental Submissions, para 33.
25 *Finkel v Coast Capital Savings Credit Union*, 2017 BCCA 361.
26 Respondent's Supplemental Submissions, para 36.

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