

Ontario Superior Court denies certification of Cambridge Analytica class action

FEBRUARY 18, 2021 3 MIN READ

Related Expertise

- [Advertising and Marketing](#)
- [Class Action Defence](#)
- [Commercial Technology Transactions](#)
- [Intellectual Property](#)
- [Privacy and Data Management](#)
- [Privacy and Data Security Disputes](#)
- [Technology](#)

Authors: [Mark A. Gelowitz](#), [Robert Carson](#), [Lauren Harper](#)

On February 16, 2021, the Ontario Superior Court of Justice [dismissed a motion for class certification](#) in *Simpson v. Facebook, Inc.*, a putative privacy class action. Justice Belobaba held that there was no basis in fact for the existence of the proposed common issues, and therefore no justification for a class proceeding. His reasons address the evidentiary requirement of “some basis in fact” and reinforce that certification can be a meaningful screening device in privacy class actions.

Background

This was one of several putative class actions filed in Canada with allegations that a third party named Cambridge Analytica had obtained information about Canadian Facebook users from a professor and third-party application developer named Kogan. In 2018, the plaintiff was granted carriage of a proposed class action on behalf of “Canadian residents whose Facebook Information was shared with Cambridge Analytica Group.”

Justice Belobaba’s reasons

The primary issue in the certification motion was whether there is any basis in fact for the proposed common issues – i.e., whether there is any evidence that Dr. Kogan sold or transferred data regarding any Canadian user to Cambridge Analytica. Justice Belobaba reiterated the principle that the plaintiff must lead some evidence that a common issue exists beyond a bare assertion in the pleading, stating: “It is fundamental to class action certification that the plaintiff adduce some evidence (some basis-in-fact) for both the existence and commonality of each of the proposed common issues.”

Justice Belobaba found that there was no evidence in the record that any Canadian user’s data was shared with Cambridge Analytica. Accordingly, he found that the motion for certification must be dismissed:

It follows that there is no basis in fact for any of the proposed common issues that ask whether the defendants invaded any class member’s privacy, whether at common law under the tort of intrusion upon seclusion or in breach of provincial privacy statutes. None of these [proposed common issues] can be certified. Absent common issues, there is no justification for a class proceeding.

Justice Belobaba also noted that, while he did not need to rule on any of the other arguments against certification, Facebook advanced “an array of, frankly, compelling arguments”, including, for example, arguments about the scope of the tort of intrusion upon seclusion

and the absence of class-wide commonality.

Justice Belobaba also re-confirmed the Court's important gatekeeping role in certification of privacy class actions, stating: "The dismissal of this certification motion is simply a reminder to class counsel that while certification remains a low hurdle it is nonetheless a hurdle."

Key takeaway

This case is a helpful reminder that certification remains a meaningful screening device and that, depending on the facts of the case, there are a variety of strategies that defendants facing putative privacy class actions may be able to use to successfully defeat class actions at a preliminary stage.

Osler represented Facebook, Inc., in this action with a team led by Mark Gelowitz, Robert Carson and Lauren Harper.