IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Douez v. Facebook, Inc.*, 2014 BCSC 953

Date: 20140530
Docket: S122316
Registry: Vancouver

Between:

Deborah Louise Douez

Plaintiff

And

Facebook, Inc.

Defendant

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

Application for Certification

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Introduction

[1] Do British Columbian users of social media websites run by a foreign corporation have the protection of BC's *Privacy Act*, R.S.B.C. 1996, c. 373? Do the online terms of use for social media override these protections? These are questions at the heart of this proceeding.

[2] In January 2011 Facebook began making advertising revenue from a product called Sponsored Stories. The plaintiff says that Facebook took the names and images of Facebook users in British Columbia and featured them in advertisements sent to the users' contacts, without the knowledge or consent of the person featured in the ad. The plaintiff says this was a breach of the *Privacy Act* of BC. The plaintiff seeks to certify this proceeding as a class proceeding on behalf of all BC Facebook users featured in the Facebook Sponsored Stories.

[3] Facebook says that it obtained the express consent of users to feature them in Sponsored Stories, through the terms of use accepted by every user when accessing a Facebook service and other conduct such as the setting of privacy settings. Furthermore, Facebook says that through its terms of use, Facebook users in BC agreed that the jurisdiction and law governing claims would be that of California. Facebook says that this Court ought not to exercise jurisdiction over it.

Overview

[4] The plaintiff, Ms. Douez, is a videographer. She is a resident of Vancouver and has been a member of the Facebook website since June 2007.

[5] The defendant Facebook, Inc. is a company incorporated in Delaware in the United States of America in 2004. It became a public company in 2012. It operates a social networking website located at www.facebook.com and makes a substantial majority of its revenues from internet advertising. Its head office is in California.

[6] The plaintiff alleges that Facebook used the names and likenesses of people who were users of Facebook, without their permission, for advertising. It did so by creating a product called "Sponsored Stories".

[7] Advertisers paid Facebook for Sponsored Stories, which would feature the name and likeness of Facebook users and the advertising logo and other product or service information of the entity which had purchased the advertising service.

[8] These Sponsored Stories would be sent to the Facebook users' contacts, unbeknownst to the Facebook user whose likeness appears in the ad. For example, a Sponsored Story might go to Deborah Douez's contacts, saying that she liked a certain product, implying that she endorsed others using or buying the product.

[9] Ms. Douez says that Facebook did not seek or obtain the consent from her or other Facebook users for the Sponsored Stories advertisements, and that this was a breach of s. 3(2) of the *Privacy Act*. That section provides:

> 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.

[10] Ms. Douez brings a claim for damages under s. 3(2) of the *Privacy Act* on her behalf and seeks to have the claim certified as a class action for 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.

[11] Noting that a corporation is a legal "person", and without delving into the question of whether or not s. 3(2) *Privacy Act* claims could even be brought on behalf of a corporation, the plaintiff has clarified that she intends by the above class definition to only include natural persons.

[12] Facebook says all people using its service had to register as members and accept its terms of use as set out in what it now calls a "Statement of Rights and Responsibilities" (the "Terms of Use"). Facebook says that through the Terms of Use and other disclosure on its website, and by users' own actions such as in setting their "privacy settings", it obtained the express consent of Facebook users to use their names or likenesses in the Sponsored Stories products.

[13] The plaintiff denies that the Terms of Use disclose the potential use of Facebook users' names and likenesses in Sponsored Stories, and denies that users gave their express consent to such use.

[14] Facebook argues alternatively that Facebook members gave their implied consent to the use of their names and likenesses in Sponsored Stories. The plaintiff denies that implied consent is a defence under s. 3(2) of the *Privacy Act*. Further, the plaintiff says that no such implied consent was given.

[15] Thus it is that the issue of consent will be front and centre in the trial of the plaintiff's claim.

[16] In addition, as a first position Facebook argues that this Court should decline to exercise jurisdiction over this claim. This argument is primarily based on the allegation that under the Terms of Use, registered Facebook users have agreed to a choice of jurisdiction based in California. Further, Facebook argues that by the same clause in the Terms of Use users agreed that California law governs which is a factor the Court should weigh in declining jurisdiction.

[17] The plaintiff argues that the choice of forum and choice of law clause does not supersede the *Privacy Act*, which grants exclusive jurisdiction to this Court over claims under the *Act*.

<u>Issues</u>

[18] The issues I must decide are:

1. Should this Court decline jurisdiction? If not,
2. Should this Court certify the proceeding as a class proceeding? In this regard:
    (a) do the pleadings disclose a cause of action;
    (b) is there an identifiable class of two or more persons;
    (c) do the claims of the class members raise common issues;

(d) would a class proceeding be the preferable procedure for the fair and efficient resolution of the common issues; and

(e) is there a representative plaintiff who

i. would fairly and adequately represent the interests of the class;

ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and

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

1. Jurisdiction

[19] Facebook makes a number of submissions in support of its application for an order that the Court decline jurisdiction and stay the action. However, its primary argument is that its standard-form online terms, the Terms of Use, contain a forum selection clause that binds users of the service to adjudicate disputes in the courts of California (the "Forum Selection Clause").

[20] One of the more recent versions of the Forum Selection Clause provides:

> 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 provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims.

[21] Earlier versions referred to a choice of Delaware law, but also referred to the courts of California being the choice of jurisdiction.

[22] The primary answer of the plaintiff is that the claim is brought pursuant to s. 3(2) of the *Privacy Act*, and that statute confers exclusive jurisdiction on this Court pursuant to s. 4 which provides:

> 4. Despite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court.

[23] Section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, provides that in any enactment “Supreme Court’ means the Supreme Court of British Columbia.

[24] Also relevant is the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*].

[25] I pause to note that at times in oral submissions Facebook made assertions that suggested it was confused about the difference between territorial competence and the declining of jurisdiction. However, Facebook has not in fact disputed that this Court has territorial competence over it.

[26] In the Form 108 Jurisdictional Response filed by Facebook pursuant to Rule 21-8 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, it did not check the box asserting that it disputes that this Court has jurisdiction over the defendant; rather, it checked the box submitting that this Court ought not to exercise jurisdiction over the defendant.

[27] As well, Facebook’s jurisdiction application is for an order that the Court decline jurisdiction, it is not seeking an order declaring that this Court does not have territorial competence. This point was previously noted in this proceeding on Facebook’s sequencing application: see 2012 BCSC 2097 at para. 31.

[28] In any event, it is clear based on the *Privacy Act* and the BC residency of the plaintiff that this Court does have territorial competence, also known as territorial jurisdiction, over the claim. The issue is whether or not this Court ought to decline to exercise jurisdiction.

[29] The Court may decline jurisdiction on the basis of either the Forum Selection Clause or the *forum non conveniens* considerations codified by s. 11 of the *CJPTA.* These are separate inquiries: *Viroforce Systems Inc. v. R&D Capital Inc.,* 2011 BCCA 260 [*Viroforce*] at para. 14; *Preymann v. Ayus Technology Corp.*, 2012 BCCA 30 [*Preymann*] at paras. 48-49. Facebook argues both grounds here.

[30] I will examine the two prongs of Facebook's argument in turn.

The Forum Selection Clause

[31] The British Columbia Court of Appeal in *Preymann* set out the steps in the analysis of whether a court should decline jurisdiction based on a forum selection clause at paras. 43-44:

(a) the respondent party relying on the forum selection clause must first establish that it is:

1. valid,
2. clear,
3. enforceable,
4. and that it applies to the cause of action before the court;

(b) once that is established, the plaintiff must show "strong cause" as to why the court should not enforce the forum selection clause.

Has the Defendant Shown that the Clause is Valid, Clear and Enforceable?

[32] As for the validity and enforceability of the Forum Selection Clause, the evidence establishes that many members of the proposed class will like be infants, as Facebook allows children to sign up as users from age 13 on. The plaintiff says that at a minimum, the Forum Selection Clause is not valid and enforceable as against infants who will be members of the class.

[33] However, the defendant submits that the plaintiff herself is an adult and was at the material times in issue in this case. Facebook says that when determining whether to decline jurisdiction, this Court should consider only the plaintiff's claim as it is pre-certification, and that any other potential claims if certified are irrelevant.

[34] In *Ezer v. Yorkton Securities Inc.*, 2004 BCSC 487 at para. 29, the court rejected the argument that procedural advantages of the BC *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], provided "strong cause" to overcome an exclusive

jurisdiction clause in a securities contract entered into by the plaintiff. The court's analysis suggested that jurisdiction was to be determined on the basis of the plaintiff's claim, not on the basis of others in the class who might not be subject to the exclusive jurisdiction claim.

[35] On the other hand, the prospect of a multiplicity of proceedings where the forum selection clause is enforced with respect to only one aspect of a claim can be a factor when considering whether or not to decline jurisdiction on the basis of a forum selection clause: *Magill v. Expedia Canada Corporation and Expedia.ca*, 2010 ONSC 5247 at para. 53.

[36] As for the clarity of the clause, it is found within Facebook's Terms of Use.

[37] A user must agree to Facebook's Terms of Use when the user registers for a Facebook account. I have not been given an online demonstration, but one version of the Terms of Use, when printed, runs 13 pages long, with the portion dealing with "Governing Law: Venue and Jurisdiction" commencing ten pages after the first page.

[38] Another version of the Terms of Use as of April 26, 2011, appears to be in very small font and comprised of approximately 18 sections. The Forum Selection Clause set out above in these Reasons is towards the end of these tiny terms, as item 15 under the heading "Disputes".

[39] I have not heard evidence as to how long it would take the average reader to read Facebook's Terms of Use, or for that matter, the context of that time in relation to every "terms of use" facing an internet user on a daily basis.

[40] But the obscure nature of a clause in online terms of use has been found in some other cases not to defeat a forum selection clause: see *Rudder v. Microsoft Corp.*, [1999] O.J. No 3778 (Ont. S.C.J.), Supplemental Reasons for Judgment (12 November 1999), Doc. 97-CT-046534CP (Ont. S.C.J.) [*Rudder*]. The *Rudder* case dealt with an intended class proceeding against Microsoft in relation to its MSN service. The claim alleged that Microsoft had charged members and taken payments from their credit cards in breach of contract.

[41] In *Rudder*, the court rejected the argument that the forum selection clause was too buried within the terms of use to be binding on the plaintiffs. Users were required to click "I agree" accepting the terms of use for the MSN service.

[42] There was evidence in *Rudder* that Mr. Rudder had the ability to scroll through the entire terms of use when he signed up to use the site. The terms of use contained a forum selection clause in favour of the State of Washington, U.S.A. The court rejected the idea that the plaintiffs could advance a claim based on breach of contract, but then seek to ignore the forum selection clause in the same contract. The court expressly rejected the notion that contracts formed by accepting online terms of use should be any less enforceable than agreements in writing: see paras. 16-17.

[43] The result in *Rudder* was that the Ontario action was stayed based on the forum selection clause in favour of Washington State.

[44] It must be kept in mind that *Rudder* was not dealing with a non-contract claim based on a statutory tort where the statute provides that the local court has exclusive jurisdiction. This is the situation we have here.

[45] In *Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 [*Century 21*], the defendant, a sophisticated media company, argued that giving effect to the plaintiff's "terms of use" would cripple the internet because it would hamper public access. This argument was given short shrift by Punnett J. of this court who held at paras. 118-119:

> The defendants argue that what Century 21 provides, in making their Website available to the public, (as opposed to an internal "Intranet"), is merely a grant of access to the site. The defendants' argument may be correct in part; however, when a user accesses a main page that merely places the user at Century 21's door. Entry is an additional step and one that website owners clearly control and users can undoubtedly choose to take.
>
> Taking the service with sufficient notice of the Terms of Use and knowledge that the taking of the service is deemed agreement constitutes acceptance sufficient to form a contract. The act of browsing past the initial page of the website or searching the site is conduct indicating agreement with the Terms of Use if those terms are provided with sufficient notice, are available for

> review prior to acceptance, and clearly state that proceeding further is acceptance of the terms.

[46] The court in *Century 21* emphasized that the online contract was between sophisticated commercial parties who employ similar terms of use themselves and who had conceded the reasonableness of the terms of use at issue (at para. 120). The court noted that it was not addressing issues that may face other courts in the future, such as the reasonableness of the terms or the sufficiency of notice. I note that the latter concerns are potential issues in this case.

[47] Here the defendant has filed evidence indicating that Facebook users must register for an account in order to become Facebook members and that when they do so, they must agree to Facebook's Terms of Use.

[48] Having considered the evidence and leaving aside the arguments based on the *Privacy Act*, I accept at least on a *prima facie* basis subject to the evidence and arguments at trial, the defendant has shown a case for the validity, clarity and enforceability of the forum selection clause in the Terms of Use as against the plaintiff.

Has the Defendant Shown that the Forum Selection Clause Applies to Claims under the *Privacy Act*?

[49] The defendant also has the burden of showing that the Forum Selection Clause applies to the cause of action, as identified in *Preymann*, above.

[50] Here the Forum Selection Clause includes any claim, cause of action or dispute the user has with Facebook arising out of or relating to the Terms of Use or Facebook. This language is very wide and is not limited to claims in contract.

[51] In interpreting the Forum Selection Clause, the ordinary principles of contract interpretation will require consideration of the whole of the contract.

[52] There is other language in the Terms of Use indicating that Facebook promises to respect local laws. For example, one version of the Terms of Use includes this language:

> We [Facebook] strive to create a global community with consistent standards for everyone, but we also strive to respect local laws... ."
>
> [Emphasis added.]

[53] The plaintiff argues in effect that this is contractual recognition by Facebook that where local laws oust the contract or are inconsistent with the contract, then the local laws apply. Since the local law here, the *Privacy Act*, confers exclusive jurisdiction on this Court and such claims could not be brought in California, and this is inconsistent with the selection of a California forum, the Forum Selection Clause must give way to the *Privacy Act*.

[54] In my view, the plaintiff has at least a triable issue on her argument that the Forum Selection Clause does not apply to the *Privacy Act* cause of action, based on a full interpretation of the Terms of Use. However, it is not necessary to decide this issue, as I am able to decide the jurisdictional issue on other grounds.

Has the Plaintiff Shown Strong Cause?

[55] As mentioned, even if the Forum Selection Clause might otherwise apply to the cause of action, the court may exercise its discretion not to enforce it by declining jurisdiction where a statute confers exclusive jurisdiction on the court and where the plaintiff has met the burden of showing "strong cause" for not enforcing the clause.

***Privacy Act* Torts and Exclusive Jurisdiction**

[56] I return to s. 4 of the *Privacy Act* which provides that actions under it "must be heard and determined" by this Court.

[57] Facebook submits that s. 4 of the *Privacy Act* only confers exclusive jurisdiction on this Court in preference to other decision-making bodies in British Columbia.

[58] The argument Facebook asks this Court to accept is that the legislature intended any court outside British Columbia to have jurisdiction to try a *Privacy Act*

claim; but within British Columbia, only the Supreme Court of British Columbia has this jurisdiction, instead of a tribunal or the Provincial Court, for example.

[59] Facebook has not provided any authority for this proposition, even by analogy, despite the wide number of statutes creating claims.

[60] A similar argument that the legislature was simply identifying which local court had jurisdiction and was not excluding courts outside the province from exercising jurisdiction, was advanced and rejected by the New Brunswick Court of Queen's Bench in *Nord Resources Corp v. Nord Pacific Ltd*, 2003 NBQB 201 at para. 17. That argument was made in respect of claims pursuant to the New Brunswick *Business Corporations Act*, S.N.B. 1981, c. B-9.1.

[61] Facebook's argument is inconsistent with multiple authorities considering claims established by statute, including *Gould v. Western Coal Corp*, 2012 ONSC 5184 [*Gould*], a decision of Strathy J., as he then was. In that case the Ontario Superior Court of Justice was faced with a claim that was premised, *inter alia*, on an oppression remedy under the British Columbian *Business Corporations Act*, S.B.C. 2002, c. 57. The plaintiff argued that she it should be allowed to pursue the claim in Ontario, notwithstanding the language of the BC statute which provided it "may" apply to the Supreme Court of British Columbia for this relief.

[62] The plaintiffs in *Gould* claimed that the Ontario court could take jurisdiction over the claim on the basis that the statute did not confer exclusive jurisdiction on the BC court. Strathy J. reviewed all the relevant jurisprudence and disagreed, holding at para. 339:

> The oppression remedy applicable to this dispute is a creation of a British Columbia statute. The statute confers the remedy and describes the manner in which it is to be enforced. I have no jurisdiction to grant the remedy because the statute expressly grants jurisdiction to the British Columbia Superior Court. It is irrelevant that the defendants may be otherwise subject to this court's jurisdiction, or may have attorned to the jurisdiction. I have no jurisdiction over the subject matter. The oppression claim should therefore be struck.
>
> [Emphasis added.]

[63] Facebook argues that *Gould* and the cases cited in it can be distinguished on the basis that the statutes at issue involved corporate or securities legislation, where the legislature expected local courts to develop a local expertise.

[64] Facebook argues that there are public policy reasons for having local courts develop the law on local corporations, but these same reasons do not apply to the development of the law affecting local individuals. Facebook submits:

> Legislation governing securities and corporations provide for broad remedies, and their application has far-reaching consequences. Decisions under such statutes have the potential to affect every corporation in a jurisdiction. From the standpoint of comity and public policy, it is important that statutes of such broad application be interpreted with consistency, by courts with particular experience and expertise in applying the legislation. By contrast, the British Columbia *Privacy Act* creates a rarely applied statutory tort.

[65] I do not accept Facebook's argument. I see no public policy reason why legislatures would want to prefer corporations over individuals when creating a statutory cause of action that grants jurisdiction to this Court.

[66] The cases involving corporations and this case involving *Privacy Act* claims all deal with claims affecting residents of the jurisdiction where the statute has been enacted. The logic that the legislature intended to grant remedies in respect of local residents and to have local courts determine those claims applies to both the situation of local individuals and local corporations.

[67] Strathy J. in *Gould* noted that the constraint on other courts, where the legislature selects a local court to hear disputes, goes beyond comity, it is a matter where the other courts do not have constitutional competence to hear the matter (at para. 338).

[68] Also relevant is the Supreme Court of Canada decision of *Seidel v. TELUS Communications Inc*, 2011 SCC 15 [*Seidel*]. In that case the Supreme Court held that a statutory conferral of jurisdiction upon the Supreme Court of British Columbia precluded a stay of proceedings in the face of an exclusive arbitration clause.

[69] The cause of action in *Seidel* arose pursuant to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*], which provides at s. 172 that a person “may bring an action in Supreme Court” for breach of that Act.

[70] Telus’s contract at issue in *Seidel*, 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”.

[71] The majority decision of the Supreme Court of Canada in *Seidel* found that the *BPCPA* evidenced clear legislative intent that such actions must be brought in this Court. The permissive language in the statute, “may bring an action in Supreme Court”, allowed the complainant to choose whether or not to make a claim, but if one was brought, the Supreme Court of Canada said it must be brought in the British Columbia Supreme Court.

[72] Facebook argues that *Seidel* turns on a procedural right, as the tension was between a contractual choice of arbitration and a claim litigated in court. Facebook points out that the Supreme Court of Canada was influenced in that case by the public policy objective that it interpreted was behind the statutory claim, namely, that such consumer claims be heard in open court where they can be publicized rather than in the confidential process of arbitration: see *Seidel* at paras. 36-37.

[73] I am not persuaded that the point Facebook makes distinguishes the present situation from that in *Seidel*.

[74] The language in the *Privacy Act* is even stronger than the *BPCPA* in mandating that claims under it must be brought in this Court: s. 4 states “an action under this Act <u>must be heard and determined</u> by the Supreme Court” (emphasis added). The “determination” of a claim is a substantive determination on the merits, not a procedural one.

[75] The 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 as follows:

(a) the actions do not require damages to be shown. This is recognition that even where there are no damages, there is a harm caused by these statutory torts and there is a public interest in protecting the privacy of and misappropriation of personality of BC residents;

(b) cases where damages are not shown are likely to be cases where the expense of prosecuting the claim may outweigh an award of nominal damages. Providing for a local forum is one way of attempting to control and minimize the cost of bringing such claims, in contrast to having the claims heard in distant jurisdictions;

(c) ensuring that such claims are brought locally also 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; and,

(d) local courts may be more sensitive to the social and cultural context and background relevant to privacy interests of British Columbians, as compared to courts in a foreign jurisdiction. This could be important in determining the degree to which privacy interests have been violated and any damages that flow from this.

[76] On the latter point, there are cultural differences in the ways various jurisdictions think of a right to privacy. As summarized by Bryce Newell in "Rethinking Reasonable Expectations of Privacy in Online Social Networks" (2011) 17:4 Rich. J.L. & Tech. 1 at 5-6:

> Present United States privacy law – despite being made up of a patchwork of federal and state constitutional, statutory, and common law – is predominantly based on the ideals of individual control, autonomy, and liberty from governmental intrusion, despite the fact that its inspiration was an idea grounded on the importance of protecting human dignity and an "inviolate personality." Comparatively, Europe has predominantly taken the second position – that privacy protects human dignity and fosters personal

> relationships. The European view also promotes individual autonomy, although it does so in a different fashion and perhaps to a greater extent, as this Article suggests. This view of privacy and individual autonomy embeds an element of human dignity into its analysis of an individual's reasonable expectation of privacy, rather than strictly tying reasonableness to ideas of control and waiver. This conception is also more in line with the view that "[w]ithout our privacy, we lose 'our very integrity as persons' . . . ." Privacy may signify a fundamental human right, although this view has been challenged.
>
> [Footnotes omitted.]

[77] The result in *Petrov v. B.C. Ferry Corp.*, 2003 BCSC 270, confirms that this Court has exclusive jurisdiction over *Privacy Act* claims even in the face of a contract covering all other disputes. There the court declined jurisdiction over an employee's claims for a wide variety of causes of action, including harassment, negligence, breach of fiduciary duty and breach of contract. The court held that the collective agreement to which the employee was subject applied to the substance of all disputes (at para. 39). There was one exception however, and that was with respect to the *Privacy Act* claim. The court held that the *Privacy Act* gave exclusive jurisdiction to the court and it was not covered by the collective agreement (at paras. 47-48), although the claim failed on other grounds.

[78] I conclude that the *Privacy Act* does confer exclusive jurisdiction on this Court to hear claims brought in respect of the statutory torts conferred by that *Act*. This means that if the present claim is stayed, the plaintiff will have no other forum to bring this claim. I discuss the implications of this below.

What Is Meant by Strong Cause

[79] There is considerable case law on the question of what is "strong cause" for not enforcing a forum selection clause.

[80] The oft-cited source of the "strong cause" test is the English case of *The Eleftheria (Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v. Owners of Ship or Vessel Eleftheria)*, [1969] 2 All E.R. 641 (Eng. P.D.A.) at 645. The strong cause goes beyond mere balance of convenience: *Sarabia v. Oceanic Mindoro (The)* (1996), 26 B.C.L.R. (3d) 143 (C.A.) at para. 38.

[81] The "strong cause" test was affirmed by the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.,* 2003 SCC 27 [*Pompey*].

[82] The facts in *Pompey* involved sophisticated commercial parties contracting for shipment of cargo pursuant to a bill of lading. The bill of lading contained a choice of law and forum selection clause in favour of the courts of Antwerp, Belgium. The cargo was shipped from Antwerp to Montreal by sea, and then by rail from Montreal to Seattle where it was found to be damaged. A claim was filed by the plaintiff in the Federal Court of Canada alleging that the cargo was damaged while in transit by rail. The defendant goods carrier sought a stay of proceeding on the basis of the bill of lading and forum selection clause. The Supreme Court of Canada held that a stay should be granted based on the clause.

[83] The Supreme Court of Canada in *Pompey* reinforced the importance of holding commercial parties to their bargains, for commercial certainty and order and fairness, at para. 20:

> Forum selection clauses are common components of international commercial transactions, and are particularly common in bills of lading. They have, in short, "been applied for ages in the industry and by the courts": Décary J.A. in *Jian Sheng, supra*, at para. 7. These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law: La Forest J. in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1096-97; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, at paras. 71-72. The "strong cause" test remains relevant and effective and no social, moral or economic changes justify the departure advanced by the Court of Appeal. In the context of international commerce, order and fairness have been achieved at least in part by application of the "strong cause" test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise. In any event, the "strong cause" test provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.
>
> [Emphasis added.]

[84] It was a factor important enough for the Court in *Pompey* to mention in the above passage that the forum selection clause was not an exclusion of liability clause in disguise. The relevance of this has to be that the Court did not consider that the plaintiff would be without a remedy if forced to comply with the forum selection clause and bring the claim in the foreign jurisdiction. In other words, there was no juridical disadvantage in that case from enforcing the foreign selection clause.

[85] In contrast, in the present case if the Forum Selection Clause was applied it would have the effect of being an exclusion of liability clause, given that the BC *Privacy Act* cause of action only applies in British Columbia.

[86] Furthermore, the Court in *Pompey* recognized that legislatures may override forum selection clauses, and in such case, the legislation will prevail and the strong cause test is unnecessary. In that case certain legislation had been enacted subsequent to the lower court decision, namely s. 46(1) of the *Marine Liability Act*, S.C. 2001, c. 6, which the Court concluded meant that it would have the effect in future cases of overriding forum selection clauses in favour of the Federal Court where the port of loading or discharge was in Canada (at para. 37).

[87] Interestingly, the Court in *Pompey* was of the view that the subsequent legislation would override the forum selection clause even though the legislation at issue, s. 46(1) of the *Marine Liability Act*, was permissive in that it provided that a claimant “may” bring the claim in Canada in certain circumstances.

[88] The language in the *Privacy Act* is much stronger than the legislation at issue in *Pompey*, in that an action under the *Privacy Act* “must” be heard and determined in this Court. Applying the reasoning in *Pompey*, this language overrides the Forum Selection Clause.

[89] The Court in *Pompey* held at para. 39:

> I am of the view that, <u>in the absence of applicable legislation</u>, for instance s. 46(1) of the *Marine Liability Act*, the proper test for a stay of proceedings pursuant to s. 50 of the *Federal Court Act* to enforce a forum selection clause

> in a bill of lading remains as stated in *The "Eleftheria"*, which I restate in the following way. Once the court is satisfied that a validly concluded bill of lading otherwise binds the parties , the court must grant the stay unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause. In exercising its discretion, the court should take into account all of the circumstances of the particular case. See *The "Eleftheria"*, at p. 242; *Amchem*, at pp. 915-22; *Holt Cargo*, at para. 91. Disputes arising under or in connection with a contract may not be regarded by a court in determining whether "strong cause" has been shown that a stay should not be granted.
>
> [Emphasis added.]

[90] The examples given by the Court in *Pompey* in the above passage of circumstances where, in the absence of legislation giving the court exclusive jurisdiction the court might nevertheless exercise discretion not to enforce a forum selection clause, include those mentioned in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90 at para. 91, which held:

> Relevant circumstances include not only issues of public policy (as in this case) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigating in one forum or the other, and the discouragement of forum shopping. In short, within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.
>
> [Emphasis added.]

[91] Besides the differing commercial context of the contract at issue in that case, compared to the consumer contract of adhesion here, there are two relevant factors in this case which arise from *Pompey*:

(a) the plaintiff will lose a juridical advantage if the action is stayed in favour of the foreign jurisdiction, as the foreign jurisdiction will not have jurisdiction to determine the *Privacy Act* claim; and,

(b) this juridical advantage does not arise because of forum shopping, but because the plaintiff and putative class members all reside in British Columbia.

[92] In *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351, which was cited with approval in *Viroforce*, Juriansz J. identified a number of factors to be considered in establishing a "strong cause" not to enforce a forum selection clause, including at para. 24:

> (a) the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim;
>
> (b) enforcing the clause in the particular case would frustrate some clear public policy.

[93] It is therefore clear that the availability of a statute-based claim in the court's own jurisdiction, which confers exclusive jurisdiction on that court, can on its own be a basis for overriding a forum selection clause, but also can support two other "strong causes" for not enforcing a forum selection clause, namely, juridical advantage and public policy. This is because where a claim is established by the legislature it reflects the fact that such claims are an important aspect of public policy in the jurisdiction. Consistent with this analysis is the analysis of the Alberta Court of Queen's Bench in *Zi Corp v. Steinberg*, 2006 ABQB 92 at paras. 77-83; see also *Niedermeyer v. Charlton*, 2014 BCCA 165 [*Niedermeyer*].

Juridical Advantage

[94] Facebook argues that there is no evidence that the court in California will refuse jurisdiction if the present action is stayed. I find that it is not necessary to have evidence from the plaintiff on this point given that the *Privacy Act* is clear that another court outside of this Court does not have jurisdiction. There is no support for the assertion by Facebook that a California court would or could exercise jurisdiction under the *Privacy Act*.

[95] The loss of the ability to sue in this Court in BC will mean the loss of the ability of the plaintiff to advance her *Privacy Act* claim anywhere. This loss of the right to bring this claim is strong cause for not enforcing the Forum Selection Clause.

Public Policy

[96] Facebook argues that the *Privacy Act* should be interpreted narrowly because it pre-dated the internet and class action legislation, and that it should not be interpreted as evidencing any public policy. Facebook makes this bald assertion without referring to any authorities as to the origins of the legislation or the public interest in protecting privacy.

[97] The *Privacy Act* was passed in 1968. While this was not the internet age, the passage of the *Act* did not pre-date social concern over technology interfering with privacy interests; nor did it pre-date photographs, television, recording devices or newspapers, or advertisers using images to sell products.

[98] An article published by Warren and Brandeis in 1890 (see Samuel D. Warren & Louis D. Brandeis, “The Right to Privacy” (1890) 4:5 Harv. L.R. 194) is often cited as one of the origins of modern protection of privacy law. This article was an early plea for the protection of privacy in the face of invasive technology.

[99] In *Jones v. Tsige*, 2012 ONCA 32, the Ontario Court of Appeal reviewed the history of the legal protection of privacy as follows at paras. 16-18:

> Canadian, English and American courts and commentators almost invariably take the seminal articles of S.D. Warren & L.D. Brandeis, "The Right to Privacy" (1890) 4 Harv. L. R. 193 and William L. Prosser, "Privacy" (1960), 48 Cal. L. R. 383 as their starting point.
>
> Warren and Brandeis argued for the recognition of a right of privacy to meet the problems posed by technological and social change that saw "instantaneous photographs" and "newspaper enterprise" invade "the sacred precincts of private life" (at p. 195). They identified the "general right of the individual to be let alone", the right to "inviolate personality" (at p. 205), "the more general right to the immunity of the person" and "the right to one's personality" (at p. 207) as fundamental values underlying such well-known causes of action as breach of confidence, defamation and breach of copyright. They urged that open recognition of a right of privacy was well-supported by these underlying legal values and required to meet the changing demands of the society in which they lived.
>
> Professor Prosser's article picked up the threads of the American jurisprudence that had developed in the seventy years following the influential Warren and Brandeis article. Prosser argued that what had emerged from the hundreds of cases he canvassed was not one tort, but four, tied together by a common theme and name, but comprising different elements and protecting

> different interests. Prosser delineated a four-tort catalogue, summarized as follows, at p. 389:
>
> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> 2. Public disclosure of embarrassing private facts about the plaintiff.
> 3. Publicity which places the plaintiff in a false light in the public eye.
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

[100] The *Privacy Act* by its very structure categorizes two torts: under s. 1, invasion of privacy, which could include the first three of the above categories identified by Prosser; and, under s. 3(2), misappropriation of the name or likeness of a person for commercial purposes, the fourth category identified by Prosser. It is the latter tort which is at issue here.

[101] The article by Warren and Brandeis was prescient in describing the desire for privacy as nuanced: it is not an all or nothing right. People have an innate desire to control how much private information they share and with whom and in what form. This passage from the Warren and Brandeis article could be written for today's social media user:

> The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music. Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression. The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece.
>
> (at 198-199)
> [Footnotes omitted.]

[102] Clearly the BC legislature thought it a matter of important public policy to protect the privacy interests of BC residents by the creation of statutory torts. While

the *Privacy Act* was introduced in 1968, the policy reasons behind protecting the privacy rights of British Columbians have only expanded since that time.

[103] The protection of privacy rights are now found to be consistent with the values of Canadians as expressed in the Canadian Charter of Rights: ss. 7, 8 of the *Canadian Charter of Rights and Freedoms* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841).

[104] Furthermore, with the creation and growth of the internet the potential implications for a loss of privacy are greater than ever. The difficulty in proving quantifiable damage remains great for an individual whose privacy is lost, but the social harm can be monumental if the loss of privacy includes publicity over the internet with its almost infinite reach and timelessness.

[105] I conclude that the legislative conferral of exclusive jurisdiction on this Court for claims under the *Privacy Act* evidences both a legislative intention to override any forum selection clause to the contrary, and a strong public policy reason for not enforcing the Forum Selection Clause.

[106] I conclude that the plaintiff has shown strong cause why the Forum Selection Clause should not cause this Court to decline jurisdiction.

The *CJPTA* s. 11 Factors

[107] Facebook also argues that the Court should decline jurisdiction based on the *forum non conveniens* factors in s. 11 of the *CJPTA*.

[108] The *CJPTA* provides at s. 11:

> 11(1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceedings and for their witnesses, in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to the issues in the proceeding,
>
> (c) the desirability of avoiding multiplicity of legal proceedings,
>
> (d) the desirability of avoiding conflicting decisions in different courts,
>
> (e) the enforcement of an eventual judgment, and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[109] Facebook submits that California is the more convenient jurisdiction for the hearing of the claim for all of the reasons outlined in s. 11, except for the reasons having to do with avoiding multiplicity of proceedings and conflicting decisions.

Convenience of Witnesses

[110] Facebook submits that its head office is in California. It says that it does not keep books and records in BC.

[111] Facebook has not described the form of its books and records but it would surprise me if it does not have electronic records which can readily be made available in British Columbia. Even in paper form, there is no barrier to bringing paper from California to BC, and there is a common language in the two jurisdictions.

[112] There is no evidence that it would be difficult for Facebook witnesses to attend court in BC.

[113] In September 2012, Facebook filed affidavit evidence that it does not have any business operations in British Columbia. Since then, the plaintiff filed hearsay evidence of a newspaper article in Vancouver, BC in March 2013 reporting that Facebook intended to open an office in Vancouver in May 2013. Facebook has not filed any responsive evidence on this point but I note that counsel for Facebook did

not argue orally that Facebook has no business operations in British Columbia, just that the relevant books and records are with head office.

[114] The plaintiff points out that she lives in BC, and so do the many members of the putative class.

[115] I find that it will be more convenient to examine the circumstances of the plaintiff in a BC court than in a California court. There will likely be less inconvenience in having the books and records of Facebook made available for inspection here in BC than in having the plaintiff travel to California to advance her claim.

The Law to be Applied

[116] Facebook argues that the Forum Selection Clause also contained a choice of law clause, the most recent iteration of which is a choice of the law of the State of California.

[117] Facebook did not advance the argument that the choice of law clause should influence the Court's analysis of whether or not the Forum Selection Clause should be enforced. However, it argues that it is a significant factor under the *forum non conveniens* test set out in s. 11 of the *CJPTA*.

[118] Facebook argues that not only will the *Privacy Act* not apply to the plaintiff based on her contract with Facebook as set out in the Terms of Use, it also could not apply to the defendant as that would give the *Act* extra-territorial effect.

[119] The issue of whether or not the contractual choice of law will apply to defeat the merits of the claim is a complex one, as is the question of whether or not the *Privacy Act* can be found to apply to Facebook, a foreign defendant interacting through the internet with BC residents.

[120] The plaintiff argues that if there is an enforceable contract between her and Facebook, the scope of the choice of law clause remains circumscribed by the

agreement by Facebook that it will respect local laws, and so the *Privacy Act* will still apply.

[121] Even if that argument by the plaintiff is not accepted, the contract choice of law clause still might be unenforceable to defeat claims under the *Privacy Act*. The recent decision of the British Columbia Court of Appeal in *Niedermeyer* affirmed that there are instances when a contract clause will be found unenforceable as in violation of public policy. The evidence of public policy can be found in a statute which provides a benefit for the public interest.

[122] In *Niedermeyer*, Garson J.A. for the majority allowed an appeal on the basis that to the extent a release purported to exclude liability for motor vehicle accidents, it was contrary to public policy and unenforceable: see para. 114. This was because of the statute providing universal and compulsory insurance coverage for motor vehicle accidents, which was seen as conferring a public benefit and addressing a public safety problem: see paras. 101-107.

[123] The dissenting judgment of Hinkson J.A. (as he then was) in *Niedermeyer* identifies that there can be room for disagreement as to when a contract clause will be found to be unenforceable as contrary to public policy: see paras. 40-68.

[124] The issue of the applicability and enforceability of the choice of law clause and of the *Privacy Act* to Facebook in relation to BC residents are issues that go to the substantive merits of expected defences to the claim.

[125] The argument advanced by the defendant that the *Privacy Act* does not apply because the parties agreed to be governed by the law of California can still be determined by this Court if this Court exercises jurisdiction. If the Court concludes that California law applies, then presumably the claim will be at an end. In contrast, the California court cannot determine that the *Privacy Act* does apply as those determinations are solely for this Court's jurisdiction. This weighs the balance heavily in favour of this Court exercising jurisdiction.

Multiplicity of Proceedings

[126] The plaintiff argues that the avoidance of multiplicity of proceedings favours hearing the claim in BC. This is because, if the action is certified as a class action, the plaintiff says the proposed class will include both adults and children.

[127] The plaintiff says that the *Infants Act*, R.S.B.C. 1996, c. 223, s. 19 provides that, except in limited circumstances, "a contract made by a person who was an infant at the time the contract was made is unenforceable against him or her". Thus the plaintiff argues that claims brought by Facebook users who were children in BC at the relevant time will survive any attempt by Facebook to rely on contractual terms as a defence.

[128] However, two points arise from this submission. First, if the adults who are members of the class are precluded by the contract from bringing claims in BC, they will have nowhere to bring their claims: therefore the remaining claims of children will not give rise to a multiplicity of proceedings. Second, the plaintiff has not yet taken the steps necessary for the creation of a subclass of minors.

[129] Regardless, I am persuaded based on a weighing of all of the other factors in s. 11 of the *CJPTA* already mentioned that the courts of California are not more appropriate than this Court for determining the plaintiff's claim based on BC's *Privacy Act*.

CJPTA s. 12

[130] Before I complete the analysis of *forum non conveniens* factors codified in s. 11 of the *CJPTA*, s. 12 of that *Act* must be addressed. It provides as follows:

> If there is a conflict or inconsistency between this Part and another Act of British Columbia or of Canada that expressly
>
> (a) confers jurisdiction or territorial competence on a court, or
>
> (b) denies jurisdiction or territorial competence to a court, <u>that other Act prevails</u>.
>
> [Emphasis added.]

[131] The plaintiff argues that this reinforces the overriding principal in the common law that where the legislature confers exclusive jurisdiction on a court, that prevails over any other considerations in respect of jurisdiction.

[132] Here, the *Privacy Act* by its terms confers exclusive jurisdiction on this Court and thereby denies jurisdiction to another court. The section conferring exclusive jurisdiction, s. 4, also states that it is "despite anything contained in another *Act*".

[133] I find that an analysis of s. 4 of the *Privacy Act* together with the *CJPTA* and the common law makes it clear that the statutory conferral of jurisdiction on this Court for *Privacy Act* claims prevails over any Forum Selection Clause in the Facebook Terms of Use and over any other considerations in s. 11 of the *CJPTA*.

Conclusion on Jurisdiction

[134] Having considered all of the circumstances relating to declining jurisdiction, the strongest factor here is the fact that the claim is brought by a resident of BC based on a statutory cause of action that is unique to BC and for which only this Court has jurisdiction.

[135] The application by Facebook to have this Court decline jurisdiction is therefore refused.

2. Certification

[136] I turn now to the plaintiff's application to have the proceeding certified as a class proceeding pursuant to the *CPA.*

[137] The *CPA* mandates that a court must certify an action as a class proceeding if all of the following requirements set out in s. 4(1) are met:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of two or more persons;

(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and

(e) there is a representative plaintiff who

i. would fairly and adequately represent the interests of the class;

ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and

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

[138] The standard of proof on an application for certification is that the plaintiff must show “some basis in fact” that each of the requirements of certification are met, other than the requirement of pleading a cause of action. However, the certification stage is not meant to test the merits of the action. While evidence is required, it is not necessary for the plaintiff to prove each requirement on a balance of probabilities: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*] at paras. 99-102.

[139] The certification judge is required to consider the evidence and serve a screening role, but is not required to engage in an “extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial”: *Pro-Sys* at paras. 102-105.

(a) Cause of Action

[140] Whether or not a cause of action is properly pleaded is judged on the pleadings in the same way as a motion to strike. The test is, assuming the facts as pleaded are true, is it plain and obvious that the plaintiff’s claim cannot succeed: *Pro-Sys* at para. 63.

[141] The plaintiff’s claim is based on the allegation that Facebook used her name or portrait, and those of the Class Members, in what Facebook calls the “Sponsored Stories”, for the purpose of advertising. She alleges that it did so without seeking or obtaining consent of the person’s whose names or portraits were used. These are the elements of a cause of action under s. 3(2) of the *Privacy Act*.

[142] The defendants do not contest that the plaintiff has pleaded a valid cause of action under the *Privacy Act*.

(b) Identifiable Class

[143] The requirement for an identifiable class was described by McLachlin C.J.C. in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 [*Western Canadian*] at para. 38:

> While there are differences between the tests, four conditions emerge as necessary to a class action [from a review of the class proceedings statutes that then existed in Ontario, British Columbia and Quebec]. Class definition is critical because it <u>identifies the individuals entitled to notice</u>, <u>entitled to relief</u> (if relief is awarded), and <u>bound by the judgment</u>. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While <u>the criteria should bear a rational relationship to the common issues</u> asserted by all class members, <u>the criteria should not depend on the outcome of the litigation</u>. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class <u>be determinable by stated, objective criteria</u>.
>
> [Emphasis added.]

[144] To repeat, the proposed class here is:

> 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.

[145] The defendant argues that the proposed class definition is overly broad and has several problems:

(a) it has no temporal limitations;

(b) it does not address the fact that many Facebook users use false names or unidentifiable portraits;

(c) it does not address the fact that Sponsored Stories were used for non-commercial entities as well as for businesses, such as for charities or political parties;

(d) it does not and cannot address the necessary element of lack of consent; and,

(e) it includes people who do not have a plausible claim and who therefore have no rational connection to the common issues, and people will not be able to self-identify as to whether they are or are not in the class.

[146] I will address these points in turn.

i. Temporal Scope

[147] I agree with Facebook's submission that the proposed class definition is flawed because it does not have a defined temporal scope. However, this can be corrected.

[148] The starting point of the time period is already defined in that the period only covers the use of Sponsored Stories. On Facebook's evidence, the Sponsored Stories program began in January 2011. For purposes of giving notice to potential class members, I consider that it would be helpful if the class definition included a start date. Otherwise people who were Facebook users before January 2011 but not afterwards might think they are included in the class when they are not.

[149] If the evidence turns out to be that Facebook in fact started its Sponsored Story program earlier than asserted in this hearing, amendments can always be made.

[150] The end point of the time period, it seems to me, must be the date of the present judgment. This was one of two choices mentioned in *Heward v. Eli Lilly & Company* (2007), 47 C.C.L.T. (3d) 114 (Ont. S.C.J.) at para. 73, aff'd (2008), 91 O.R. (3d) 691 (Ont. S.C.J.), the other choice being to have the end date as at the commencement of the claim. The plaintiff prefers the end date to be the date of this judgment and I know of no reason to consider this inappropriate.

[151] Thus, the class definition should be amended to include the words “at any time in the period from January 1, 2011, to the date of this judgment, namely May 30, 2014”.

ii. False Names or Unidentifiable Portraits

[152] Facebook has submitted evidence that many Facebook users create a false identity when they sign up to be Facebook members, using a false name and unrecognizable portrait.

[153] A claim under s. 3(2) of the *Privacy Act* must be based on use of the claimant’s name or portrait.

[154] The class definition as proposed attempts to follow the language of the *Privacy Act*, by referring to the person’s name or portrait.

[155] The plaintiff explains that this definition attempts to exclude from the class those Facebook users who used false names and any portraits other than that of themselves.

[156] If a person registered under a false name and did not use a self-likeness as a portrait, which is the case for many Facebook users, then that person’s name or portrait will not have been featured in a Sponsored Story.

[157] Some Facebook users change their portraits over time, and so at one time may have used a personal portrait, and another time not, and will only have a claim if the Sponsored Story they were featured in was at a time when the person’s actual name or portrait was used.

[158] If the action is certified and hypothetically, if liability was established, no doubt there are means available to ensure that only people whose actual name or portrait was featured in a Sponsored Story could participate in relief, and this is the goal of the proposed class definition.

[159] I am satisfied that the goal of this aspect of the proposed class definition is appropriate and not overly broad. However, given the evidence of the predominance of use of false names and use of alternative images by Facebook users, I am of the view that the definition could be further clarified for members of the class as follows:

> 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; and
>
> (b) whose name, portrait, or both have been used by Facebook in a Sponsored Story.

[160] I am satisfied that the above revisions to the class definition will capture what was intended by the plaintiff and that the definition is suitably tailored to capture only those whose actual name or likeness was featured in a Sponsored Story.

iii. Sponsored Stories for Charities or Political Parties

[161] Facebook submits that s. 3(2) of the *Privacy Act* should be interpreted as limited to commercial use of a name or portrait.

[162] Facebook submits that sometimes Sponsored Stories were used for charities or political parties, that this is a non-commercial use that would not violate the *Privacy Act*, and so the class is overly broad by including all types of Sponsored Stories. Or, to put it another way, Facebook's position is that non-commercial Sponsored Stories should be excluded from the scope of the class.

[163] The s. 3(2) *Privacy Act* claim is limited to use of a name or portrait "for the purpose of advertising <u>or</u> promoting the sale of, or other trading in, property or services" (emphasis added).

[164] There are two possible ways to read s. 3(2) of the *Privacy Act*:

(a) the purpose of both advertising or promoting is qualified by the words "the sale of, or other trading in, property or services";

(b) advertising stands alone; the "or" separates it from promoting, and means that on its own it can found a claim regardless of whether or not the advertising is in relation to the sale or other trading in of property or services.

[165] One does not need evidence to take judicial notice of the fact that political parties and charities advertise their messages in a variety of ways. The fact that a billboard or newspaper advertisement is not for a commercial purpose does not make it any less an advertisement. The advertisement is published for the purpose of spreading the sponsoring entity's message or brand.

[166] The evidence is that Facebook was paid by third parties for circulating Sponsored Stories as a marketing feature. This seems on its face quite like an advertisement. The very word "Sponsored" was presumably to identify that the messages were "sponsored" by someone paying money to Facebook.

[167] Facebook does not appear to dispute that Sponsored Stories are advertisements.

[168] It may be that some uses of Sponsored Stories related to charities or political parties and were not promoting the sale of or other trading in, property or services. However, if they were advertisements, then the question is whether they would still fall within the ambit of s. 3(2) of the *Privacy Act*.

[169] This is a question in my view better answered on the merits in the course of the lawsuit and not at the stage of the class definition.

[170] I do not consider it necessary to narrow the class by excluding people who were featured in "non-commercial" Sponsored Stories, because these people may still have a claim that they were featured in an advertisement. The class definition is not overly broad in this regard.

iv. Lack of Consent

[171] As already noted, s. 3(2) of the *Privacy Act* makes it a tort to use someone's name or portrait in the ways described "unless … a person … consents to the use for that purpose".

[172] Facebook argues that the fact that lack of consent is a critical element of a *Privacy Act* claim defeats certification here as it makes it impossible to have a suitable class definition. It argues that it creates the following dilemma for the plaintiff:

(a) without including the element of a lack of consent as a necessary element of the class, as in the present proposed class definition, the class is overly broad and includes people who did consent and so who therefore do not have a claim;

(b) if the lack of consent was included as an element of the proposed class definition, it would make the definition merits-based, which is not suitable for certification.

[173] With respect to the latter point, Facebook relies on *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120 [*Keatley*]. In *Keatley*, the proposed class definition included people who were owners of copyright of plans of survey, and who did not consent to use of plans of survey by the defendant. Horkins J. of the Ontario Superior Court found that both ownership of copyright and consent to use were essential to a determination of the merits of the claim, and to include these terms in the class definition was "circular and inherently unworkable" and could result in a judgment that "binds no one" (at para. 165). For this and other reasons, the proceeding was not certified as a class proceeding.

[174] However, the plaintiff's case was recast on appeal to the Ontario Divisional Court in *Keatley* and was certified: 2014 ONSC 1677 [*Keatley Appeal*]. The revised class definition was comprised of people who were authors of a plan of survey or employer of the land surveyor, or assignees of either, whose plan of survey

appeared in the defendant's electronic database (at para. 48). The Divisional Court held that the class definition was now suitable as it was no longer merits-based.

[175] The Divisional Court in the *Keatley Appeal* rejected the argument that the revised class definition was overly broad, as it might include people who did not own copyright or whose claim was statute-barred. It concluded that the class could not be more narrowly defined without potentially excluding some people who share the same interest in the resolution of the common issues, or introducing a merits-based analysis, applying the approach of the Supreme Court of Canada in *Hollick v. Toronto (City)*, 2001 SCC 68 [*Hollick*]: see *Keatley Appeal* paras. 53-60.

[176] I am of a similar view in the present case as the Ontario Divisional Court in the *Keatley Appeal*.

[177] I accept the defendant's submission that if the class definition were amended to include as an element that the members "did not consent" to the use of their names or portraits in Sponsored Stories, the definition would be merits-based.

[178] However, this does not mean that the class as currently defined is overly broad, as the class cannot be more narrowly defined without excluding people who share the same interest in the resolution of the common issues. I consider the plaintiff's proposed class definition here, as including all people whose name or portrait or both was used by Facebook in a Sponsored Story, as similar to the class definition that was approved in the *Keatley Appeal*.

[179] In my view, it is not necessary to narrow the class out of concern that it might include some people who consented to use of their names or portraits in a Sponsored Story. If this is the case, consent will be a defence to those persons' claims.

[180] There is a strong possibility in this case, given that standard Terms of Use were used and Facebook users did not have unique individual contract negotiations with Facebook, that the issue of consent will be determined by the outcome of the common issues. If not, the process for determination of the consent issue can then

be re-assessed by considering such things as: will it be assisted by categorizing class members into subclasses, depending on the actions taken by Facebook users or any material differences in the relevant Terms of Use; will it be assisted by test cases; or will it be necessary to have individual determinations.

[181] I am satisfied that the class definition is not overly broad simply because it includes all people who appeared in Sponsored Stories.

[182] There is an alternative approach to this issue that I have considered.

[183] The concern over a class definition that depends on success on the merits of the underlying action is that the defendant will not be able to rely on a successful defence of a class action when subsequently having to defend an individual claim of the same nature.

[184] For example, Facebook's logic is that if the class definition here was narrowed to include as an element that that the members of the class did not consent; and Facebook was able to show that consent was given through acceptance of Terms of Use, the class action would be defeated but it would bind no one and Facebook would still be vulnerable to individual plaintiffs suing it on the same basis.

[185] I am not persuaded that this argument goes as far as Facebook argues.

[186] It has been pointed out that there is less than compelling logic behind the argument that a class definition is flawed if it will bind no one if the defendant is successful. This problem will often be the case where the defendant is successful in defending a class proceeding: see *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 [*Merck Frosst*].

[187] I note that one of the policy reasons behind class actions is that where individual claims will be uneconomic a class action may be the only way small claims will have access to justice. That is certainly a significant factor in this case. In a case like this where the individual claims are likely small, there is going to be little

risk that an individual plaintiff will choose to sue a defendant which has been successful in defending a class action for similar claims. Furthermore, regardless of the fact that *res judicata* might not apply to a new claim, *stare decisis* would apply if there are similar legal issues which defeated the class action.

[188] As pointed out in *Merck Frosst*, citing the comprehensive judgment of Winkler J., as he then was, in *Attis v. Canada (Minister of Health)*, [2007] O.J. No. 1744, amongst other authorities, one way of addressing the concern about merits-based class definitions is to substitute a claims-based definition. Defining people who assert a claim as including those who in the future may assert a claim gets around the concern that defendants will not be able to rely on a successful result in the class proceeding to defeat future individual claims. This type of class definition would capture people who later make a claim based on the same criteria.

[189] In *Merck Frosst*, the Court noted that the Supreme Court of Canada in *Rumley v. British Columbia*, 2001 SCC 69 [*Rumley*], took no issue with the claims-based class definition in that case, which was:

> Students at the Jericho Hill School between 1950 and 1992 who reside in British Columbia and claim to have suffered injury, loss or damage as a result of misconduct of a sexual nature occurring at the school.

[190] Thus the class definition in *Rumley* included several essential elements of the cause of action: damage and causation and sexual misconduct. The merits of these elements would have to be proved as part of the substantive lawsuit. But by defining the class as people who made claims asserting these three elements, the class was defined sufficiently narrowly and was not offending the rule against a merits-based class definition.

[191] As held in *Merck Frosst*, after reviewing the authorities, at para. 103:

> In my view, what emerges from this review is a requirement for careful scrutiny of the facts and circumstances of a particular case prior to deciding: (1) whether a particular class definition is too broad to satisfy the requirement that it be rationally connected to the causes of action and common issues identified in the case; (2) that a merits based definition will necessarily lead to circularity or otherwise be objectionable; and (3) whether a claims based

> class definition sufficiently meets the requirements of objectivity and certainty, in light of the established purposes of class definition.

[192] It is therefore worth considering whether or not there is any benefit to refining the proposed class by referring to people who assert or who in the future assert they did not give consent to the use of their names or portraits in a Sponsored Story.

[193] While this is a possible option, in my view it will do little to truly narrow the class or assist in the determination of issues in this case.

[194] The question of whether or not Facebook's online Terms of Use provided sufficient information to enable a Facebook user to give express consent to the use his or her name or portrait of in Sponsored Stories, as asserted by Facebook in the hearing before me, in my view will ultimately be determined as a common issue for all members of the class.

[195] If Facebook succeeds in establishing that all users gave their consent just by their decisions to use the Facebook service, then this will be a defence for any resident in BC who in future asserts such a use, within the time period.

[196] I thus see little benefit to narrow the proposed class definition to refer to the additional element that class members assert that they did not consent to the use of their names or portraits in Sponsored Stories.

[197] There is one further point to address in relation to the Facebook argument. Facebook argues that the onus of proving a lack of consent will be on the plaintiff and class members as a necessary element of the *Privacy Act* tort. I am not so sure. Facebook has no authority to support this position, other than its own interpretation of the *Privacy Act*.

[198] It may well be that the onus of proving an appropriation of personality will be on the plaintiff, but one possible interpretation of the *Privacy Act* is that the onus will then shift to the defendant to affirmatively prove consent as a defence. Who has the onus of either proving a negative (a lack of consent) or an affirmative (consent) does not need to be decided on the present application.

[199] I conclude that it is appropriate for the proposed class definition to not address the element of lack of consent.

v. Inability to Self-Identify

[200] Another argument advanced by Facebook in its challenge to the definition of the class, is that members of the class will not be able to self-identify. This is because, on the evidence, Sponsored Stories were not sent by Facebook to the people whose name or portrait appeared in them, but rather, they were sent to the person's Facebook "friends". Not every Facebook user was in a Sponsored Story.

[201] In support of this argument, Facebook relies on *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 [*Sun-Rype*]. That case involved a proposed class action on behalf of direct and indirect purchasers of products containing high fructose corn syrup ("HFCS"). It was brought against parties who were alleged to have engaged in price fixing of HFCS.

[202] The majority judgment of the Supreme Court of Canada in *Sun-Rype* held that an identifiable class could not be established for indirect purchasers, and so that category of claims could not be certified.

[203] In *Sun-Rype* the defendants argued that it was going to be impossible to determine in which products contained HFCS, and what consumers may have purchased them in the time period covered by the class (at para. 55). This is because product manufacturers used liquid sugar and HFCS interchangeably.

[204] In accepting the argument of the defendants, the Supreme Court of Canada in *Sun-Rype* did not say it was necessary for potential class members to be able to self-identify at time of certification. Rather, it described the test prospectively: "there is insufficient evidence to show some basis in fact that two or more persons will be able to determine if they are in fact a member of the class" (at para. 58).

[205] The Court in *Sun-Rype* was concerned that the question of who was an indirect purchaser might never be determinable. There seemed no ready source of

data as to in what products HFCS was used, and when, and who purchased the products with the HFCS as opposed to with other sugar.

[206] The facts of this case are unlike the facts in *Sun-Rype*. 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.

[207] The plaintiff says that 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: if the Facebook user featured in a Sponsored Story otherwise meets the definition of the class (is a BC resident, registered under his or her name or portrait or both and within the applicable time parameters) then he or she will be a member of the class.

[208] I accept the plaintiff's submission. I find that the class members will be identifiable.

vi. Two or More Persons

[209] A related issue is whether or not the plaintiff has shown an identifiable class of "two or more" persons.

[210] Facebook argues that this requirement means that the plaintiff must show evidence of two or more people who are interested in pursuing a claim and that the plaintiff has not done so. The plaintiff argues that she has evidence of this, but that it is not a necessary requirement of certification.

[211] The evidence required to show there is an identifiable class of two or more persons was discussed by the British Columbia Court of Appeal in *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 [*Wakelam*] at paras. 96-105. There the certification judge had relied on an affidavit of the lawyer for the plaintiff stating he had been informed by other named persons that they were interested in and supported the class proceeding. The Court of Appeal concluded

that the certification judge did not err in relying on this evidence and that the affidavit did "demonstrate the existence of an identifiable class of two or more persons" (at para. 105).

[212] The Court of Appeal's analysis in *Wakelam* did not conclude one way or the other that it was legally necessary to have evidence that more than one person is <u>desirous</u> of pursuing the claim. The certification judge had proceeded on the basis that it was necessary to show that there is at least more than one "identifiable class member who shares her <u>complaint</u>": 2011 BCSC 1765 at para. 130 (emphasis added). In that case the claim was based on the allegation that the defendant manufacturers had marketed cough medicine for use in children which was ineffective and a waste of money. I note that the certification judge decided the issue before the Supreme Court of Canada clarified the requirement of an identifiable class in *Sun-Rype*. Also, while the Court of Appeal in *Wakelam* referred to some Ontario case law dealing with the point, the *Keatley Appeal* casts new light on those authorities.

[213] Also, in deferring to the certification judge on the identifiable class requirement in *Wakelam*, the Court of Appeal was proceeding on the basis that there was a higher standard of review for the requirement of an "identifiable class of 2 or more persons", requiring an overriding error of fact or principle (at para. 9).

[214] The Ontario Divisional Court undertook a lengthy analysis of the issue in the *Keatley Appeal*, at paras. 61-91, before concluding that it was not a requirement of certification to show that there is someone in addition to the plaintiff who is "desirous" of pursuing a claim.

[215] As stated in the *Keatley Appeal* at paras. 84-88:

> 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".
>
> <u>In short, the "desirous" component of the identifiable class criterion is not mentioned in the legislation, not required to achieve the purposes of the</u>

> criterion and not mentioned in the Supreme Court of Canada jurisprudence that discusses the issue.
>
> Further, requiring evidence that two persons *seek to employ the class proceeding* vehicle, rather than simply requiring evidence that those people have a claim, may be problematic for the same reasons articulated in support of the opt-out class actions regime legislated in Ontario.
>
> These reasons were set out in the Ontario Law Reform Commission, *Report on Class Actions* (1982), at p. 132:
>
> > If persons are required to opt in to a class action... there is thus no immediate, material incentive to class members that may help to override the operation of the social and psychological barriers, previously identified, that may operate to discourage individual litigation. Fear of involvement in the legal process, an ill-founded concern over the amount of legal costs, fear of sanctions from employers or others in a position to take reprisals, or even the demands of everyday life, may prevent a class member from taking the steps necessary to opt in.
>
> The danger of entrenching a requirement that two class members provide evidence of their desire to proceed with a class action is apparent in, for example, an employment context. One could imagine the situation of a proposed class action brought by employees, where all putative class members, other than the representative plaintiff, are reticent to give evidence at an early stage that they are in favour of a class action. Their reluctance could be for any number of the reasons set out above, e.g., fear of retaliation by the employer. This reluctance would thus prevent the launching of the class action, even where the class members have strong claims for recovery.
>
> [Emphasis added.]

[216] As noted in *Sun-Rype* at para. 69, it is not necessary for each individual class member to be identified at the outset of the litigation. But there must be some evidence to show some basis in fact that two or more people could prove they were members of the class. The Supreme Court of Canada in *Sun-Rype* did not import an additional requirement into the *CPA* of showing that more than just the plaintiff is interested in pursuing the claim.

[217] In the case at bar, there is evidence of two people who say they were featured in ads without their consent. One of the persons, Ms. Douez, clearly was featured in Sponsored Stories.

[218] The evidence of the other person, Mr. Caputa, is less clear. He appears to believe he appeared in a Sponsored Story in March 2012. Facebook's evidence is

that it began the Sponsored Story program in January 2011. Facebook's evidence is that its records indicate that Mr. Caputa has not appeared in any Sponsored Story between September 10, 2012, and March 10, 2013.

[219] Facebook argues that the inference can be drawn that Mr. Caputa was not in a Sponsored Story; the plaintiff argues that the inference can be drawn that Mr. Caputa was in a Sponsored Story before September 10, 2012, otherwise Facebook would have clearly identified that he was not.

[220] At the very least, the evidence of Mr. Caputa permits of the inference that if he was in a Sponsored Story, he would wish to pursue a claim in relation to it.

[221] There is also the evidence in Facebook's own records, as disclosed in its evidence on this motion, of a number of BC residents who were featured in Sponsored Stories: 1.8 million between September 9, 2012, and March 10, 2013.

[222] The evidence that Sponsored Stories were advertisements from which Facebook profited seems uncontested.

[223] There is the evidence of the Facebook Terms of Use, which the plaintiff argues do not obtain the consent of Facebook users to being featured in the advertisements known as Sponsored Stories.

[224] Also, there is evidence that a class action was commenced against Facebook in the United States District Court, Northern District of California, San Francisco Division, in which preliminary approval of a class settlement and class certification was granted on December 3, 2012. This class action is based on a theory similar to that advanced herein, and is on behalf of the following class and minor subclass:

> Class: All persons in the United States who have or have had a Facebook account at any time and had their names, nicknames, pseudonyms, profile pictures, photographs, likenesses, or identities displayed in a Sponsored Story, at any time on or before the date of entry of the Preliminary Approval Order.
>
> Minor Subclass: All persons in the Class who additionally have or have had a Facebook account at any time and had their names, nicknames, pseudonyms, profile pictures, photographs, likenesses, or identities displayed

> in a Sponsored Story, while under eighteen (18) years of age, or under any other applicable age of majority, at any time on or before the date of entry of the Preliminary Approval Order.

[225] The United States class action against Facebook indicates that other people outside of this jurisdiction who were Facebook users have made a complaint about having their name or portrait displayed in a Sponsored Story without their consent.

[226] The procedural model developed under the *CPA* discourages discovery before the certification hearing takes place. Where, as here, the source of information regarding who is in the class lies predominantly in the hands of the defendant, but will be producible on discovery, the burden on the plaintiff should not be higher than that described in the *Act*.

[227] I am satisfied that through the process of discovery and notice, membership in the class will be objectively determinable. In this case there is not the complete absence of evidence that was the case in *Sun-Rype*.

[228] I find the reasoning in the *Keatley Appeal* compelling:

(a) the *CPA* does not impose a requirement that the plaintiff must show that there are two or more people in the proposed class that are desirous of pursuing such a claim;

(b) Supreme Court of Canada jurisprudence also does not import such a requirement; and,

(c) entrenching such a requirement could undermine the goals of the *CPA*.

[229] On the latter point, it can often take some courage to come forward to advance a claim in the courts. Individuals who have been wronged can fear that the social or political or economic repercussions of bringing forward a claim will outweigh the potential benefits to them personally, even if the wrong on a global scale is quite large. As an example here, there appears to have been some online social ridicule of the plaintiff in this case as a result of bringing the claim, in part based on what the plaintiff would argue is a mistaken assumption that Facebook had

obtained users' consent to being used in paid advertisements known as Sponsored Stories.

[230] I conclude that 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 courts' role as gatekeeper can be adequately performed based on the existing requirements of the *CPA*.

[231] There is sufficient evidence that more than one Facebook user resident in BC was featured in advertisements by Facebook known as Sponsored Stories without the users' consent. I am persuaded that the plaintiff has met the test for proving some basis in fact for an identifiable class of two or more persons.

vii. Revised Class Definition

[232] Based on the Reasons above, the proposed class definition should be revised so that it has temporal limits, and so that it more clearly only includes people who registered with Facebook using their real name or actual portrait. These revisions are reflected as follows:

> All British Columbia Resident <u>natural</u> persons who are or have been Members of Facebook <u>at any time in the period from January 2011 to May 30, 2014</u> and:
>
> (a) <u>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</u>; and,
>
> (b) whose name, portrait, or both have been used by Facebook in a Sponsored Story.
>
> [Amendments underlined.]

[233] In my view, these revisions do not change the nature of the proceeding which the plaintiff seeks to certify as a class proceeding. The core of the cause of action and the factual and legal issues between the parties on the merits remain the same. However, these revisions tighten up the class definition and address some of the concerns raised by the defendant before me.

[234] I am therefore of the view that the above revised class definition meets the requirements of the *CPA*.

(c) Common Issues

[235] The requirement that the class proceeding involve issues common to members of the class is concerned with procedural efficiencies and avoidance of duplication of judicial fact-finding that can be gained by a class action as opposed to multiple individual actions involving similar issues. This requirement was described in *Western Canadian*, and cited in *Pro-Sys* at para. 108 as follows:

> In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "the underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:
>
> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[236] The plaintiff proposes the following as common issues:

1. Did the Defendant commit the statutory tort set out in section 3(2) of the *Privacy Act*, R.S.B.C. 1996, c. 373, by featuring Class members' names or portraits in connection with its Sponsored Stories advertising program?

2. If the Defendant committed the statutory tort referred to in paragraph 1, then:

a. Is the Defendant liable to pay damages to the Class; if so, in what amount?

b. Does the Defendant's conduct justify an award of punitive damages in favour of the Class; if so, in what amount?

c. Is the Class entitled to damages assessed in the aggregate pursuant to section 29(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50; if so, in what amount?

d. Is the Defendant liable to pay interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79; if so, in what amount?

e. Is the Class entitled to an Order enjoining the Defendant from future use of Class members' names or portraits to advertise or promote goods or services without Class members' express consent to such use?

[237] I note that the plaintiff's proposed common issues were advanced without having the advantage of knowing what Facebook's defences might be, as Facebook had not yet filed a Response to Civil Claim.

[238] However, Facebook raised many issues in the course of this hearing that reveal its expected defences to the issue framed by the plaintiff as common issue 1. The plaintiff argued orally that many of the arguments advanced by Facebook can also be determined as common issues.

[239] This gives rise to a question of what is the role of the certification judge when the parties' submissions during the certification application give rise to the possibility of additional common issues, but they have not been formally advanced in the plaintiff's motion for certification as common issues.

[240] In *Halvorson v. British Columbia (Medical Services Commission),* 2010 BCCA 267, the British Columbia Court of Appeal emphasized that judges tasked with case management of class actions have to keep in mind the purposes of the *CPA* and

allow for procedural flexibility, appreciating that plaintiffs in proposed class actions may re-cast their cases. The Court held, at para. 23:

> To hold plaintiffs strictly at the certification stage to their pleadings and arguments as they were initially formulated would in many cases defeat the objects of the *Act* - judicial economy, access to justice, and behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 26-29; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15. In *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 at 747 (Gen. Div.), leave to appeal ref'd [1993] O.J. No. 4210, in a passage adopted in *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 at para. 58 (S.C.), appeal allowed in part (1998), 48 B.C.L.R. (3d) 90 (C.A.), the court described certification as "a fluid, flexible procedural process". There must be procedural flexibility in order to facilitate realization of the statutory purposes and, contrary to the view that has been causing the case management judge such consternation, there is nothing wrong with plaintiffs reformulating their approach on appeal. As was stated in *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 at para. 39 (C.A.), leave to appeal ref'd [2007] S.C.C.A. No. 346,
>
> > [39] Provided the defendant is not prejudiced, it is open to a plaintiff to recast its case to make it more suitable for certification: see *Kumar v. Mutual Life Assurance Co. of Canada*, [2003] O.J. No. 1160, 226 D.L.R. (4th) 112 (C.A.), at paras. 30-34 and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, 205 D.L.R. (4th) 39, at para. 30.

[241] The courts in Ontario have stressed that a certification judge should exercise caution and restraint in amending the common issues, noting that the burden at first instance lies on the plaintiff for adducing evidence that the common issues exist: *McCracken v. Canadian National Railway Company*, 2012 ONCA 445 at paras. 125, 144.

[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.

[244] Facebook also advanced other arguments as to why a *Privacy Act* claim based on Sponsored Stories might fail. Again, Facebook cannot be prejudiced if I find that those arguments give rise to common issues.

[245] I will now review the various plaintiff and Facebook arguments on the question of common issues in this context.

The Elements of the Statutory Tort

[246] The first proposed common issue by the plaintiff is "Did the Defendant commit the statutory tort set out in section 3(2) of the *Privacy Act*, R.S.B.C. 1998, c. 373 by featuring Class members' names or portraits in connection with its Sponsored Stories advertising program?"

[247] The plaintiff's first proposed common issue rolls into it the two main elements of the statutory tort:

(a) the use of class members' names or portraits in advertising or promoting the sale of, or other trading in, property or services; and,

(b) the lack of consent of class members for such use.

Element of Consent

[248] I will deal with the consent issue first.

[249] Facebook submits that this case is primarily going to be about consent, and that individual issues of consent will overwhelm any potential common issues.

[250] The plaintiff says that on the contrary, if consent is going to be an issue, it is going to be a common issue.

[251] To understand the consent issue, one has to understand the details of how Facebook works. When Facebook users sign up for the service, Facebook submits that they must first accept the Terms of Use. Then, when registered and engaging the service, each user has a choice on how to set that user's "privacy settings" to limit the extent to which that user's online information is shared with others. Also,

one of Facebook's features is the "like" feature, by which a user can voluntarily identify that the user "likes" someone or something. Facebook calls this a "social action".

[252] Facebook asserts that each user featured in a Sponsored Story gave consent to this use of their name or portrait when they accepted Facebook's Terms of Use upon registering for the Facebook service, and through taking other online actions such as taking an action to click on the icon for "like" and through the person's failure to set, or setting of, the user's "privacy settings" for the service.

[253] Facebook argues that its Terms of Use provided information to users as to how they could set their privacy settings in a way that would limit those who could see their "likes", and that this would also limit the use of the person's name or portrait in Sponsored Stories.

[254] The plaintiff disagrees.

[255] The plaintiff has provided evidence of the Facebook Terms of Use and argues that nowhere in it did Facebook clearly tell its users that Facebook would be free to use that person's name or portrait in paid advertisements known as Sponsored Stories. The plaintiff says users were also not clearly given a choice of opting out of use of their name or portrait in Sponsored Stories.

[256] As such, the plaintiff argues that there is no way a user, by simply accepting Facebook's Terms of Use, would have been consenting to use of their name or portrait in a Sponsored Story, regardless of whatever "privacy settings" the user decided to choose or "like" actions a user might have taken. Without notice there can be no consent.

[257] As for the implications of the action of clicking on a "like" action, it is one thing, according to the plaintiff's theory of the case, for a Facebook user to choose to share information with friends about things the user "likes"; it is quite another for that user to agree that his or her preferences can be sold as advertisements to his or her friends. The air of paid advertising can change the perceived sincerity and

authenticity of the message and of the messenger and that is why it needs express consent.

[258] Facebook, in its effort to create profit from the service it provides, understandably wishes to maximize the advertising revenues it can generate from these social connections. The evidence before me suggests that it is against Facebook's commercial interests to make it too easy for Facebook users to opt-out of having their relationships "monetized" and turned into marketing tools.

[259] Without weighing the relative strengths and weaknesses of each side's case, on the plaintiff's interpretation of the evidence 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.

[260] The evidence before me suggests that the modern social media user is attracted to Facebook's service in order to communicate with friends. How much is communicated and to which friends and in what form is something the modern user wishes to control. This is as much an aspect of privacy as described by Warren and Brandeis above.

[261] The issue of whether Facebook's standard form Terms of Use, if accepted by a user, constitute express consent, on their own or in combination with other actions taken by a Facebook user on a Facebook site, is very similar to those cases where the issue turns on the interpretation of a standard form contract.

[262] In *Lam v. University of British Columbia*, 2010 BCCA 325 at paras. 55-60, the British Columbia Court of Appeal held that the interpretation of a standard form contract was an issue that was a common issue in a class proceeding.

[263] I agree with the plaintiff that to the extent a user's consent to be featured in a Sponsored Story could be obtained by Facebook based on a user accepting its standard form Terms of Use, alone or in combination with that user's setting of privacy settings and taking of "like" actions, is a common issue for the class.

[264] Facebook also argues that there were a number of ways users could have given implied consent to the use of their names or portraits in a Sponsored Story.

[265] It is to be remembered that 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.

[266] The plaintiff says firstly, the issue of whether or not implied consent is sufficient to defeat a s. 3(2) *Privacy Act* claim is a common issue. The plaintiff argues that s. 3(2) of the *Privacy Act* should be interpreted to require express consent in order to defeat a claim, rather than implied consent.

[267] The plaintiff says, secondly, to the extent that implied consent may be a defence, and to the extent Facebook argues that consent can be implied based on actions taken online, this too will be a common issue.

[268] I agree with the plaintiff. There are a limited number of online actions that could be taken by a Facebook user to support Facebook's argument that the user implicitly consented to the use of his or her name or portrait in a Sponsored Story. 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. It is not necessary that each class member be identically situated.

[269] If, as the plaintiff argues, Facebook's Terms of Use did not sufficiently disclose that Facebook would use the Facebook user's name or portrait in Sponsored Stories or did not sufficiently disclose how users could opt out of this through the setting of "privacy settings", and that therefore Facebook did not obtain consent, then the resolution of this issue will significantly the interests of all the class members.

[270] I have concluded that the question of whether online actions taken by a user of the Facebook service can constitute consent under s. 3(2) of the *Privacy Act* is a common issue. One possible way to phrase the common issue within the context of the timeframe covered by the class is as follows:

> *Issue 1*
>
> What if any Online Actions taken by a Class Member on the Facebook service would constitute express or implied consent to the Class Member's name or portrait being used in a Sponsored Story, such that it constitutes consent within the meaning of s. 3(2) of the *Privacy Act*, R.S.B.C. 1996, c. 373?

[271] "Online Actions" would then need to be defined by the parties along the lines of: accepting Facebook's Terms of Use; setting of the user's "privacy settings"; and taking a "like" action.

[272] If the answer to issue 1 is that no online actions could constitute express or implied consent, then these answers will significantly advance the claims of the class. Success for one would be success for all.

[273] In contrast, if there were some online actions taken by users of the Facebook service that could constitute consent, express or implied, the existence of these actions could defeat all or some of the claims of class members. Determining this issue will also avoid the duplication of fact-finding that would arise if class members were to sue individually.

[274] Finding out these answers would still be efficient in a class proceeding context, as there would be objective and efficient ways to determine which class members took the actions that would constitute consent, and which did not, and the claims could be dealt with accordingly.

[275] I also note that according to Facebook's evidence, it changes its Terms of Use from time to time. In this regard, the Terms of Use that it had in effect when it started Sponsored Stories were revised on December 11, 2012. The consent

common issue as framed can address any relevant material differences in the differing forms of standard Terms of Use.

Individual Motivations and Circumstances

[276] Facebook further argues that it should be entitled to challenge any class member's assertion that he or she did not give consent through exploring that class member's individual circumstances and motivations behind taking online actions on the Facebook service. As examples, Facebook says it would explore whether a Facebook user clicked on the "like" icon for a product because she wanted her friends to see that she had an affiliation for a product she perceived would make her more popular; or to obtain an online coupon; or to promote her own products; or to support a local business.

[277] Facebook's theory about the relevance of individual motives is based on importing ss. 1(2) and (3) of the *Privacy Act* into s. 3(2).

[278] Sections 1 and 2 of the *Privacy Act* provide:

> 1(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
>
> (2) <u>The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others</u>.
>
> (3) <u>In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties</u>.
>
> (4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.
>
> 2(1) In this section:
>
> "court" includes a person authorized by law to administer an oath for taking evidence when acting for the purpose for which the person is authorized to take evidence;
>
> "crime" includes an offence against a law of British Columbia.
>
> (2) An act or conduct is not a violation of privacy if any of the following applies:
>
>> (a) it is consented to by some person entitled to consent;

> (b) the act or conduct was incidental to the exercise of a lawful right of defence of person or property;
>
> (c) the act or conduct was authorized or required under a law in force in British Columbia, by a court or by any process of a court;
>
> (d) the act or conduct was that of
>
> > (i) a peace officer acting in the course of his or her duty to prevent, discover or investigate crime or to discover or apprehend the perpetrators of a crime, or
> >
> > (ii) a public officer engaged in an investigation in the course of his or her duty under a law in force in British Columbia,
>
> and was neither disproportionate to the gravity of the crime or matter subject to investigation nor committed in the course of a trespass.
>
> (3) A publication of a matter is not a violation of privacy if
>
> > (a) the matter published was of public interest or was fair comment on a matter of public interest, or
> >
> > (b) the publication was privileged in accordance with the rules of law relating to defamation.
>
> (4) Subsection (3) does not extend to any other act or conduct by which the matter published was obtained if that other act or conduct was itself a violation of privacy.
>
> [Emphasis added.]

[279] Thus, Facebook submits as follows:

> In summary, in order to succeed in a claim under section 3(2) of the *Privacy Act*, a plaintiff must establish that:
>
> (a) her name or portrait was used by another person;
>
> (b) for:
>
> i. the purpose of advertising or promoting
>
> ii. the sale of, or other trading in,
>
> iii. property or services;
>
> (c) she did not consent to the use of her name or portrait for the purpose set out in (b);
>
> (d) <u>the use of her name or portrait for the purpose set out in (b) was a violation of the privacy to which she was reasonably entitled to in the circumstances; and</u>
>
> (e) <u>the nature, incidence and occasion of the act or conduct and the relationship between the parties supports a finding that there was a violation of privacy</u>.
>
> [Emphasis added.]

[280] I will come back to the issue of whether or not the advertising at issue in the s. 3(2) *Privacy Act* tort has to be in relation to the sale of or other trading in property or services.

[281] But the elements asserted by Facebook as items (d) and (e) above are Facebook's insertion of elements from ss. 1(2) and (3) of the *Privacy Act* as elements of the s. 3(2) *Privacy Act* tort.

[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*.

[283] As discussed already in dealing with the issue of jurisdiction, the origins of concerns about legal protection of privacy supports the conclusion that two different torts were intended to be addressed by the *Act*: violation of privacy, for which subjective elements of reasonableness and context were relevant under s. 1(2) and (3); and misappropriation of personality, under. s. 3(2), for which reasonableness and context is not a factor.

[284] Furthermore, a plain reading of s. 3(2) sets out the elements of "a tort" without reference to s. 1.

[285] A reading of s. 5 of the *Privacy Act* also supports the conclusion that the *Act* envisions two separate torts: "violation of privacy <u>or</u> for the unauthorized use of the name or portrait of another" (emphasis added). Section 5 of the *Privacy Act* provides:

> An action or right of action for a violation of privacy or for the unauthorized use of the name or portrait of another for the purposes stated in this Act is extinguished by the death of the person whose privacy is alleged to have been violated or whose name or portrait is alleged to have been used without authority.

[286] It appears therefore that the misappropriation of personality tort under the *Privacy Act* envisions the wrongdoer using someone else's name or portrait for

advertising or promotion, without it being necessary to show that the person had a reasonable expectation of privacy in their name or likeness.

[287] Someone might not object to their name or image being publicized, and might not have a reasonable expectation of privacy in the same, but could quite rightly object to someone using their name or image to make money through advertising or promotion and to suggest that the person is endorsing the sponsor. Hence the statutory requirement of consent to use someone's name or portrait in this way.

[288] The plaintiff denies that individual motivations are relevant to the misappropriation of personality tort embodied by s. 3(2) of the *Privacy Act*.

[289] It is difficult to understand how an individual could give consent to Facebook under s. 3(2) of the *Privacy Act* based on motives unknown to Facebook at the time. It seems a more logical construct to conclude that consent would have to be communicated to Facebook in some way, otherwise consent has not been given and what Facebook would have is just a lack of objection. If consent was communicated to Facebook, then it would be through an online action that will be common to any members of the class that took that action and will be determined in answer to issue 1 above.

[290] Nevertheless, this hearing is not the final place to determine the merits of Facebook's argument. I find that the legal construct of the argument does give rise to a common issue. One way of framing this issue is:

> *Issue 2*
>
> Is a tort under s. 3(2) of the *Privacy Act* provable as an independent tort without regard to the elements of s. 1(2) and (3) of the *Privacy Act*?

[291] The answer to this second issue will advance the case for all class members. If the answer is that ss. 1(2) and (3) of the *Privacy Act* are irrelevant, that will either get rid of or substantially diminish any argument by Facebook that there are individual assessments of personal circumstance required in this case in order to determine liability under s. 3(2) of the *Privacy Act*.

[292] But even if the answer is that the factors in ss. 1(2) and (3) are relevant to a claim advanced under s. 3(2) of the *Privacy Act*, I do not see this as generating individual issues of such magnitude that it would overwhelm the common issues.

Element of Being Featured in an Advertisement or Promotion

[293] Returning to the first element of the statutory tort, the factual question of whether or not class members' names or portraits were used in in advertising or promoting the sale of, or other trading in, property or services will be individual to each member.

[294] But there is a common issue that arises out of the first element of the statutory tort.

[295] I come back to Facebook's submission that s. 3(2) of the *Privacy Act* is to be read as follows:

> In summary, in order to succeed in a claim under section 3(2) of the *Privacy Act*, a plaintiff must establish that:
>
> (a) her name or portrait was used by another person;
>
> (b) for:
>
> i. the purpose of advertising or promoting
>
> ii. the sale of, or other trading in,
>
> iii. property or services;…

[296] By structuring the argument this way Facebook argues that advertising on its own is not sufficient to establish an element of a s. 3(2) *Privacy Act* claim; rather, the advertising must be in relation to the sale of or trading in property or services. It thus argues that Sponsored Stories that dealt with things other than the sale or other trading in property or services cannot found a claim under s. 3(2).

[297] Facebook does not submit that Sponsored Stories were not advertisements, but argues that they were not all advertisements for the sale of or other trading in property or services because some were promoting other things such as political parties or charities.

[298] There is another interpretation of s. 3(2) of the *Privacy Act,* and that is that the advertising use of the name or portrait stands alone, and it is not necessary to show that it was advertising the sale of, or other trading in, property or services.

[299] Also, the plaintiff argues that the meaning of “property or services” in the *Privacy Act* should be interpreted broadly to include services of a charitable or political nature.

[300] This dispute over the proper interpretation of the *Privacy Act* is common to all class members. The issue is as follows:

> *Issue 3*
>
> Were all or only some Sponsored Stories for the purpose of advertising or promotion within the meaning of s. 3(2) of the *Privacy Act*?

[301] If the answer to issue 3 is that all of the Sponsored Stories were for the purposes of advertising or promotion within the meaning of s. 3(2) of the *Privacy Act*, this will materially advance all the class members’ claims.

[302] If the answer to issue 3 is that some Sponsored Stories fall outside s. 3(2) of the *Privacy Act*, then this answer will still be very helpful in determining claims on a class-wide basis, or may be a reason to divide the class into sub-groups.

Enforceability of Choice of Law Clause

[303] Another issue raised by Facebook in this hearing is that the choice of law clause in Facebook’s standard form Terms of Use means that the law governing the parties will be California law, not BC law, and that this defeats the application of BC’s *Privacy Act*. Facebook also argues that the *Privacy Act* cannot be applied to Facebook as its activities were outside the jurisdiction, and so to apply the *Privacy Act* would be to exceed the province’s territorial jurisdiction.

[304] Clearly if this issue is decided in Facebook’s favour, it will apply at least to all class members who were of the age of majority and will defeat their claims.

[305] The plaintiff argues that the *Privacy Act* is a protection for BC residents that overrides any choice of law clause in a contract between Facebook and its members.

[306] As mentioned above in relation to jurisdiction, the plaintiff also relies on the statement in Facebook's Terms of Use that Facebook strives to respect local laws.

[307] Interestingly, Facebook's public Form 10-K annual report filed pursuant to the US *Securities Exchange Act*, 15 U.S.C. §78a (1934), for the year ending December 31, 2012, contains the following statements indicating that it is subject to foreign laws concerning privacy:

> We are subject to a number of U.S. federal and state, and foreign laws and regulations that affect companies operating on the Internet, …These may involve user privacy….In particular, we are subject to…foreign law as regarding privacy and protection of user data. Foreign data protection, privacy and other laws and regulations are often more restrictive than those in the United States.
>
> (at p. 11)
>
> *Our business is subject to complex and evolving U.S. and foreign laws and regulations regarding privacy…and could result in claims….*
>
> We are subject to a variety of laws and regulations in the United States and abroad that involve matters central to our business, including user privacy….For example, the interpretation of some laws and regulations that govern the use of names and likenesses in connection with advertising and marketing activities is unsettled and developments in this area could affect the manner in which we design our products, as well as our terms of use.
>
> (at pp. 19-20)

[308] I find that whether or not the *Privacy Act* applies despite Facebook's choice of law clause is an issue common to all members of the proposed class and its determination will materially advance the litigation.

[309] The issue can be stated as follows:

> *Issue 4*
>
> Does the *Privacy Act* apply to Facebook in relation to BC residents who used Facebook's services?

[310] This brings me to the evidence that Facebook allowed users as young as 13 to sign up as Facebook members. The plaintiff argues that some members of the class will have been under the age when they could contract and could thereby consent to any of Facebook's Terms of Use.

[311] I agree that this is an issue that may come up on a number of the common issues. If the result of the determination of common issues is different for those users who were of the age of majority versus those who were still children, then it may in the future become evident that there will need to be a sub-class of Facebook users who were BC residents and not of the age of majority at the time their name or likeness appeared in Sponsored Stories.

[312] The above four issues deal with the applicability and interpretation of s. 3(2) of the *Privacy Act* and in my view all arise out of the plaintiff's first proposed common issue and Facebook's challenge to the same.

[313] If class members do get past the hurdle of establishing answers to the common issues in their favour regarding the application of s. 3(2) of the *Privacy Act* and the absence of consent, they will have made significant progress to establishing liability.

[314] However, I also am aware of the possibility that as the class proceeding evolves, it may become clear that there are individual issues that need determination before liability can be established. If necessary, a process for determining the individual issues can then be established, whether by way of a claims process or questionnaire or otherwise. However I am not persuaded at this stage of the proceeding that there will be significant individual issues requiring cross-examination of each member of the class.

Damages

[315] The next question is whether or not there are any common issues in relation to the assessment of damages.

[316] The plaintiff argues that the s. 3(2) *Privacy Act* claim is perfect for determination of damages on an aggregate basis, because the *Act* does not require proof of damage. The argument is that individual members of the class will not need to prove they suffered harm. The plaintiff argues that the damages question will centre upon whether Facebook's conduct was flagrant and callous, and the degree of commercial advantage gained by Facebook as a result of its conduct.

[317] The plaintiff also says that it is clear from the evidence that Facebook has the tools and data to know how many Sponsored Stories advertisements it published per class member. A formula could be developed assessing damages either on a class member basis or Sponsored Story basis.

[318] Given the estimated size of the class, which I am informed is over 1.8 million people, it strikes me that it will be very difficult to determine damages on the basis of individual loss. Furthermore, the plaintiff does not seek to do so. The plaintiff does not propose calling evidence as to the degree of embarrassment or humiliation suffered by each class member as a result of being featured in one or more Sponsored Stories, for example.

[319] Facebook argues that the plaintiff's approach poses a problem for those class members who will want to say they suffered individual harm, whether it be by exceptional embarrassment, or because they were a celebrity whose portrait has exceptional value, or otherwise.

[320] There is an easy solution to the issue raised by Facebook, and that is to limit the class to those people who do not seek to prove actual individual damage. The *Privacy Act* makes it optional for a plaintiff to prove loss. An individual plaintiff can choose not to do so.

[321] Facebook argues that the plaintiff has not put forward any expert evidence to support a theory that damages could be determined in the aggregate.

[322] Facebook relies on the affidavit of Catherine Tucker, Ph.D. (the "Tucker Affidavit"), to argue that it will be impossible to determine damages on an aggregate basis.

[323] The plaintiff argues that Dr. Tucker's opinions are inadmissible for a number of reasons. One of these reasons is that she failed to provide a certificate that she is aware of her duty to assist the court and to not be an advocate for any party, as required by Rule 11-2 of the *Supreme Court Civil Rules*. Also, some of her opinions are outside her area of expertise as they seem to be based on interpretations of law which she is not qualified to make and which seem identical to interpretations she gave in relation to a California action. For example, Dr. Tucker's opinions seem to be based on the premise that individual proof of loss is required for claims advanced under the *Privacy Act*, which it is not.

[324] I find these criticisms to be warranted. Furthermore, I found that much of the Tucker Affidavit appeared to be an argument that Facebook has social value and therefore needs to have a viable business model, as though obtaining consent of users to use their name and image in advertising would destroy the value of Facebook. This is not scientific opinion based on a particular expertise beyond the reach of the court.

[325] I do not find the Tucker Affidavit helpful on the question of whether or not an aggregate damages award is possible. I add that these are not criticisms of Dr. Tucker's academic abilities as ultimately it is the responsibility of legal counsel to ensure that expert opinions are appropriate in form and substance.

[326] Facebook also points to other class action authorities, such as price-fixing cases, where expert evidence was required to establish a methodology to calculate damages.

[327] I do not find the price-fixing cases to be a useful analogy. In cases such as *Pro-Sys* the issue was much more complicated, and that was to prove the actual over-charge by Microsoft to direct purchasers and indirect purchasers.

[328] Here 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.

[329] Nevertheless it strikes me that if the plaintiff's proposal is that there will not be individual claims for damages, the class members will need to know this up-front. I am concerned that unless this is made clear in the class definition, the class could end up including people who might otherwise want to prove they suffered unique individual losses.

[330] This can be accomplished by re-defining the class along the following lines:

> All British Columbia Resident natural persons who are or have been Members of Facebook at any time in the period from January 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;
>
> (c) and who do not seek to prove individual loss as a result..
>
> [Emphasis added identifying changes to class definition made earlier in this judgment; double-emphasis identifying latest change.]

[331] As well, 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.

[332] After hearing evidence on the trial of the common issues, the Court would be in a better position to determine Facebook's arguments that aggregate damages are inappropriate. Section 29(1) and (2) of the *CPA* provides:

> 29(1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members,

> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> (2) Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,
>
> (a) submissions that contest the merits or amount of an award under that subsection, and
>
> (b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

[333] I thus accept that the following two damages issues will be common issues:

> *Issue 5*
>
> Are Class Members entitled to damages without individual proof of damage pursuant to s. 3(2) of the *Privacy Act*?
>
> *Issue 6*
>
> Can the amount of damages be determined on an aggregate basis; if so, in what amount?

[334] The next proposed common issue has to do with whether or not punitive damages will be justified.

[335] The proposed common issue is:

> *Issue 7*
>
> Does the Defendant's conduct justify an award of punitive damages in favour of the Class; if so, in what amount?

[336] Facebook argues that this is not a common issue mainly because the underlying issues of liability and damages will involve numerous individual inquiries. It also submits that there is no basis in fact on the evidence to support a conclusion that Facebook's conduct was so egregious as to justify an award of punitive damages.

[337] I have already found that there are common issues regarding liability and damages. As to the characterization of Facebook's conduct, I conclude that will have to await a hearing on the merits of the action.

[338] The question of punitive damages was certified as a common issue in *Pro-Sys*.

[339] I conclude that on the facts alleged here, the question of the appropriateness of punitive damages is also a common issue as described by the plaintiff. The issues as framed are clearly based on an assessment of the conduct of the plaintiff which is common to the class: *Watson v. Bank of America Corp.*, 2014 BCSC 532 at para. 282.

Interest

[340] The plaintiff's next proposed common issue has to do with whether or not Facebook will be liable for court order interest.

[341] The proposed common issue is:

> *Issue 8*
>
> Is the Defendant liable to pay interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1998, c. 79; if so, in what amount?

[342] Facebook's argument is that this is not common because the issues of liability and damages are not common. I disagree.

[343] This was certified as a common issue in *Pro-Sys* and I find it equally appropriate to certify as a common issue here.

Injunctive Relief

[344] The next and last proposed common issue has to do with whether or not the class members are entitled to injunctive relief.

[345] Facebook argues that the injunctive relief sought by the plaintiff would not only be prohibited as extra-territorial, it is equitable in nature and would therefore give rise to a number of equitable defences: estoppel, waiver and acquiescence. Facebook argues that it will assert that these equitable defences apply to bar the claims of many if not all class members. It argues that these defences will involve a consideration of each member's knowledge and conduct.

[346] I am not entirely persuaded by Facebook's arguments. It seems more likely that if it is going to argue that estoppel, waiver or acquiescence apply, that it will be making this argument based on the same online actions which it argues indicate a user provided express or implied consent.

[347] In any event, these are issues that can be addressed as the proceeding unfolds, to assess whether or not they are common or individual.

[348] I do note that the injunction issue as framed by the plaintiff seems to seek an order that would be rather difficult to enforce: that Facebook be enjoined from similar conduct in the future without express consent of class members. Will that type of order not simply beg another lawsuit as to whether or not Facebook obtained express consent? Furthermore, if, as the plaintiff argues, one of the goals of this class proceeding, as with other class proceedings, is behaviour modification, will not the plaintiff's success on the other common issues suffice?

[349] I am not satisfied that the plaintiff has provided a basis for certification of the injunction issue as a class-wide issue.

Common Issues Conclusion

[350] I have concluded there are eight issues capable of being determined as common issues.

[351] The issues I have identified as 1 through 4 arise out of the first proposed common issue proposed by the plaintiff, and Facebook's submissions in response. Since the language does not match the common issue proposed by the plaintiff in

the plaintiff's notice of application, I will give the parties' liberty to apply within 30 days to address any improvements they might propose in the wording.

(d) Preferable Procedure

[352] The next issue to determine is whether or not a class proceeding would be the preferable procedure. Section 4(2) of the *CPA* requires the court to consider all relevant matters including those enumerated in the section, as follows:

> 4(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> > (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
> >
> > (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> >
> > (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> >
> > (d) whether other means of resolving the claims are less practical or less efficient;
> >
> > (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[353] On all of the factors enumerated in s. 4(2), a class proceeding here is clearly preferable. There is no other realistic procedure available to class members to provide them with relief. They cannot bring Small Claims proceedings in Provincial Court, as the *Privacy Act* gives jurisdiction to this Court. There is no tribunal offering them relief. Their claims are most likely to be uneconomical to prosecute on their own.

[354] I find that the three goals of the class action regime, judicial economy, access to justice, and behaviour modification, as held in *Hollick* and affirmed in *Pro-Sys* at para. 137, all will be better served by certifying this proceeding as a class proceeding.

[355] I reject Facebook's argument that the case will be unmanageable and will inevitably break down into many individual issues, overwhelming any progress that might be made on common issues.

[356] I find that underlying the s. 3(2) *Privacy Act* tort is the same public policy goal of behaviour modification as underlies the *CPA*.

[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. Without the assistance of the *CPA* class action procedure, the plaintiff and proposed class members' claims based on s. 3(2) of the *Privacy Act* would be unlikely to have access to justice. Furthermore, the sheer number of individual claims, given the reach of Facebook, would overwhelm the courts unless a class proceeding was available.

(e) Representative Plaintiff

[358] Facebook advances no argument that the plaintiff is not a suitable representative plaintiff, other than to repeat arguments that the case itself is not suitable for certification.

[359] I find that the plaintiff will fairly and adequately represent the class, and she has put forward a reasonable litigation plan as a starting position although I will ask the parties to return to court to refine the same. She has filed evidence establishing some basis in fact for her claim. She took the time to attend the court hearing of these motions as well. I find that she has no conflict with other class members.

Conclusion

[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.

[362] There is evidence showing some basis in fact for the plaintiff's assertion that Facebook used the names or portraits of BC residents who were Facebook users without their consent in advertisements called Sponsored Stories.

[363] There is also some basis in fact to support the plaintiff's claim that this conduct creates an actionable tort pursuant to s. 3(2) of the *Privacy Act*, without the necessity of proving actual damage.

[364] I have dismissed Facebook's application that this Court decline jurisdiction in this matter.

[365] I have granted the plaintiff's application that the within proceeding be certified as a class proceeding.

[366] The class description will be as follows:

> 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) who do not seek to prove individual loss as a result.

[367] I conclude on the evidence and submissions before me that one of the central issues in the lawsuit will be whether or not Facebook's standard Terms of Use, alone or together with other Facebook online tools, provided users' consent to Facebook to use the person's name or portrait in advertising through Sponsored Stories. This is an issue common to all class members. The determination of this issue will

significantly advance the lawsuit on behalf of all class members or could defeat the lawsuit altogether.

[368] There are other common issues in addition to the consent issue.

[369] Attached as Appendix A is a list of the approved common issues. The parties have liberty to apply within 30 days to amend common issues 1 through 4 to address any concerns with the wording. Likewise, the parties have liberty to apply within 30 days to address any concerns with the revisions to the class definition made as a result of this judgment.

[370] I also suggest that the parties arrange for a further hearing before me to address the form of notice to class members and any revisions to the litigation plan to take into account these reasons.

"S.A. Griffin, J."
The Honourable Madam Justice Susan A. Griffin

Appendix "A"

Issue 1	What if any Online Actions taken by a Class Member on the Facebook service would constitute express or implied consent to the Class Member's name or portrait being used in a Sponsored Story, such that it constitutes consent within the meaning of s. 3(2) of the *Privacy Act*, R.S.B.C. 1996, c. 373?
Issue 2	Is a tort under s. 3(2) of the *Privacy Act* provable as an independent tort without regard to the elements of s. 1(2) and (3) of the *Privacy Act*?
Issue 3	Were all or only some Sponsored Stories for the purpose of advertising or promotion within the meaning of s. 3(2) of the *Privacy Act?*
Issue 4	Does the *Privacy Act* apply to Facebook in relation to BC residents who used Facebook's services?
Issue 5	Are Class Members entitled to damages without individual proof of damage pursuant to s. 3(2) of the *Privacy Act*?
Issue 6	Can the amount of damages be determined on an aggregate basis; if so, in what amount?
Issue 7	Does the Defendant's conduct justify an award of punitive damages in favour of the Class; if so, in what amount?
Issue 8	Is the Defendant liable to pay interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1998, c. 79; if so, in what amount?