

OCT 19 2020

No.
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

MATTHEW MACKENZIE

PLAINTIFF

and

FACEBOOK, INC.

DEFENDANT

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

NOTICE OF CIVIL CLAIM

(Instagram – Apple iOS camera privacy breach)

This action has been started by the plaintiffs for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiffs and on any new parties named in the counterclaim.

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JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

THE PLAINTIFF'S CLAIM

Part 1: STATEMENT OF FACTS

Overview

1. In breach of users' privacy, the defendant Facebook, Inc. ("**Facebook**") designed and employed its Instagram app ("**Instagram**" or the "**Instagram app**") to surreptitiously access and monitor the camera feature on Apple devices while Instagram was open on a user's device, even when the user was not using the camera feature to take a photograph or video within Instagram. Facebook did so without users' consent, in breach of the *Privacy Act* and related enactments, for its own purposes. Through this suit, Canadian users seek to hold Facebook accountable for its unlawful conduct and to obtain damages.

The Parties

2. The defendant Facebook, Inc. is a Delaware company with an address for service c/o Corporation Service Company, 251 Little Falls Drive, Wilmington, DE 19808, USA. Its principal place of business is located at 1 Hacker Way, Menlo Park, CA 94025, USA. Facebook is a social media conglomerate traded on the NASDAQ stock exchange with a market capitalization of approximately \$760 billion USD at time of filing. Facebook carries on business worldwide, including in British Columbia and Canada.

3. The Plaintiff Matthew MacKenzie is a resident of British Columbia. He is a registered user on Instagram and had the Instagram app installed on his Apple iPhone at material times during the Class Period.

4. The Plaintiff brings this action on his own behalf and on behalf of:

all persons in Canada, other than Excluded Persons and residents of Quebec, who installed and used the Instagram app on an Apple device in Canada from the earliest date Facebook began accessing and monitoring device cameras without consent when the device camera was not in use in the Instagram in-app camera feature to the date this claim is certified as a class proceeding.

(the “Class”, “Class Members” and “Class Period”).

Excluded Persons means:

1. Directors and officers of Facebook and their immediate families;
2. Counsel for the parties, and the case management and trial judge in this proceeding, and their immediate families.

Facebook’s Business

5. Facebook is the world’s biggest social networking company. Its products and services can be accessed via its flagship eponymous social networking platform with a website at www.facebook.com and related Facebook mobile app. Alternatively, users can access the Facebook platform through apps owned and developed by Facebook. During the last reported quarter, Facebook had 3.14 billion monthly active users of at least one of the company’s core products of Facebook, WhatsApp, Instagram or Messenger.

6. A core component of Facebook’s business is the collection and compilation of user data. Facebook does this by offering free services in exchange for the collection of user data. Facebook then monetizes user data by selling advertising space on its platforms and services. The majority of Facebook’s revenue is generated from third parties advertising on the Facebook platform and Instagram.

The Instagram App

7. In 2012, Facebook acquired Instagram through its purchase of Instagram LLC and its subsidiaries for \$1 billion USD. Instagram is a photo and video sharing social network service

described in its Terms of Use as “one of the Facebook Products, provided to you by Facebook Inc.” Access to Instagram is offered primarily via mobile apps for the Android and iOS operating systems. The Apple iOS version of the Instagram app is offered for download on the Apple App Store by Instagram, Inc., a wholly-owned subsidiary of Facebook.

8. Instagram is a major part of Facebook’s overall revenue stream, generating \$20 billion USD in advertising revenue in 2019. The Instagram app is a computer program that can be installed on a user’s phone, tablet, or other device running Google’s Android or Apple’s iOS operating systems. As of July 2019, over 12 million internet users in Canada used Instagram at least once per month.

9. Instagram enables users to share photographs or videos with their audience of “followers”. Users can post content as permanent posts to their profile with text captions including searchable “hashtag” content. Alternatively, users can broadcast multiple photographs or videos taken throughout the day on Instagram’s “**Story**” feature. Photographs or videos posted to a user’s Story appear in a slideshow format and disappear after 24 hours. While linked to the user’s username and profile, the Story content does not remain on their profile after it expires.

10. Instagram allows users to adjust their settings to limit who may access their profile through in-app privacy settings. A user may wish to make their account “private” in which case only approved followers can view the user’s posted content. If a user does not limit their account access, their posts and Story content will be visible to anyone viewing their profile.

11. In addition to posting their own content, Instagram users can follow accounts of interest to them, which may include friends, family, celebrities, business or other entities. A user can scroll through a “feed” to view recent content posted by accounts the user follows. Similarly, users can view a reel of Story content posted by accounts the user follows.

12. An Instagram user can post content to their profile or Story one of two ways. First, the user can post archived content already saved to the photo or video album of their mobile device or tablet. Second, the user can post photograph or video content from the camera feature within the Instagram app itself (the “**in-app camera feature**”). This requires the Instagram app to

access the user's device camera for the limited purpose of recording the photograph or video content that the user seeks to post to their Instagram profile or Story.

Underage Users

13. Facebook makes the Instagram app available to users between the ages of 13 and the age of majority ("Underage Users"). Facebook does not require parental consent for such users and has treated them in the same manner as users of the age of majority. Underage Users are Class Members and part of the Class.

Facebook's Monitoring of Users' Device Cameras

14. Apple's newest version of their mobile operating system, iOS 14, became available to software beta-testers on June 22, 2020 and in Canada to the general public on September 16, 2020. A feature new to iOS 14 is the ability for users to see which applications are accessing their camera or microphone by way of a green "camera on" indicator (the "**Camera Indicator**").

15. In July 2020, iOS14 beta testers discovered through the Camera Indicator that the Instagram app was secretly and continually accessing the camera while users were merely scrolling through their Instagram feed of the accounts they followed, and not using Instagram's in-app camera feature.

16. Accessing a device camera without user input is unexpected, unanticipated, and unjustified behaviour by Facebook, as Facebook has no need to access the camera except when a user is taking a photograph or video with Instagram's in-app camera feature. At no material time did Facebook notify users that it would be accessing their cameras on a continual basis. Other than when a user is taking photographs or videos using Instagram's in-app camera feature, there is no situation in which users would expect that Facebook would be monitoring their cameras through the Instagram app.

The Plaintiff and Class Members' Use of the Instagram App

17. During the Class Period, the Plaintiff regularly used the Instagram app on his Apple devices. He used the Instagram app not just to post original content, but to view content of accounts he follows.

18. Prior to this action, the Plaintiff and Class Members were not aware of Facebook's misconduct as set out above. The Plaintiff and Class Members have not consented to Facebook continually accessing and monitoring their device cameras or recording, storing, or otherwise using information recorded from their cameras with the limited exception of when the Plaintiff and Class Members were posting content using Instagram's in-app camera feature.

19. As a result of Facebook's actions, the Plaintiff and Class Members have suffered a serious violation of their privacy. Facebook has done so wilfully, and knowing that users had not consented and were not aware of it doing so. Facebook has profited from its access to and use of information not willingly shared with Facebook intended to build a more fulsome profile of Instagram users for Facebook's advertising customers.

20. Facebook developed and implemented these invasive mechanics intentionally. Facebook did so knowing that users had not consented to and were not aware of the extent of the Instagram app's access to their device cameras.

21. Senior officers and directors of Facebook were aware at all material times that users did not have notice and were not consenting to the Facebook's misconduct.

22. In 2012, Facebook entered into a consent decree with the FTC to resolve proceedings related to user privacy ("Consent Decree"). The Consent Decree provided *inter alia* that Facebook could not override users' privacy settings without first getting explicit consent, that Facebook was required to establish, implement and thereafter maintain a system to identify reasonably foreseeable material risks that could result in the unauthorized collection of user information, that Facebook engage in regular testing and monitoring to ensure its controls and procedures effectively protect user privacy, and that Facebook obtain biennial assessments and reports from a qualified, objective, independent third-party professional to report on the

effectiveness of Facebook's privacy controls. The privacy controls contemplated by the Consent Decree include "photos and videos".

23. The wrongdoing by Facebook described herein continued until public outcry motivated Facebook to modify the behaviour of the Instagram app on a date known to Facebook subsequent to July 2020. It is unknown whether the conduct continues by some other means.

Part 2: RELIEF SOUGHT

24. An order certifying this action as a class proceeding under the *Class Proceedings Act*, RSBC 1996, c 50;
25. Statutory damages for breach of the *Privacy Act BC* for residents of British Columbia;
26. Statutory damages for breach of the *Privacy Act SK* for residents of Saskatchewan;
27. Statutory damages for breach of the *Privacy Act MB* for residents of Manitoba;
28. Statutory damages for breach of the *Privacy Act NL* for residents of Newfoundland & Labrador;
29. Damages for the tort of intrusion upon seclusion for residents of Yukon, Northwest Territories, Alberta, Nunavut, Ontario, New Brunswick, Nova Scotia and Prince Edward Island;
30. Punitive damages;
31. An injunction to restrain the impugned practice by Facebook by requiring that the impugned functions be disabled in the Instagram app by default for all users in Canada, unless expressly enabled by a user;
32. Interest under the *Court Order Interest Act*, RSBC 1996, c 79;
33. Such further and other relief as this Honourable Court may deem just.

Part 3: LEGAL BASIS

Breach of the Privacy Act (BC)

34. The *Privacy Act*, RSBC 1996, c 373, s 1 creates a tort, actionable without proof of damage, a person, wilfully and without a claim of right, violates the privacy of another.

35. Facebook's acts as set out above constituted "eavesdropping or surveillance" on Class Members within the meaning of the *Privacy Act BC*, s 1(4).

36. Facebook breached the *Privacy Act BC*, s 1 and the Plaintiff and Class Members' privacy of the Plaintiff and Class Members wilfully and without a claim of right when it continually and secretly accessed and monitored their Apple device cameras when the Plaintiff and Class Members were not using Instagram's in-app camera feature.

37. The Plaintiff and Class Members resident in British Columbia are entitled to statutory damages as a result of Facebook's breaches under the *Privacy Act BC*, s 1.

38. Class Members are entitled to an injunction under the *Law and Equity Act*, RSBC 1996, c 253 to restrain this conduct by Facebook. In particular, the Plaintiff and Class members are entitled to an injunction to restrain the impugned practice by Facebook by requiring that the impugned function in the Instagram app be disabled by default for all users in Canada, unless expressly enabled by a user.

Breach of the Privacy Act (SK)

39. The *Privacy Act*, RSS 1978, c P-24, s 2 creates a tort, actionable without proof of damage, a person, wilfully and without a claim of right, violates the privacy of another.

40. Facebook's acts as set out above constituted "eavesdropping" or "surveillance" on Class Members within the meaning of the *Privacy Act SK*, s 3(a).

41. Facebook breached the *Privacy Act SK* and Class Members' privacy as set out above wilfully and without a claim of right, and without Class Members' consent, express or implied when it continually and secretly accessed and monitored their Apple device cameras when the Plaintiff and Class Members were not using Instagram's in-app camera feature.

42. By its conduct set out above, Facebook has breached the *Privacy Act SK*, ss 2 and 3(c).

43. Class Members resident in Saskatchewan are entitled to statutory damages as a result of Facebook's breaches under the *Privacy Act SK*, s 2 under s 7(a).

Breach of the Privacy Act (MB)

44. The *Privacy Act*, CCSM, P125, s 2 creates a tort, actionable without proof of damage, where a person to substantially, unreasonably, and without claim of right, violates the privacy of another.

45. Facebook's acts as set out above constituted "eavesdropping" or "surveillance" on Class Members within the meaning of the *Privacy Act MB*, s 3(a).

46. Facebook breached the *Privacy Act MB* and Class Members' privacy as set out above wilfully and without a claim of right, and without Class Members' consent, express or implied when it continually and secretly accessed and monitored their Apple device cameras when the Plaintiff and Class Members were not using Instagram's in-app camera feature.

47. Class Members resident in Manitoba are entitled to statutory damages as a result of Facebook's breaches under the *Privacy Act MB*, s 2 under s 4(1)(a).

Breach of the Privacy Act (NL)

48. The *Privacy Act*, RSNL 1990, c P-22, s 3(1) creates a tort, actionable without proof of damage, where a person, willfully and without a claim of right, violates the privacy of an individual (natural person).

49. Facebook's acts as set out above constituted "eavesdropping" or "surveillance" on Class Members within the meaning of the *Privacy Act NL*, s 4(a).

50. Facebook breached the *Privacy Act NL* and Class Members' privacy as set out above wilfully and without a claim of right, and without Class Members' consent, when it continually and secretly accessed and monitored their Apple device cameras when the Plaintiff and Class Members were not using Instagram's in-app camera feature.

51. By its conduct set out above, Facebook has breached the *Privacy Act NL*, ss 3 and 4(c).

52. Class Members resident in Newfoundland & Labrador are entitled to statutory damages as a result of Facebook's breaches under the *Privacy Act NL*, s 3 under s 6(1)(a).

Intrusion upon Seclusion

53. For Class Members resident in Ontario and other common law provinces except British Columbia, Saskatchewan, Manitoba and Newfoundland & Labrador, it is a tort, actionable without proof of harm, for a defendant to:

- (a) intentionally or recklessly;
- (b) invade a plaintiff's private affairs or concerns;
- (c) without lawful justification;
- (d) where a reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish.

54. As set out above, through its unauthorised manipulation, examination, collection, retention and use of Class Members' Personal Information, Facebook committed the tort of intrusion upon seclusion against Class Members. Facebook intentionally, or at a minimum recklessly, invaded the private affairs or concerns of the Class Members by continually and secretly accessing and monitoring their Apple device cameras when the Plaintiff and Class Members were not using Instagram's in-app camera feature. Facebook's actions were without lawful justification. A reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish.

Breaches of the Infants Act

55. Persons under the age of majority are afforded special protection in British Columbia and elsewhere in Canada. Contracts made with minors are unenforceable by operation of the *Age of Majority Act*, RSBC 1996, c 7 and the *Infants Act*, RSBC 1996, c 223, s. 19(1) and related enactments.

56. Underage Users could not and did not provide consent to the Facebook for the continual and secret access and monitoring by Facebook of their Apple device cameras when the Underage Users were not using Instagram's in-app camera feature.

57. There was no enforceable or any contract here to permit the extent of Facebook's camera access. Underage Users are entitled to compensation from Facebook for *inter alia* their loss of privacy.

58. The Plaintiff and Class Members rely upon parallel provisions and the common law in the other provinces and territories of Canada.

Punitive Damages

59. Facebook's misconduct, as described above, was oppressive and high-handed, and departed to a marked degree from ordinary standards of decent behaviour. It violated the trust and security of users and showed willful disregard for Class Members' privacy. Facebook's actions offend the moral standards of the community and warrant the condemnation of the Court such that an award of punitive damages should be made.

Discoverability

60. The Plaintiff and Class Members could not reasonably have known that

- a. they sustained injury, loss or damage as a consequence of Facebook's actions; or
- b. having regard to the nature of their injuries, losses or damages, a court proceeding would be an appropriate means to seek to remedy the injuries, losses or damages until, at the earliest, July 2020.

61. The Plaintiff and Class Members plead and rely on postponement and discoverability under the *Limitation Act*, SBC 2012, c 13, s 8.

62. In addition, Facebook, though its manipulation of clipboard function through the Instagram app, willfully concealed the fact of the misuse of the Plaintiff and Class Members' Personal Information without consent, and that this was caused or contributed to by Facebook's

acts or omissions. The Plaintiff and Class Members rely on *Pioneer Corp. v. Godfrey* and the *Limitation Act*, s 21(3).

63. The Plaintiff and Class Members plead and rely on the *Emergency Program Act*, Ministerial Order No M098 and related enactments to suspend the running of the limitation period from March 26, 2020.

Service on Facebook

64. The Plaintiff and Class Members have the right to serve this Notice of Civil Claim on Facebook pursuant to the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 10 (*CJPTA*), because there is a real and substantial connection between British Columbia and the facts on which this proceeding is based.

65. The Plaintiff and Class Members rely on the following grounds, in that this action concerns:

- a. a tort committed in British Columbia (*CJPTA*, s 10(g)); and
- b. a business carried on in British Columbia (*CJPTA*, s 10(h)).

66. An action under the *Privacy Act* must be determined in the Supreme Court of British Columbia (*Privacy Act*, s 4).

Plaintiff's address for service:

Slater Vecchio LLP
1800 - 777 Dunsmuir Street
Vancouver, BC V7Y 1K4
Fax number for service: 604.682.5197
Email address for service: service@slatervecchio.com

Place of trial: Vancouver, BC

The address of the registry is:

800 Smithe Street
Vancouver, BC
V6Z 2E1

Date: October 19, 2020

For:  "Anthony A. Vecchio"

Signature of lawyer for plaintiff
Anthony A Vecchio, Q.C.

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION
FOR SERVICE OUTSIDE BRITISH COLUMBIA**

The plaintiff claims the right to serve this pleading on the defendant Facebook, Inc outside British Columbia on the ground that the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 10 (*CJPTA*) applies because there is a real and substantial connection between British Columbia and the facts on which this proceeding is based. The Plaintiff and Class Members rely on the following grounds, in that this action concerns:

- a. a tort committed in British Columbia (*CJPTA*, s 10(g)); and
- b. a business carried on in British Columbia (*CJPTA*, s 10(h)).

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

This is a claim for breaches of the *Privacy Act* in Facebook, Inc.'s provision of the Instagram app.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- ☐ a motor vehicle accident
- ☐ medical malpractice
- ☐ another cause

A dispute concerning:

- ☐ contaminated sites
- ☐ construction defects
- ☐ real property (real estate)
- ☐ personal property
- ☒ the provision of goods or services or other general commercial matters
- ☐ investment losses
- ☐ the lending of money
- ☐ an employment relationship
- ☐ a will or other issues concerning the probate of an estate
- ☐ a matter not listed here

Part 3: THIS CLAIM INVOLVES:

- ☒ a class action
- ☐ maritime law
- ☐ aboriginal law
- ☐ constitutional law
- ☐ conflict of laws
- ☐ none of the above
- ☐ do not know

Part 4:

Age of Majority Act, RSBC 1996, c 7

Class Proceedings Act, RSBC 1996, c 50

Infants Act, RSBC 1996, c 223

Privacy Act, RSBC 1996, c 373

Limitation Act, SBC 2012, c 13