

Time to Face(book) the Music: Class Action Against Facebook Proceeds in British Columbia Following Failure of Jurisdictional Challenge

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The Supreme Court of Canada (the SCC) has ruled that a breach of privacy class action can proceed in British Columbia notwithstanding a forum selection clause favouring California. In doing so, the SCC has upheld a decision of the Court of Appeal for British Columbia (the BCCA), which upheld the certification of a class proceeding against Facebook based on an alleged breach of privacy legislation and allowed the chambers judge significant leeway to adjust the class definition and common issues.

Key Takeaways

- **Valid forum selection clauses in favour of certain jurisdictions will not necessarily bar proceedings in another jurisdiction.** Strong public policy reasons may be sufficient to override such contractual clauses.
- **The jurisdiction of a certification judge is broad.** In certifying a class proceeding, the certification judge may adjust the class definition and the common issues presented by the parties.

Summary and Background

On a motion before the Supreme Court of British Columbia (and subsequently on appeal before the BCCA and the SCC), Facebook sought to rely on its forum selection clause to argue that the class action should be stayed in British Columbia and be heard in California.

While all but one member of the SCC held that the forum selection clause was *prima facie* valid, clear, and applicable, the majority ultimately held that there were strong public policy factors present which militated against enforcement of the forum selection clause in the circumstances. Accordingly, the SCC declined to stay the class action, and the case was allowed to proceed in British Columbia.

A review of the case and the foreseeable implications of this particular issue to both consumers and shareholders were discussed in our previous article.

In addition to the jurisdictional issue, Facebook sought to attack the chambers judge's decision to certify the class action on a number of other bases, including by citing errors relating to:

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- exceeding her role in revising the class definition and the common issues;
- certifying an unworkable class definition;
- certifying as common certain issues that require individual inquiry; and
- finding that a class proceeding was the proper way in which to proceed.

The BCCA found that the chambers judge had properly exercised her discretion as a certification judge in revising the class definitions and common issues, properly certified the common issues, and properly exercised her discretion in determining the proper procedure for the proceeding. However, it agreed with Facebook that certain aspects of the class definition were unworkable, and remitted the matter back to the lower court to ensure class members were notified and made aware they had opt-out rights.

The Upshot

This case may have significant implications for corporate defendants who deal with consumers using contracts that include forum selection clauses. Even where such clauses are valid, there remains a risk that they will not be enforced by the courts for reasons of public policy. This case also serves as a reminder of the power that a certification judge has in certifying a proceeding. Counsel are reminded that when describing the class and defining the common issues, it is important to use language that does not give rise to uncertainty to avoid court intervention in these matters.

If you have any questions concerning this case or class actions generally, please contact John M. Picone, Kate Byers, or any other member of our Class Actions Group.

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This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.