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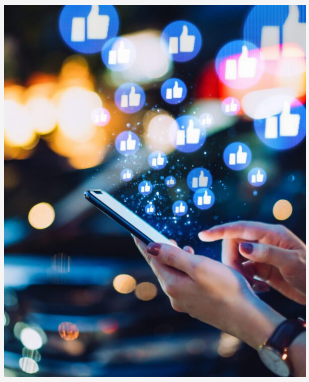
# Ontario appellate court affirms denial of certification in Cambridge Analytica class action

**MARCH 4, 2022 3 MIN READ**



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On March 1, 2022, the Divisional Court dismissed the plaintiff's appeal from an order denying certification of a putative privacy class action against Facebook, Inc. Facebook was represented by Osler. The decision addresses the "some basis in fact" standard and reinforces the principle that a plaintiff seeking certification must provide evidence to show that a common issue exists beyond a bare assertion. The Divisional Court upheld the motion judge's decision denying certification on the threshold basis that there was no evidence that any Canadian's data had actually been shared with Cambridge Analytica.

## Background on the motion judge's decision denying certification

This was one of several putative class actions filed in Canada with allegations that a third party, Cambridge Analytica, had obtained information about Canadian Facebook users from a professor and third-party application developer named Aleksandr Kogan. Shortly after the actions were filed, the plaintiff in this action was granted carriage of a proposed class action on behalf of "Canadian residents whose Facebook Information was shared with Cambridge Analytica Group."

In February 2021, the Ontario Superior Court of Justice dismissed the plaintiff's certification motion. Justice Belobaba held that the plaintiff failed to satisfy the fundamental requirement to provide some evidence for the existence of the proposed common issues, because there was no evidence that Canadian users' data had actually been shared with Cambridge Analytica.

Justice Belobaba also noted that, while he did not need to rule on any of the other arguments against certification, Facebook advanced "an array of, frankly, compelling arguments," including arguments about the scope of the tort of intrusion upon seclusion and the absence of class-wide commonality.

## The Divisional Court's decision on appeal

The Divisional Court dismissed the plaintiff's appeal. Justice Ryan Bell, writing for the Court, confirmed the established principle that "there must be some evidentiary basis indicating that a common issue exists beyond a bare assertion in the pleadings." As the Divisional Court

explained, requiring the plaintiff to provide some evidence that Canadian users' data had actually been shared with Cambridge Analytica does not mean that the motion judge required the plaintiff to "prove the core allegation at the certification stage". Nor did the motion judge engage in an assessment of the merits of the case. Instead, he applied the governing legal principles for certification and made no error in doing so.

The plaintiff advanced several other arguments relating to findings of fact and Justice Belobaba's interpretation of his own carriage orders. However, the Divisional Court rejected those arguments as well, finding that the plaintiff failed to demonstrate any error in principle or any palpable and overriding error.

## Key takeaway

This decision is a valuable reminder that certification remains a meaningful screening device, requiring the plaintiff to provide an actual evidentiary basis beyond allegations or speculation. It also joins a recent trend of Canadian courts exercising their gatekeeping role to deny certification of speculative class actions that were essentially "downloaded from the internet", rather than being genuine expressions of grievance or loss by the putative class members. (See, for example, Osler's Updates on the denial of certification in the *Chow* and *Kish* actions against Facebook, Inc. in British Columbia and Saskatchewan, respectively.)

This decision also reinforces the point 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 the* Simpson *action (and the* Kish *and* Chow *actions*) *with a team led by Mark Gelowitz, Robert Carson and Lauren Harper.*