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 SUPPLEMENTAL FACTUM

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

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A. Overview

1. These submissions supplement Ms. Douez's original factum. Focus is upon the Supreme Court of Canada's June 23, 2017 judgment in this case (2017 SCC 33) and case law introduced since the first hearing before this Court (March 2, 2015).

B. Supreme Court of Canada Decision

2. While the Supreme Court of Canada's judgment concerns jurisdiction, all three sets of reasons support certification as a class proceeding. In particular, in concurrent reasons the majority held that (a) privacy rights at stake rise to the level of fundamental quasi-constitutional rights, (b) the contract ("Terms") are a product of gross inequality of bargaining power, and (c) the Terms constitute a contract of adhesion over which Members have no meaningful choice. In reaching these conclusions the majority was unconcerned with Ms. Douez's personal circumstances. The focus is upon British Columbians generally.

3. In its Supplemental Factum, Facebook claims the Supreme Court reasons support non-certification. It focuses on a potential consent defence (no defence has been filed yet). It says Members consented to the use of their names or portraits in Facebook's commercial advertising. In this context it argues that the Supreme Court's "[21] … *approach highlights the need for an individualized analysis of consent*. *The Plurality's decision … was premised on the animating concept of individual choice …*"

4. Facebook is wrong. Even the dissent undermines Facebook's assertion. In this regard, the dissenting justices explain that "Facebook's defence is that Ms. Douez consented, not by her actions in British Columbia, but by agreeing to the terms of use", and that resolving this "consent" defence "is a legal matter of construing the contract." (para. 163, emphasis added). That this is a legal matter of construction fully supports suitability of the consent issue to class-wide determination.

5. The dissent also points out that in resolving this legal question "[173] … the stronger party relying on a standard form contract faces the *contra proferentem*

rule under which any ambiguity is resolved against them …". Again, the assessment is objective. A Member's subjective conduct is irrelevant.

6. Indeed, in refusing to enforce the forum selection clause the majority said nothing about Ms. Douez's personal circumstances or the "individual choice" of any Facebook Member. Rather, the Terms were considered as they impact all Members. In all cases the Terms are a consumer contract between parties of unequal bargaining power. They implicate the same rights for all. Enforcing the jurisdiction clause could trump privacy rights for all Members, not just for Ms. Douez. The same is true of other clauses. As Karakatsanis, Wagner and Gascon JJ. explained (emphasis added):

> [50] We conclude that Ms. Douez has met her burden of establishing that there is strong cause not to enforce the forum selection clause. A number of different factors, when considered cumulatively, support the chambers judge's finding of strong cause. Most importantly, the claim involves a consumer contract of adhesion and a statutory cause of action implicating the quasi-constitutional privacy rights of British Columbians. …

7. Thus, their concerns is with the impact of the alleged privacy breach on the "*rights of British Columbians*", plural (para. 50, emphasis added). And the chambers judge expressed this same concern. In her words: "[357] Here, the tort under s. 3(2) of the *Privacy Act* seems tailor-made for class proceedings, where the alleged wrongful conduct was systemic and on a mass scale, and where proof of individual loss is not necessary or sought. …" (emphasis added).

8. Karakatsanis, Wagner and Gascon JJ.'s reasons abound with treatment of the issues from a common perspective. For example (emphasis added):

> [54] Despite Facebook's claim otherwise, it is clear from the evidence that there was gross inequality of bargaining power between the parties. Ms. Douez's claim involves an online contract of adhesion formed between an individual and a multi-billion dollar corporation. The evidence on the record is that Facebook reported almost $4.28 billion in revenue in 2012 through advertising on its social media platform. It is in contractual relationships with 1.8 million British

> Columbian residents, approximately forty percent of the province's population. Ms. Douez is one of these individuals.
>
> [55] Relatedly, individual consumers in this context are faced with little choice but to accept Facebook's terms of use. … [I]n today's digital marketplace, transactions between businesses and consumers are generally covered by non-negotiable standard form contracts presented to consumers on a "take-it-or-leave-it" basis (Pavlović, at p. 392).
>
> [56] In particular, unlike a standard retail transaction, there are few comparable alternatives to Facebook, a social networking platform with extensive reach. British Columbians who wish to participate in the many online communities that interact through Facebook must accept that company's terms or choose not to participate in its ubiquitous social network. … Having the choice to remain "offline" may not be a real choice in the Internet era.

9. Note Karakatsanis, Wagner and Gascon JJ.'s finding that users have "*little choice but to accept Facebook's terms of use*", and that remaining "*offline*" may not be a real choice. Contrary to Facebook's argument, this finding is made in relation to British Columbians *en masse* (para. 56). The concern is not with *individual choice*.

10. In reaching these conclusions the majority did not find it relevant or necessary to consider whether Ms. Douez read the Terms, nor did they consider her subjective interpretation of the Terms. Moreover, Facebook cannot point to any individual negotiation or unique interaction with the Members. The issue is simply a legal matter: construction of a standard form contract. Similarly see this Court's recent holding in *Finkel v. Coast Capital*, 2017 BCCA 361 at paras. 67 and 92.

11. The issues are thus all amenable to class wide determination. They all flow from a standard form contract and an online computer platform. The contract and platform operate in the same manner for all. The platform can only be used in a defined and limited manner common to all class members. As found by the chambers judge:

> [265] … in this online relationship, Facebook did not have individual unique contracts or communications with users. All relationships were governed by standard terms or a limited set of user actions. The user actions that Facebook relies on to suggest that express consent was given include the same ones relied on for implied

> consent, such as actions taken by the user in setting or not setting "privacy settings", and in clicking on a "like" icon.

12. The Supreme Court also ignored Ms. Douez's personal circumstances in relation to the substance of the claim. Rather, focus was upon the impact of Facebook's alleged conduct on all of British Columbians. *Per* Karakatsanis, Wagner and Gascon JJ. (emphasis added):

> [59] … it is especially important that such harms do not go without remedy. And since Ms. Douez's matter requires an interpretation of a statutory privacy tort, only a local court's interpretation of privacy rights under the *Privacy Act* will provide clarity and certainty about the scope of the rights to others in the province.

13. Contary to Facebook's assertion, Abella J. effectively agreed with most of the findings of the rest of the majority, in particular findings relating to the degree of commonality of issues to all persons. She too avoided considerations unique to Ms. Douez and treated the issue generally from the perspective of all consumers:

> [98] … We are dealing here with an online consumer contract of adhesion. Unlike *Pompey*, there is virtually no opportunity on the part of the consumer to negotiate the terms of the clause. To become a member of Facebook, one must accept all the terms stipulated in the terms of use. No bargaining, no choice, no adjustments.

14. Note Abella J.'s focus upon the conduct of *all* persons joining Facebook: no bargaining, no choice, no adjustments. She also noted lack of true consent *for all Members*, explaining as follows (emphasis added):

> [99] … What does "consent" mean when the agreement is said to be made by pressing a computer key? Can it realistically be said that the consumer turned his or her mind to all the terms and gave meaningful consent? In other words, it seems to me that some legal acknowledgment should be given to the automatic nature of the commitments made with this kind of contract, not for the purpose of invalidating the contract itself, but at the very least to intensify the scrutiny for clauses that have the effect of impairing a consumer's access to possible remedies.

15. Thus, Abella J.'s concern is with the impact of Facebook's alleged conduct upon British Columbians as a whole: "[105] Public policy concerns relating to access to domestic courts are especially significant in this case given that we are dealing with a fundamental right like privacy. …" (emphasis added). This comment also underlies the importance of certifying this action as a class proceeding as doing so ensures access to justice for class members, discussed further below.

16. To summarize, the Supreme Court of Canada's reasons support certification:

    a. All members are in precisely the same unequal bargaining position vis-à-vis Facebook.

    b. All members clicked "I agree" to the same standard form contracts.

    c. The "consent" defence depends upon the contract Terms, or perhaps if Facebook is correct, at most to a limited set of online actions applicable to all Members.

    d. The "consent" defence is a legal issue that will be resolved by construing the Terms. Ambiguity works against Facebook for all Members. Whatever the court decides will apply equally to all class members.

    e. The rights at stake are the same for all members: quasi-constitutional privacy rights.

17. Facebook also ignores aspects of the reasons supporting certification.

18. As observed in the respondent's factum at para. 74, the *CPA* must be construed generously to avoid impeding realization of its intended benefits: *judicial economy*, *access to justice* and *modification of the behavior of wrongdoers*.

19. The Supreme Court majority viewed this case as a serious matter, one crying out for access to justice and behavior modification. As noted, Karakatsanis, Wagner and Gascon JJ. highlighted the need for access to justice, observing: "[59] … it is especially important that such harms do not go without remedy. …" They also found a legislative intent to ensure access to the courts through the tools of both the *Privacy Act* and the *CPA*:

> [61] Similarly, the legislature's creation of a statutory privacy tort that can be established without proof of damages reflects the legislature's

> intention to encourage access to justice for such claims. As well, British Columbia's *Class Proceedings Act* provides important procedural tools designed to improve access to justice (*Endean v. British Columbia*, [2016] 2 S.C.R. 162, at para. 1).

20. This passage harken directly to the chambers judge's reasoning, wherein she wrote: "[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."

C. Deferential Approach to Chambers Judge's Conclusions on Certification

21. In *Jiang v. Peoples Trust Co.*, 2017 BCCA 119, this Court reiterated that to the extent the chambers judge's conclusions are discretionary, "[37] … this Court must review those elements on a highly deferential basis." In contrast, questions of law are reviewed on a standard of correctness (para. 37). Identifiable class and preferable procedure requirements involve the exercise of some discretion, and this Court may only intervene where there is "[38] … palpable and overriding error of fact or where there is error of principle …"

D. Chambers Judge's Role as Certification Judge

22. Facebook asserts at para. 25 of its Supplemental Factum that "*the B.C. Supreme Court has confirmed Facebook's position that the Chambers Judge erred in principle by overstepping her role [etc.]* …". To support this startling proposition, Facebook cites *Lee v. Transamerica Life Canada*, 2017 BCSC 843 (Kent J.). In fact, *Lee* fails to include any references to the case at bar*. Lee* does not suggest Griffin J. overstepped her role.

23. In *Lee* the plaintiffs were granted many opportunities to amend their pleadings. Despite this, they failed to plead a proper cause of action. Kent J. refused to certify the case, finding that lack of a cause of action was fatal to certification and to the case itself (para. 63). In refusing to grant an opportunity to amend, Kent J. stated: "[78] … the deliberate nature of these tactics militates against the exercise of any discretion to grant further relief and I decline to do so. In the circumstances, the plaintiffs are rightly hoisted by their own petard."

24. In *obiter* Kent J. considered the class definition and outlined its numerous deficiencies (essentially, it was overbroad). He held that a court *can* amend a class definition (para. 93). But in the circumstances a revised definition would have required wholesale changes, going well beyond an exercise of discretion.

25. In the present case Griffin J. made minor changes to address concerns raised by Facebook during argument (and thus obviously involved the consideration of Facebook's position). Her modification was not wholesale. Nothing in *Lee* changes the respondent's submissions (factum paras. 100 to 105). The minor amendments made by Griffin J. are consistent with the types of amendments routinely made by courts after oral argument on certification.

26. For example, in *Berg v. Canadian Hockey League*, 2017 ONSC 2608, the Court made minor amendments to the class definition similar to those made by the chambers judge in the case at bar. See at paras 13, 162 to 165 and 247.

27. In *Tonn v. Sears Canada Inc*., 2016 BCSC 1081, Griffin J. noted that "[128] A chambers judge is in a position to make some modifications to a proposed class action, but in this case there are too many areas requiring modification. I consider that it is more appropriate to leave it open to the plaintiff to re-apply should it choose to do so." While Griffin J. did not certify that action, she suggested the overbroad class definition could have been rectified through minor modification (*i.e.*, consistent with the approach in this case) (see paras. 49, 54, 59).

28. In *Jiang v. Peoples Trust Co.* at para. 122, this Court identified the propriety of amending a class definition to allow certification.

E. Self-Identification

29. Facebook argues that class members cannot self-identify because they do not know if they were placed in Advertisements by Facebook. As Griffin J. noted, Facebook can inform people if it put them in Advertisements (see Ms. Douez's factum paras. 80 and 81). Furthermore, in *Jiang v. Peoples Trust Co.* at para. 74 this Court held that "… It is enough that the definition state objective criteria by

which members of the class can later be identified. …" (emphasis in original). It would be manifestly unfair to allow Facebook to defeat certification as a result of its deliberate choice not to tell Members it had put them in its Advertisements.

F. Subjective Criteria in Class Definition

30. In *Jiang v. Peoples Trust Co.* at para. 95 this Court held that "… It cannot be the case that a definition incorporating any subjective element denies the plaintiff resort to the *CPA* by virtue of failing the s. 4(1)(b) requirement. …"

31. This Court emphasized that determining membership in the class pre-trial of common issues is assessed from class members' perspective. In other words, whether a defendant can determine which person may fall within the class definition is irrelevant before trial of the common issues. *Jiang* paras. 90 and 100.

32. In the case at bar, class members can self-identify after Facebook tells them it put them in an Advertisement. They will know whether they seek to prove individual loss. If so, they are not class members. An alternative is to remove from the class definition the *proviso* that the class consist only of persons "*who do not seek to prove individual loss*". This information can be included in notice to allow people to opt out, should they so choose.

G. Class of Two or More People

33. At paras. 108 to 114 of her factum Ms. Douez addresses Facebook's claim that there is only one class member: Ms. Douez. Ms. Douez's new evidence motion resolves this issue if Facebook's argument otherwise prevails. However, in addition, in *Finkel v. Coast Capital Savings Credit Union*, 2016 BCSC 561, aff'd 2017 BCCA 361, Masuhara J. made the following finding, which is directly on point:

> [76] … The test is whether there is an "identifiable class" of two or more persons. As Justice Griffin stated in *Douez v. Facebook, Inc*., 2014 BCSC 953 at para. 230, rev'd (but not on this point) . . . "showing some basis in fact that two or more persons are in the proposed class is all that is necessary under the *CPA* and there is no additional requirement of showing that two or more persons are

> interested in pursuing a claim." The evidence that Coast Capital has over 500,000 members in British Columbia gives rise to the reasonable inference that some may have conducted transactions similar to those described by Mr. Finkel. Further, Ms. Nancy McNeill, Coast Capital's Senior Vice-President of Operations, deposed that "[t]he number of members in the proposed class could be as many as there are members with accounts at Coast Capital".

H. Preferable Procedure

34. Facebook's reliance on *Vaugeois v. Budget Rent-A-Car of BC Ltd*., 2017 BCCA 111 is misplaced. The chambers judge in that case found that the claims could not be prosecuted on a class wide basis. This Court underscored the notion that the chambers judge's decision is owed "special deference" regarding preferable procedure: "[11] … we should pay special deference to the weighing of factors by the chambers judge …" This same "special deference" is owed to Griffin J..

35. The factual matrix in *Vaugeois* differed substantially from the issue in the case at bar. As Facebook writes in its supplemental factum at para. 35: "*individual issues [in Vaugeois] (regarding whether any given individual was wrongly billed for repairs) would overwhelm the common issues . . .*" This Court noted that "[21] … the judge could rightly have concluded that a class proceeding would 'merely be a prelude to many individual trials'."

36. There is no issue in the case at bar concerning any particular person's placement in a Sponsored Story (*cf.* the issue in *Vaugeois* as to whether "any given individual was wrongly billed" (*per* Facebook's summary)). Only people placed in a Sponsored Story are in the class. Then the question is whether the Terms allowed Facebook to do what it did. Thus, resolving the common issues will *not* be a "prelude to many individual trials". Rather, it will significantly advance or entirely resolve the issues *vis-à-vis* all class members.

37. In short, the mere fact that in an entirely different context another B.C. Supreme Court judge found that a class proceeding was *not* preferable says nothing about whether the chambers judge erred in finding the case at bar wholly suited for a

class proceeding, i.e., that "the tort under s.3(2) of the *Privacy Act* seems tailor-made for class proceeding." (*per* Griffin J.'s reasons for judgment para. 357).

38. Additionally, in *Jiang* this Court held that a need to conduct individual factual inquiry at the claims stage is not itself a reason to deny certification. The plaintiff need only establish "some basis in fact" that there is or reasonably will be sufficient information available to persons to permit them to determine whether they are class members. (*Jiang* at paras. 77-78, 81, 90-94). Class members will be able to self-identify in the present case. The appellant's records will provide all information needed to test their claims, if necessary, at the administration stage.

39. Facebook also relies on *Baker v. Rendle*, 2017 BCCA 72, an action in nuisance. As this Court observed in *Baker* (para. 52), nuisance claims involve a high degree of subjectivity requiring individual assessment. In contrast, the case at bar concerns uniform contract interpretation and possible consideration of a limited set of online acts. See also *Finkel v. Coast Capital*, 2017 BCCA 361 at paras. 67, 92.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Dated: October 20, 2017

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