

**CITATION:** Donegani v. Facebook, Inc., 2026 ONSC 4657  
**DIVISIONAL COURT FILE NO.:** DC-25-00000971-0000  
**DATE:** 20260812

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**  
**Varpio, Vermette and Brownstone JJ.**

|                           |   |                                                  |
|---------------------------|---|--------------------------------------------------|
| <b>BETWEEN:</b>           | ) |                                                  |
|                           | ) |                                                  |
| DOUGLAS DONEGANI, MATTHEW | ) | <i>Adam Tanel, Aryan Ziaie and Elie Waitzer,</i> |
| HOWAT and LYNE BRASSARD   | ) | for the Plaintiffs / Appellants                  |
|                           | ) |                                                  |
| Plaintiffs / Appellants   | ) |                                                  |
|                           | ) |                                                  |
| <b>– and –</b>            | ) |                                                  |
|                           | ) |                                                  |
| FACEBOOK, INC.            | ) | <i>Mark A. Gelowitz, Robert Carson, Lauren</i>   |
|                           | ) | <i>Harper and Clare Barrowman, for the</i>       |
| Defendant / Respondent    | ) | Defendant / Respondent                           |
|                           | ) |                                                  |
|                           | ) |                                                  |
|                           | ) |                                                  |
|                           | ) | <b>HEARD at Toronto:</b> June 11, 2026           |

**VERMETTE J.**

[1] The Appellants are the plaintiffs in a proposed class action. They appeal from the order of Akbarali J. dated October 24, 2025, dismissing their motion to certify the action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“**CPA**”).

[2] For the reasons set out below, I would dismiss the appeal.

**A. BACKGROUND**

[3] In this putative class action, the Appellants claim that the Respondent, Facebook, Inc.,<sup>1</sup> has misused their data by making it available to certain third-party applications without their consent. The motion judge described the Appellants' claims as follows in her endorsement dated December 19, 2024 (*Donegani v. Facebook, Inc.*, 2024 ONSC 7153 at paras. 5-6 ("**2024 Endorsement**")):

[5] The plaintiffs claim that Facebook users who signed up for a third-party app through Facebook, or who connected a third-party app to Facebook, were asked by the third party to give it permission to access the users' Facebook data. The plaintiffs allege that when permission was given, not only did Facebook make the installing user's data available to the third-party app, it also provided the data of the installing user's Facebook friends (the "affected users"). Their claim focuses on the data of the affected users whose Facebook friend(s) installed or connected a third-party app. The plaintiffs claim the affected users' Facebook data was made available to the third-party app without the affected users' consent.

[6] The plaintiffs claim that account data sharing took place with hundreds of third parties, but in this claim, they have narrowed their focus to nine: AirBNB, Amazon, Apple, Lyft, Microsoft, Netflix, RBC, Yahoo and This is Your Digital Life.

[4] The motion judge heard the certification motion in two parts: in July 2024 and in September 2025. In the 2024 Endorsement, she addressed two of the criteria under section 5 of the *CPA*, that is, whether the pleading disclosed a cause of action and whether the claims raised common issues. She ordered that the matter return for further submissions on the questions of the workability of the class definition, preferable procedure and the litigation plan. She dealt with the remaining issues in a subsequent endorsement: *Donegani v. Facebook, Inc.*, 2025 ONSC 6020 ("**2025 Endorsement**").

[5] Before turning to the motion judge's endorsements, it is useful to review some aspects of the Appellants' claim.

### **1. Relief sought by the Appellants in the Statement of Claim**

[6] In their 58-page Second Fresh as Amended Consolidated Statement of Claim ("**Statement of Claim**"), the Appellants seek, among other things:

- a. damages in the amount of two billion dollars, or such amount as the court determines to be appropriate;

---

<sup>1</sup> Facebook, Inc. is now known as Meta Platforms, Inc. However, I will use "Facebook" in these reasons.

- b. various declaratory relief;
- c. disgorgement of the profits/revenues Facebook generated through its appropriation and misuse of class members' user account data;
- d. restitution for unjust enrichment;
- e. nominal damages for breach of contract in the event that the class' damages in contract are unquantifiable; and
- f. punitive damages.

[7] One of the causes of action pleaded in the Statement of Claim is breach of contract. The Appellants state that they and every class member entered into an online standard form contract with Facebook by filling out a registration form and agreeing to Facebook's terms and conditions to create a Facebook account. The Appellants plead that through its successive terms of service and data use policies, Facebook warranted to class members that third party access to user account information could be controlled by its privacy settings technology, which was a promise by Facebook to class members that no one would access their user account data except those persons who were granted access by the account holder.

[8] In addition to breach of contract, the Appellants plead many other causes of action in the Statement of Claim, including breach of confidence, negligence, intrusion upon seclusion, unjust enrichment, breach of consumer protection legislation, breach of provincial privacy statutes, and breach of the *Competition Act*, R.S.C. 1985, c. C-34.

## 2. Proposed class definition

[9] As will be discussed below, the motion judge required the Appellants to redraft the class definition they initially proposed. The class definition they ultimately proposed consists of all Facebook users in Canada from 2009 to the present who were friends with a Facebook user who installed one of nine third-party programs. The specific class definition proposed by the Appellants is as follows:

### **Class Definition:**

The following are defined terms for the purposes of this class definition:

- A. "Third Party Programs" means:
  - i. Integrations created to integrate Facebook with products developed by **Amazon**, **Microsoft**, and **Apple**;
  - ii. Messaging partnerships entered into between Facebook and **Netflix** or Facebook and **RBC**;

iii. Applications developed for use with the Facebook platform by **AirBNB**, **Lyft**, Cambridge Analytica/Aleksander Kogan (the **thisisyourdigitallife app** created by Aleksander Kogan for Cambridge Analytica), and **Yahoo**.

B. “Installing User” means a Facebook user who connected their own Facebook account to one of the Third Party Programs, either by downloading, using, or otherwise installing or signing up for it.

C. “Affected Friends” means any Facebook user who was friends on Facebook with an Installing User.

The class is defined as all Affected Friends in Canada during the period from 2009 to present.

Excluded from the class are residents of the Province of Quebec, the defendant or their subsidiaries, affiliates, officers, directors, senior employees, legal representatives, heirs, predecessors, successors, and assigns.

[10] As discussed by the motion judge in the 2025 Endorsement, the litigation plan put forward by the Appellants proposes a process for creating a “Master Class List”. The litigation plan states that the class members would be those who fall within the class definition and appear on the Master Class List. The process of creating the Master Class List involves removing from the category of “Affected Friends” the Facebook users who were themselves Installing Users, i.e., who had themselves consented to install the same third-party program as their Facebook friend.

## **B. MOTION JUDGE’S ENDORSEMENTS**

### **1. 2024 Endorsement**

[11] In the 2024 Endorsement, the motion judge first dealt with a number of evidentiary issues and determined what evidence – including expert evidence – was admissible for the purpose of establishing some basis in fact for the certification criteria set out in subsection 5(1) of the *CPA*. Among other things, she found that three expert affidavits, including the affidavit of Jason Frankovitz to which I will return later in these reasons, were inadmissible.

[12] With respect to the first criterion of the certification test, i.e., whether the pleadings disclose a cause of action, the motion judge concluded that the Appellants had adequately pleaded causes of action in breach of contract, intrusion upon seclusion, and under the provincial privacy statute of Saskatchewan. She also found that the claim for disgorgement had been adequately pleaded. The motion judge stated the following regarding the claim for disgorgement:

[122] I accept that class members have a legitimate interest in preventing Facebook from profiting from their personal data in circumstances where they

have not agreed to the use of their data in that manner, which Facebook is alleged to have done. In my view, it cannot be said that the class members' claim for disgorgement is bound to fail simply because class members also seek nominal damages. The question of whether nominal damages amount to relief that can vindicate the nature of the class members' interest is not one that ought to be determined at this stage of the proceeding.

[13] The motion judge held that the following causes of action had not been adequately pleaded and struck them without leave to amend: (a) breach of confidence; and (b) claims raised under the provincial privacy statutes of British Columbia, Manitoba, and Newfoundland and Labrador.

[14] With respect to the second criterion of the certification test, i.e., whether there was an identifiable class, the motion judge was of the view that the Appellants had to redraft the proposed class definition in order to overcome some problems identified in her reasons. She stated that the issue of the workability of the class definition could be addressed once a clear definition was put forward.

[15] With respect to the third criterion of the certification test, i.e., whether the claims raise common issues, the motion judge concluded that there were common issues related to: (a) the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“**PIPEDA**”) and informed consent; (b) whether the class members entered into standard form contracts with the Respondent and the relevant terms of these contracts; and (c) whether the Respondent breached its contractual duty of honesty, good faith and fair dealing.

[16] The motion judge found that the question of whether the Respondent breached the contracts and, if so, how, was not a common issue because it required individual enquiries into the context of the alleged breaches of contract. She stated that the proposed question was cast in general terms, which raised the concerns set out by the Supreme Court of Canada in *Rumley v. British Columbia*, 2002 SCC 69 at para. 29 (“**Rumley**”), i.e., that the action would ultimately break down into individual proceedings. The motion judge also stated the following:

[146] The plaintiff submits that the contractual terms were so unclear the defendant could not rely upon them to obtain informed consent. However, the allegations of breach of contract are general, and turn on Facebook's practices writ large. The question of whether the defendant breached the contract with class members cannot be answered without individual enquiries such as:

- a. Did the defendant share the data of any particular class member? There is no basis in fact in the evidence to conclude that all proposed class members' data was shared.
- b. Did the class member whose Facebook friend downloaded an app and whose data was shared with an app also download the same

app, such that they directly authorized the sharing of data with the third party?

[17] The motion judge held that the proposed common issues regarding the tort of intrusion upon seclusion could not be resolved in common because they required that the same individual issues as the ones identified above be determined. Similarly, she concluded that the proposed question regarding a breach of the Saskatchewan privacy legislation was not common because it required considering the impact of the disclosure on the individual.

[18] The motion judge also declined to certify the proposed common issues regarding damages, disgorgement and punitive damages. She stated, in part:

[163] The question of damages for the breach of the duties of honesty, good faith and fair dealing, cannot be determined in common. Whether, and to what extent, each class member suffered damages is an individual issue. It engages questions such as whether their data was shared, the nature of the data shared, and whether they had authorized the sharing of the data with the third party directly. Even if a breach of the above duties is proven, it is not a given that each class member suffered damages.

[164] The question of whether disgorgement is appropriate cannot be determined in common. First, this issue turns on whether the nature of the class member's interest is such that it cannot be vindicated by other forms of relief. Assuming a breach is proven, some class members may have suffered compensatory damages as claimed in the pleading, and would not be entitled to disgorgement as a result. Others may be in a different position. In these circumstances, resolving the question of disgorgement would require undertaking an individual inquiry into each class member's loss.

[19] The motion judge stated that the fourth criterion of the certification test, i.e., whether a class proceeding would be the preferable procedure for the resolution of the common issues, would be determined after the delivery of a revised class definition.

[20] With respect to the last criterion of the test for certification, the motion judge noted that there was no objection to the adequacy of the representative plaintiffs, but she found that a new plan for the proceeding needed to be proposed. She stated that the issue of the workability of the plan would return for further argument.

## **2. 2025 Endorsement**

[21] In the 2025 Endorsement, the motion judge reviewed the proposed class definition in conjunction with the proposed litigation plan, which stated that the class members would be those who fell within the class definition and appeared on the Master Class List. The motion judge found that this proposal created a class definition that did not match the class membership. She also found that some Facebook users who may have a claim would not appear on the Master

Class List – making class membership underinclusive – and that some Facebook users who would appear on the Master Class List may or may not have a claim, depending on individual issues such as when they were friends with the Installing Users.

[22] The motion judge concluded that the Appellants had failed to articulate a workable class definition. She stated the following:

[25] The plaintiffs are in fact proposing an evolving class definition, that requires discovery relating to individual class members' circumstances to define its limits, that is under-inclusive in some respects, and that is overbroad in others. It will necessarily bind some people who should not be bound, and omit some people who ought to be bound. It is not an appropriate class definition.

[26] Additionally, as I have alluded to, the record does not give me confidence that the data required to develop the Master Class List exists. [...]

[...]

[28] In submissions, counsel for the plaintiff agreed that their class would consist of “many millions of people.” The notion that sufficient data dating from over a decade ago could be found about many millions of people from Facebook and the third party apps requires more than aspiration. It requires some basis in fact, which is not present on this record.

[23] While this conclusion was sufficient to dispose of the motion, the motion judge considered a proposed common issue regarding nominal damages that had not been discussed in the 2024 Endorsement. She found that an issue about nominal damages could not be determined in common at the time of the common issues trial because individual issues trials would have to be held first to determine whether a class member's data was shared or made available for sharing.

[24] Finally, the motion judge held that a class proceeding would not be the preferable procedure. The motion judge noted that there was no evidence of compensatory damages in the record and that the Appellants had admitted that it did not appear that the alleged unlawful sharing of user data had caused pecuniary damages. The motion judge found that certifying an action without compensable loss would not meet the goal of promoting access to justice. She also found that regulatory proceedings were a preferable way of encouraging behaviour modification in this case in the absence of evidence of compensable loss, and that this proceeding would not advance the goal of judicial economy given that it would be large, unwieldy and factually complex.

### **C. ISSUES ON APPEAL AND STANDARD OF APPELLATE REVIEW**

[25] The Appellants raise four issues:

- a. Whether the motion judge erred in determining the class definition criterion by imposing the wrong legal test and finding no basis in fact for the proposed class definition?
- b. Whether the motion judge applied an incorrect legal standard in concluding that the claim in breach of contract could not be determined in common?
- c. Whether the motion judge erred in concluding that disgorgement could not be determined in common?
- d. Whether the motion judge misconstrued a legal principle that, absent proof of compensatory damages, a class proceeding was not preferable?

[26] The standards of review applicable to questions that arise on appeal were set out in *Housen v. Nikolaisen*, 2022 SCC 33. The standard of correctness applies to questions of law and the standard of palpable and overriding error applies to questions of fact and questions of mixed fact and law, unless an error of law can be extricated from the question of mixed fact and law, in which case the standard of correctness applies.

[27] The Appellants submit that the errors that they allege are reviewable on the correctness standard. They argue that the motion judge failed to apply the correct legal principles in her class definition and commonality analysis, and that she wrongly applied a legal principle in determining that a class proceeding was not the preferable procedure.

[28] The Respondent states that, when properly analyzed, all of the errors alleged by the Appellants are questions of mixed fact and law that are reviewable on a standard of palpable and overriding error. The Respondent submits that the motion judge identified and applied the correct legal tests and principles, and that she committed no error.

[29] I discuss the applicable standard of review below with respect to each issue.

## **D. ANALYSIS**

### **1. Class definition**

#### ***i. Positions of the parties***

[30] The Appellants submit that the motion judge erred by requiring them to show some basis in fact not only for the proposed class definition, but also for the existence of records required to identify each class member whose data was in fact made accessible to a third party without their permission. They argue that the result of such an approach is to define class membership by having proof of a claim, not by objective criteria allowing identification.

[31] The Appellants further submit that the motion judge erred by unduly focusing on an aspect of the litigation plan to inform her analysis of the class definition without regard for the

proper framework for assessing class definition. They state that her approach conflated the class definition analysis with the evaluation of a litigation plan required by section 5(1)(e) of the *CPA*. They note that it is well settled that a litigation plan is a work in progress that may evolve as the case progresses.

[32] The Appellants argue that the motion judge's conclusion that the class definition was unworkable for failing to be limited to the universe of claimants with provable claims is contrary to settled authority holding that courts should not place undue emphasis on the fact that some or even many members of the proposed class will be unable to establish liability against the defendant. The Appellants point out that overinclusive class definitions have routinely been approved by courts. According to the Appellants, the class in this case cannot be defined more narrowly without arbitrarily excluding potential claimants.

[33] The Respondent states that the motion judge did not conflate the Appellants' class definition with their litigation plan. The Respondent points out that the Appellants made it clear at the 2025 hearing that they intended to use the Master Class List at the certification stage to determine class membership and to notify class members of the opportunity to opt out of the class action.

[34] According to the Respondent, the motion judge did not require a merits-based class definition, and she was correct to find that the proposed class definition was both overinclusive and underinclusive. The Respondent asserts that the proposed class definition in this case includes not only individuals who may not ultimately have a claim, but individuals who could not possibly have a claim.

[35] The Respondent submits that the motion judge's finding that the proposed class definition was unworkable was correct. The Respondent also argues that, as noted by the motion judge, the Appellants failed to provide some basis in fact that the Master Class List could even be created from information about alleged data-sharing that occurred more than a decade ago.

## **ii. Discussion**

[36] Given my conclusion on the other issues raised in this appeal, it is unnecessary to determine the issues raised by the Appellants with respect to the class definition. For the purposes of the analysis of the other issues below, I will assume, without deciding, that the class definition proposed by the Appellants should have been accepted.<sup>2</sup>

---

<sup>2</sup> In their Factum, the Appellants argue that the motion judge incorrectly excluded the expert report of Jason Frankovitz in its entirety. That report included an opinion that Facebook has the requisite information to identify putative class members and prove their claims against Facebook at trial. The admissibility issue was not dealt with during oral argument, and the Appellants have not identified the

## 2. **Breach of contract as a common issue**

### *i. Additional background*

[37] The Appellants' specific allegations of breaches of contract are set out in paragraph 90 of the Statement of Claim, which reads as follows:

Facebook breached the Contract and its warranties by sharing User Account Information with Third Parties (in particular the Whitelisted Apps<sup>3</sup>) and by failing to disclose it was doing so. In particular the breaches included:

- (a) failing to abide by its own Terms of Service, Data Use Policy and other policies and failing to maintain strict security safeguards;
- (b) failing to comply with the obligations set out in section 5(3) and Principle 4.3 of Schedule 1 of *PIPEDA*;
- (c) collecting User Account Data for purposes other than the purposes defined in the Data Use Policy;
- (d) disclosing User Account Data to Third Parties (in particular the Whitelisted Apps) without first sufficiently communicating, identifying and documenting the purpose or new purpose and obtaining customer consent;
- (e) failing to communicate and fully and/or adequately explain the full breadth of User Account Information that may be disclosed to Third Parties (in particular the Whitelisted Apps). In order to

---

specific portions of the report that they say should have been admitted. To the extent that (a) the Appellants are still pursuing this issue, and (b) this issue has any relevance beyond the issue of the class definition, I see no palpable and overriding error in the motion judge's conclusion that the report of Mr. Frankovitz was not admissible. As noted by the motion judge, Mr. Frankovitz generally does not explain in his report the bases for his assertions, or why his experience as a software litigation expert and computer programmer allows him to draw the conclusions that he is drawing.

<sup>3</sup> The "Whitelisted Apps" is a defined term in the Statement of Claim that includes the nine Third Party Programs contained in the class definition.

make consent meaningful, an individual must be able to understand reasonably how the information will be used or disclosed. Facebook failed to adequately inform its users how the information was used and thus could not obtain meaningful or informed consent;

- (f) failing to abide by the promises, warranties and representations it made that Facebook would be responsible for storing and safeguarding all of the Class Members' User Account Data; and
- (g) failing to protect Class Members' Account Information from unjustified access, despite representing that Class Members could control access to their Account Information through privacy settings;

[38] The word "Contract" is defined as follows in the Statement of Claim:

The contract was formed when users entered into the Terms of Service which incorporate by reference Facebook's Data Use Policy (sometimes called their "Data Policy" or "Privacy Policy"). The Terms of Service and Data Use Policy varied over time, although subsequent iterations contained similar provisions. In exchange for agreeing that Facebook could collect, use and store User Account Data in accordance with its Data Use Policy, Class Members were granted access to a Facebook account and associated services (the "Contract").

[39] The specific wording of the proposed common issue put forward by the Appellants with respect to breach of contract is: "Did the defendant breach the contracts? And, if so how?" While the motion judge found that this question was not truly common, she concluded that the following issues related to the Appellants' claims in breach of contract were capable of certification:

- a. Did the defendant have a duty to obtain meaningful consent under *PIPEDA* Schedule 1, 4.3 Principle 3 – Consent, from users' friends for the disclosure of their personal information/user account data to Whitelisted Apps for applications installed by their friends and/or to make their personal information/user account data accessible to third parties? If the answer is yes, did the defendant obtain meaningful consent and if so, how?
- b. Did the defendant have a policy or practice of disclosing the personal information/user account data of users' friends and/or making it accessible to Whitelisted Apps without obtaining meaningful consent? If so, how was the personal information/user account data disclosed?
- c. If the answer to the previous question is yes, did the policy or practice continue throughout the class period?

- d. Did the class enter into standard form contracts with the defendant?
- e. What are the relevant terms of the class members' contracts with the defendant respecting the sale, sharing and/or making accessible of users' friends' personal information/user account data to the Whitelisted Apps?
- f. Did the defendant mislead class members about its practices with respect to the sale, sharing and/or making accessible of users' friends' personal information/user account data with the Whitelisted Apps and so breach its contractual duty of honesty, good faith, and fair dealing?

**ii. *Positions of the parties***

[40] The Appellants submit that by requiring evidence that all class members' data was shared, the motion judge imposed an excessively onerous standard of proof for certification which is not compatible with the existing jurisprudence. They state that the standard applied by the motion judge is only suitable for a merits determination.

[41] The Appellants argue that all that is required to certify the proposed common issue on breach of contract is some basis in fact that: (a) Facebook entered into a standard form contract with class members; (b) the terms of the contract can be determined on a class-wide basis, and (c) Facebook made at least some class members' data accessible to third parties without their permission. The Appellants state that while it is true that some class members, following adjudication on the merits, may not succeed in establishing liability against Facebook, the common determination of the proposed common issue will avoid duplication of fact-finding and legal analysis for the class members who do succeed in establishing liability against Facebook.

[42] The Appellants point to the numerous breaches of contract that have been pleaded in the Statement of Claim, including non-compliance with the obligations set out in *PIPEDA*. They also point out that the motion judge found that issues related to *PIPEDA* raised common issues, and that answering these questions would advance the entire class' claim that Facebook allegedly breached the implied contractual term to comply with *PIPEDA*. The Appellants submit that even if it is not possible to answer the question of whether there is a breach of contract in the affirmative with respect to all the alleged breaches, answering in the affirmative in relation to the *PIPEDA* obligations will advance the interests of the class.

[43] The Respondent submits that the motion judge was manifestly correct in concluding that the proposed common issue asking whether Facebook breached the contracts is not truly common because it requires individual enquiries into the context of the alleged breaches of contract. The Respondent states that Facebook cannot be liable to a class member unless Facebook actually breached the contract with that class member, which is an individual inquiry. The Respondent argues that the answer to the proposed common issue on breach of contract is not capable of extrapolation in the same manner to each member of the class.

### iii. Discussion

[44] At the certification stage, the representative plaintiffs have an obligation to introduce evidence to establish “some basis in fact” for each of the certification requirements, other than the requirement that the pleadings disclose a cause of action. This standard of proof does not ask whether there is some basis in fact for the claim itself. This is because the certification stage does not involve an assessment of the merits of the claim and focuses instead on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding. The “some basis in fact” standard requires that there be sufficient facts to satisfy the motion judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage because it was not an appropriate matter to proceed as a class proceeding. See *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99-100, 102, 104 (“**Pro-Sys**”).

[45] In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage is with respect to establishing whether these questions are common to all the class members. See *Pro-Sys* at para. 110.

[46] The concept of “common issues” is defined in section 1 of the *CPA* as common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[47] A question will be considered common if it can serve to advance the resolution of every class member’s claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members. See *Vivendi Canada Inc. v. Dell’Aniello*, 2014 SCC 1 at para. 46.

[48] A court should avoid framing commonality between class members in overly broad terms. The guiding question should be whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. This is because such an action would ultimately break down into individual proceedings. See *Rumley* at para. 29.

[49] The motion judge stated the correct legal test with respect to common issues. In my view, the Appellants have not articulated an error of law that could be extricated from the motion judge’s application of the legal principles to the facts of this case. Therefore, the applicable standard of appellate review is palpable and overriding error.

[50] Based on the pleadings in the Statement of Claim and the evidence before her, the motion judge was entitled to find that the proposed common issue “Did the defendant breach the

contracts? And, if so how?” was cast in overly broad and general terms, contrary to the principles set out in *Rumley*. She was also entitled to conclude that this proposed common issue was not common because it could not be answered without individual inquiries.

[51] As set out above, the Appellants proposed specific common issues – which were accepted by the motion judge – with respect to: (a) the Respondent’s duty under *PIPEDA*, (b) any policy or practice of the Respondent of disclosing or making information or data accessible without obtaining meaningful consent, (c) the terms of the class members’ contracts with the Respondent respecting the sharing and/or making accessible of users’ friends’ personal information or user account data, and (d) whether the Respondent breached its contractual duty of honesty, good faith and fair dealing by misleading class members about its practices with respect to the sharing and/or making accessible of users’ friends’ personal information or user account data. These specific questions relate to some of the breaches of contract pleaded in the Statement of Claim.

[52] In contrast, the common issue asking whether the Respondent breached the contracts and, if so, the manner in which it breached the contracts, is very general and broad. In order to provide a complete answer to this question in the context of this case, the Court would have to go through the seven allegations of breach of contract set out in paragraph 90 of the Statement of Claim (reproduced in paragraph 37 above), as well as the more general allegation in the opening sentence of paragraph 90 that the Respondent “breached the Contract and its warranties by sharing User Account Information with the Third Parties (in particular the Whitelisted Apps) and by failing to disclose it was doing so.”

[53] A question regarding the general allegation in paragraph 90 of the Statement of Claim and some of the more specific allegations in that paragraph (e.g., the allegation set out in subparagraph 90(g) of the Statement of Claim) cannot be answered without individual enquiries. Based on the class definition, a class member, i.e. an “Affected Friend”, may have been friends on Facebook with an “Installing User” only before the “Installing User” installed and used the Third Party Programs, or only after the Installing User stopped using the Third Party Programs. As noted by the motion judge, there is nothing in the evidence that shows that the personal information or user account data of such an Affected Friend was made accessible to third parties. Thus, individual enquiries as to whether a particular class member’s data was shared or made accessible to third parties would be required in order to answer the question of whether the Respondent breached its contract with a particular class member and, if so, how.

[54] An issue that is common only when stated in the most general terms and would ultimately break down into individual proceedings is not a certifiable common issue. See *Rumley* at para. 29.

[55] Accordingly, I find that the motion judge did not make any palpable and overriding error in concluding that the question “Did the defendant breach the contracts? And, if so how?” could not be determined in common.

### 3. Disgorgement as a common issue

**i. Additional background**

[56] As stated above, the Appellants seek significant damages in this action. The damages sought are described as follows in paragraph 185 of the Statement of Claim:

185. By providing Third Parties with access to User Account Data and by failing to disclose the unauthorized access to the Class Members, and various other material facts regarding the abuse of User Account Data and the Defendant's acts and omissions pleaded herein, Facebook is liable for damages, including but not limited to:

- (a) Moral damages for the tort of Intrusion Upon Seclusion;
- (b) Damages for breach of informational privacy under provincial privacy legislation;
- (c) Damages for the tort of Breach of Confidence being the detriment arising from the breach of informational privacy including distress and worry caused by the uncertainty of not knowing to what extent confidential personal information was disseminated on the internet or to other companies and what use was made of the data by Third Parties;
- (d) Damages under the Applicable Consumer Protection Legislation;
- (e) Damages under the Competition Act;
- (f) Restitution for unjust enrichment;
- (g) Disgorgement of revenues/profits earned for breach of contract and breach of confidence;
- (h) Nominal damages for breach of contract; and
- (i) Compensatory damages for any proven losses.

[57] The Statement of Claim also includes the following allegations:

***Disgorgement/Breach of Contract***

186. Class Members have a legitimate contract interest in the defendant complying with its contractual obligations not to share or disclose User Account Data.

187. The nature of the Class Members contract interest is such that it cannot be vindicated by other forms of contractual relief and cannot possibly be quantified in monetary terms such that the Class Members' interest in performance of the contract is not reflected by a pure economic measure.

188. In all the circumstances, other remedies would not adequately protect or vindicate the Class Members contractual right to control the dissemination of their own personal information, including: [...]

(f) Class Members did not pay for the Defendant's services and therefore their rights cannot be vindicated absent disgorgement of the profits and revenues earned by the Defendant effectively selling information by bartering or trading Class Members' data with the Whitelisted Apps.

189. Therefore, the Class Members seek disgorgement of profits or revenues generated from the unlawful use of the Class Members User Account Data.

[...]

### ***Nominal Damages/Breach of Contract***

197. Nominal damages are appropriate here to affirm that there has been an infraction of Class Members' legal rights under the Contracts. The plaintiffs plead that since for the most part there is no direct compensable loss to themselves or to Class Members, an award of nominal damages for breach of contract is appropriate to vindicate their rights.

### ***Compensatory Damages***

198. Additionally, the plaintiffs claim compensatory damages on behalf of each Class Member who has suffered an actual financial loss, pecuniary damages or out of pocket expenses as a result of the defendant's conduct described herein.

[58] The issue of damages is not addressed squarely in the affidavits of the three proposed representative plaintiffs that were filed in support of the certification motion. The affidavits are silent on the issue of whether or not the representative plaintiffs have suffered damages.

[59] However, Matthew Howat states in his affidavit that when he first learned that his personal information was being disclosed to third parties by Facebook without his express consent, he was shocked and he took some steps, including spending 24 hours monitoring his account. In his second affidavit, he states that "[i]f the personal information in my Facebook messages was made public, it could have harmed my job prospects or my relationships with

friends and family.” He also states that depending on the context, the contents of some of his Facebook posts could be embarrassing for him or his friends if made public, and that “[t]here are still people I know who might criticize me for the contents of those posts if they were made public.”

[60] In her affidavit, Lyne Brassard states that after learning that Facebook was sharing users’ personal information with third parties without users’ consent, she spent 2-3 hours trying to secure her Facebook account. In her second affidavit, she states that when she learned that information was shared with third parties without her knowledge, she became concerned that she “could be judged and/or discriminated against and/or be subject of surveillance for who I am Facebook ‘friends’ with.”

[61] The specific wording of the common issue put forward by the Appellants with respect to disgorgement is as follows: “Is the defendant liable to the class for damages for: [...] disgorgement of revenues/profits?” As stated above, the motion judge declined to certify the Appellants’ proposed common issues with respect to disgorgement and damages more generally because she found that these issues could not be determined in common.

[62] At this stage, the claim for disgorgement is with respect to the Appellants’ claim in breach of contract. While I have explained above why I would uphold the motion judge’s finding against the Appellants with respect to the proposed common issue on breach of contract, the motion judge held that the issue of whether the Respondent had breached its contractual duty of honesty, good faith and fair dealing was a common issue.

## ***ii. Positions of the parties***

[63] The Appellants submit that the motion judge’s conclusion in the 2024 Endorsement that individual inquiries were required to determine disgorgement is inconsistent with her 2025 Endorsement where she found that there was no evidence of any class member having suffered compensable loss. The Appellants argue that the motion judge’s latter finding contradicts the former and obviates any requirement for individual inquiries into the nature of class members’ loss.

[64] The Respondent submits that the Appellants’ argument that the motion judge made inconsistent findings in her 2024 and 2025 Endorsements mischaracterizes the motion judge’s rulings and attempts to manufacture a contradiction where none exists. The Respondent states that the motion judge never ruled on whether the class actually suffered compensable harm in either the 2024 Endorsement or the 2025 Endorsement and, therefore, there is no contradiction in her holdings.

[65] The Respondent argues that the tension on this issue stems entirely from the Appellants who consistently maintained that they were prepared to pursue compensatory damages, notwithstanding their concession that proposed class members were unlikely to have sustained financial damages. The Respondent submits that because the Appellants explicitly sought

compensatory damages, the motion judge was entirely correct to find that the assessment of whether proposed class members suffered compensatory damages would require individual inquiries, and to deny the certification of disgorgement as a common issue. The Respondent notes that the Appellants did not unconditionally disclaim compensatory damages, and that the Statement of Claim still seeks compensatory damages.

### iii. Discussion

[66] In *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at paras. 51 and 61 (“**Atlantic Lottery**”), the Supreme Court of Canada held that disgorgement for breach of contract is exceptional relief. It is not available at the plaintiff’s election to obviate matters of proof. Rather, it is available only where other remedies are inadequate and only where the circumstances warrant such an award, such as when the plaintiff has a legitimate interest in preventing the defendant’s profit-making activity. Circumstances of inadequacy arise when the nature of the claimant’s interest is such that it cannot be vindicated by other forms of relief. This may arise where, for example, the plaintiff’s loss is impossible to calculate or where the plaintiff’s interest in performance is not reflected by a purely economic measure. However, compensatory damages are not inadequate merely because a plaintiff is unwilling, or does not have sufficient evidence, to prove loss. Inadequacy flows not from the availability of evidence, but from the nature of the claimant’s interest. See *Atlantic Lottery* at paras. 53, 59-61.

[67] The motion judge stated the correct legal test with respect to common issues and disgorgement. Again, the Appellants have not articulated an error of law that could be extricated from the motion judge’s application of the legal principles to the facts of this case. Therefore, the applicable standard of appellate review is palpable and overriding error.

[68] In my view, the alleged contradictions between the 2024 and 2025 Endorsements that are relied upon by the Appellants are more apparent than real. When discussing the preferable procedure requirement in the 2025 Endorsement, the motion judge correctly pointed out that there was no evidence of compensable loss or compensatory damages in the record. This does not amount to a finding that the class members did not, in fact, suffer any loss that could give rise to compensatory damages. It is important to remember that the Appellants had the obligation to introduce evidence to establish “some basis in fact” with respect to both the preferable procedure requirement and the commonality requirement in relation to the proposed question about the Respondent’s liability to the class for disgorgement. While there was no evidence of compensatory damages in the record, the representative plaintiffs do not state in their respective affidavits that they have not suffered any compensable loss. In fact, some of the statements in the affidavits of Matthew Howat and Lyne Brassard suggest that the disclosure of personal information posted on Facebook could potentially cause compensatory damages.

[69] The lack of evidence one way or the other with respect to the issue of compensatory damages creates ambiguity. This ambiguity is compounded by the positions taken by the Appellants regarding compensatory damages in the Statement of Claim and at the certification motion.

[70] Further, even though the Statement of Claim was amended many times, the current version still claims compensatory damages on behalf of each class member who has suffered compensatory damages (see paragraphs 185 and 198 of the Statement of Claim reproduced in paragraphs 56 and 57 above).

[71] In their Factum filed for the certification hearing in 2025, the Appellants stated the following:

The plaintiffs submit that this is not a situation where significant compensatory damages have accrued. Class members did not pay a fee for Facebook’s services nor does it appear the alleged unlawful sharing of user data caused any pecuniary damages. Similarly, claims for severe mental distress are likely to be limited especially as users were not aware of the data sharing. [Emphasis added.]

[72] The motion judge referred to these statements in the 2025 Endorsement. She also referred to the Appellants’ admission that “there are unlikely to be pecuniary damages” (at para. 57). Before the motion judge, the Appellants indicated that they would disclaim compensatory damages on behalf of the class if a question on nominal damages was certified, but that they would pursue their claims for compensatory damages if a common issue regarding nominal damages was not certified (see paras. 38-39 of the 2025 Endorsement).

[73] As the foregoing shows, the Appellants’ position in their Statement of Claim and before the motion judge has not been that there are no compensatory damages and that they would not pursue compensatory damages for any class member.

[74] While it may be possible for representative plaintiffs to disclaim compensatory damages in favour of nominal damages, it is not possible to do so with respect to disgorgement. The Supreme Court made it clear in *Atlantic Lottery* (at para. 61) that disgorgement for breach of contract is exceptional relief that is not available at the plaintiff’s election.

[75] In light of the Statement of Claim, the evidence in the record and the positions taken by the Appellants before her, which always kept the option of compensatory damages open, the motion judge was entitled to conclude that: (a) “some class members may have suffered compensatory damages as claimed in the pleading, and would not be entitled to disgorgement as a result”; and (b) the issue of whether the Respondent was liable to the class for disgorgement could not be determined in common because the issue of whether compensatory damages were an inadequate remedy could not be determined in common.<sup>4</sup>

---

<sup>4</sup> I note that similar reasoning with respect to the refusal to certify as a common issue a question about nominal damages was upheld by the Court of Appeal for British Columbia in *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at paras. 161-165.

[76] Therefore, I find that the motion judge did not make any palpable and overriding error in concluding that the question “Is the defendant liable to the class for damages for: [...] disgorgement of revenues/profits?” could not be determined in common.

#### **4. Preferable procedure**

##### ***i. Positions of the parties***

[77] The Appellants acknowledge that their argument with respect to the preferable procedure criterion is contingent on disgorgement being certified as a common issue. They submit that “some evidence of compensable loss” is not the correct test for preferability, and that the motion judge wrongly applied a principle relevant only in narrow circumstances where all claims for non-compensatory damages have been struck or where claims pled require proof of compensable loss. The Appellants state that if the exceptional circumstances warranting disgorgement for breach of contract are present and amenable to treatment in common, there is no principled reason to limit such relief to individual actions or test cases.

[78] The Respondent submits that the motion judge correctly found that the proposed class proceeding would not advance any of the goals of class proceedings. The Respondent argues that the Appellants advance new arguments on the issue of preferable procedure that were not before the motion judge when she decided the preferable procedure requirement in the 2025 Endorsement. The Respondent states that the motion judge’s findings must be read in the context of the action that the Appellants were asking her to certify, i.e., a claim for nominal damages only.

##### ***ii. Discussion***

[79] Given: (a) my conclusion that the motion judge did not err in refusing to certify the proposed common issue regarding disgorgement, and (b) the Appellants’ concession that their argument with respect to the preferable procedure criterion is contingent on disgorgement being certified as a common issue, it is not necessary to discuss this ground of appeal in any detail. Suffice it to say that I see no error of law and no palpable and overriding error in the motion judge’s analysis of this issue.

[80] Determining whether a class action is manageable is a discretionary judgment that involves weighing multiple factors in light of judicial experience managing class proceedings and trials. Such determination attracts special deference on appeal. See *Carcillo v. Ontario Major Junior Hockey League*, 2025 ONCA 652 at para. 53. The motion judge applied the correct legal principles, and her weighing of the relevant factors under the preferable procedure criterion is entitled to deference. The Appellants’ criticisms ignore the context of the 2025 Endorsement. At the 2025 hearing, the Appellants took the position that, based on the 2024 Endorsement, the only claim that would go forward was the claim for breach of the duty of good faith and fair dealing, and they asked that a common issue about nominal damages be certified. See paras. 37-38 of the 2025 Endorsement. The motion judge’s reasons on the preferable procedure

requirement have to be read in this context and in light of the issues that were before her in 2025, which did not include the issue of disgorgement.

[81] Consequently, I find that the motion judge did not make any palpable and overriding error in concluding that a class proceeding was not the preferable procedure.

**E. CONCLUSION**

[82] Accordingly, I would dismiss the appeal and, as agreed by the parties, order the Appellants to pay costs to the Respondent in the all-inclusive amount of \$35,000.00.

\_\_\_\_\_  
Vermette J.

I agree.

\_\_\_\_\_  
Varpio J.

I agree.

\_\_\_\_\_  
Brownstone J.

**Released:** August 12, 2026