

## Supreme Court of British Columbia denies certification in Facebook privacy class action

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On January 27, 2022, the Supreme Court of British Columbia dismissed an application for class certification in *Chow v. Facebook, Inc.*, a putative privacy class action. Justice Skolrood held that there was no evidence that Facebook had misused the plaintiffs' information for its own benefit. In addition to this "fatal flaw," Justice Skolrood also found that the plaintiffs failed to satisfy the common issues criterion and that a class proceeding would not be the preferable procedure. This decision underscores the importance of the court's "robust gatekeeping function to weed out claims of dubious merit early at the certification stage."

### Background

This plaintiffs alleged that, without adequate consent, Facebook extracted call and text data from users of its applications on Android smartphones. The plaintiffs' claim involved two different theories of liability: (i) a "front end" allegation that Facebook accessed call and text data based on prompts which were allegedly inadequate to constitute consent; and (ii) a "back end" allegation that Facebook surreptitiously "scraped" call and text data without seeking consent.

### Justice Skolrood's reasons

As a preliminary matter, Justice Skolrood reviewed the evidence and found that there was *no evidence* to support the plaintiffs' central allegation that Facebook used, or misused, the plaintiffs' information for its own benefit. Instead, he noted that the documents relied on by the plaintiffs lend weight to Facebook's submission that, "rather than being a genuine expression of grievance or loss that warrants invoking the complex, time consuming and expensive mechanisms of a class proceeding", the plaintiffs' claim was largely "downloaded from the internet".

Justice Skolrood compared this case to *Simpson v. Facebook*, in which Justice Belobaba denied certification on the basis that there was no evidence of the plaintiff's core allegation that Canadian users' data was shared with Cambridge Analytica. Justice Skolrood reiterated Justice Belobaba's statement that the onus is on the plaintiffs to adduce some basis in fact for their core allegation. Citing *Simpson* and *Kish v. Facebook* (in which the Court of Queen's Bench for Saskatchewan denied certification of another proposed privacy class action), Justice Skolrood emphasized the need for "robust gatekeeping" to weed out dubious claims

early at the certification stage.

In addition to the absence of evidence — which Justice Skolrood described as a “fatal flaw” — Justice Skolrood considered three of the statutory certification criteria and held:

- **cause of action:** Taking the allegations as true, the plaintiffs adequately pleaded a breach of section 1 of the B.C. *Privacy Act*. However, several of the claims, including the unjust enrichment, unlawful means tort and other statutory claims, were not sufficiently pleaded.
- **common issues:** The plaintiffs had not satisfied the common issues criterion because, among other reasons, the alleged breaches of the B.C. *Privacy Act* could not be determined on a class-wide basis. Rather, those claims would require consideration of the individual circumstances of the person claiming a breach.
- **preferable procedure:** A class proceeding was not the preferable procedure because there is no evidence to indicate any *actual loss or harm* to the plaintiffs or to proposed class members. Accordingly, certifying this proposed class action and deploying “considerable judicial resources” would be the “antitheses of judicial economy and would not provide meaningful access to justice.”

## Key takeaway

This case is yet another helpful reminder that certification remains a meaningful screening device and that claims with no chance of success should not be permitted to pass through the certification stage.

Osler represented Facebook, Inc. in this action with a team led by Mark Gelowitz, Tristram Mallett, Robert Carson and Lauren Harper. Osler also represented Facebook, Inc. in the *Simpson* and *Kish* actions described above.