

Another Canadian court denies certification of Cambridge Analytica class action

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This communication was updated on November 5 to reflect the decision of the Court of Appeal for Saskatchewan to dismiss the plaintiff's motion seeking leave to appeal.

On July 14, 2021, the Court of Queen's Bench for Saskatchewan dismissed the plaintiff's application for class certification in *Kish v. Facebook, Inc.* [PDF], a putative privacy class action. Justice Keene's reasons address the evidentiary requirement of "some basis in fact" and reinforce that the certification process is a meaningful screening device in privacy class actions.

This decision builds on a series of recent decisions emphasizing the gatekeeping role of the courts at the certification stage of privacy class actions, including [the Ontario Superior Court of Justice's decision denying certification in *Simpson v. Facebook*](#) and the Court of Queen's Bench of Alberta's decision denying certification in *Setoguchi v. Uber B.V.*

Background

The *Kish* action 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. The *Kish* action also included a variety of other allegations, but most of the pleadings and the evidence that the plaintiff sought to lead related to the allegations about Cambridge Analytica. As described below, the plaintiff's evidence in support of these allegations consisted primarily of documents that plaintiff's counsel and the plaintiff's proposed expert had downloaded from the internet.

Near the end of the initial certification hearing, the plaintiff reconstituted her action and sought to certify a class that essentially consisted of any person in Canada who has ever had a Facebook account or has never registered for a Facebook account. Justice Keene noted that the proposed class would appear to include every person in Canada.

Justice Keene's reasons

Justice Keene's primary basis for denying certification was the plaintiff's failure to satisfy the evidentiary requirements for certification. Justice Keene struck out all of the evidence led by the plaintiff – which consisted of a proposed expert report and two affidavits from the plaintiff herself – because the evidence did not meet the threshold requirements for admissibility. Justice Keene explained that striking this evidence "results in there being no evidence before this Court from the plaintiff and this is fatal to the plaintiff's application".

- **The Expert Evidence:** among other defects, the plaintiff did not establish that the proposed expert had the qualifications to answer the questions posed to him. Justice Keene also expressed concerns over the proposed expert's "research", which included relying on documents that had been downloaded from the internet but lacked any badges of reliability.
- **The Plaintiff's Affidavits:** all of the attachments to the plaintiff's affidavits were provided to her by her counsel, and the plaintiff conceded that she had not even read some of them. Justice Keene held that these documents were inadmissible because the plaintiff did not provide any evidence to show that they were reliable or met other threshold requirements for admissibility.

As noted above, this failure to establish an evidentiary basis for the certification requirements was fatal to the application. However, Justice Keene went on to explain that, in the alternative, even if he were to consider evidence led by the plaintiff, the plaintiff failed to meet any of the five certification criteria prescribed in s. 6(1) of *The Class Actions Act*. Justice Keene found that there were many defects, including:

- **No Cause of Action:** the plaintiff's pleadings lacked the requisite particularization to allow the defendants to understand the claims.
- **No Identifiable Class:** the proposed class was not a single over-arching class sharing common issues. (Rather, it was two mutually exclusive classes: people with Facebook accounts, and people without.)
- **No Common Issues:** the over-generalization in the pleaded claims and the proposed class definition defeated commonality.
- **Not the Preferable Procedure:** the claims would require extensive individual inquiries.

Justice Keene also cited with approval Justice Belobaba's statement in the *Simpson* case about the Court's important gatekeeping role in certification of privacy class actions: "while certification remains a low hurdle it is nonetheless a hurdle."

Key takeaway

Like the *Simpson* case, the *Kish* case is another 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 (and in the *Simpson* action) with a team led by Mark A. Gelowitz, Robert Carson and Lauren Harper.

UPDATE: On November 2, 2021, [the Court of Appeal for Saskatchewan dismissed the plaintiff's motion \[PDF\]](#) seeking leave to appeal from Justice Keene's decision denying certification. Justice Caldwell, who decided the leave motion, was not persuaded that there was a realistic prospect of overturning Justice Keene's decision, and concluded that the proposed appeal lacked sufficient merit to be heard by a panel of the Court of Appeal.