COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Situmorang v. Google, LLC,* 2024 BCCA 9

Date: 20240111
Docket: CA48774

Between:

Yeremia Situmorang

Appellant
(Plaintiff)

And

Google, LLC

Respondent
(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Justice Griffin
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated November 24, 2022 (*Situmorang v. Google LLC*, 2022 BCSC 2052, Vancouver Docket S2012870).

Counsel for the Appellant:	P.J. Bates J.R.E. Archibald
Counsel for the Respondent:	T.M. Cohen, K.C. A. Borrell J.M. Kindrachuk
Place and Date of Hearing:	Vancouver, British Columbia November 14, 2023
Place and Date of Judgment:	Vancouver, British Columbia January 11, 2024

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Justice Griffin

Summary:

The appellant appeals from an order dismissing his application to certify a class proceeding, and dismissing the action itself, on the basis that the notice of civil claim did not disclose a cause of action. The claim concerns the alleged conduct of the respondent in using facial recognition technology to collect and store facial biometric data. The appellant alleges that the respondent's conduct violates the privacy of class members, and is actionable under common law and statutory privacy torts. The appellant also seeks remedies under consumer protection legislation. The judge found that the appellant had failed to plead material facts to support any of the causes of action alleged. The judge declined to provide the appellant with an opportunity to amend his pleading, and she dismissed the action.

Held: Appeal allowed. The judge erred in mischaracterizing the nature of the appellant's claims, and in her approach to assessing the viability of the pleaded claims. Assuming the facts pleaded to be true, the notice of civil claim discloses a cause of action for breach of privacy under the British Columbia Privacy Act. There are deficiencies in the pleaded claims for remedies under provincial consumer protection legislation, however, the appellant should have an opportunity to remedy the deficiencies through amendment. The elements of the common law tort of intrusion upon seclusion are sufficiently pleaded. The issue of whether a common law privacy tort exists in British Columbia should be raised, as necessary, with the court below on the remittal.

Reasons for Judgment of the Honourable Madam Justice Horsman:

Overview

[1] This proceeding is a proposed class action arising from the alleged conduct of the respondent, Google LLC, in using facial recognition technology to extract, collect, store, and use the facial biometric data of thousands of Canadians without their knowledge or consent. The data is said to be collected from photographs uploaded by users to Google Photos, a software application for photo-sharing and storage. The appellant alleges that the respondent extracts unique biometric identifiers from face images in uploaded photos that can be used to form a "face template", which is a numerical representation of the human face. An individual can be identified when the numerical representation of their face is compared against others in a database.

[2] The appellant alleges that facial biometric data is intrinsically sensitive personal information, akin to an individual's DNA or fingerprints. He says that the

respondent's conduct in extracting, collecting, storing, and using facial biometric data without adequately disclosing this practice to class members or seeking their consent constitutes a violation of their privacy. The appellant pleads causes of action under provincial privacy legislation as well as the common law tort of intrusion upon seclusion. The appellant also seeks remedies under provincial consumer protection legislation, on the theory that the respondent has engaged in deceptive and unconscionable practices.

[3] A chambers judge dismissed the appellant's application to certify the action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. She found that the notice of civil claim did not disclose a cause of action, as required by s. 4(1)(a) of the *CPA*, and that it was not in the interests of justice to permit the appellant an opportunity to amend the claim. In light of this conclusion, the judge found it unnecessary to address the remaining certification requirements in s. 4(1) of the *CPA* and other jurisdictional issues raised by the respondent. The action was dismissed.

[4] The appellant says the judge erred in her approach to the question of whether the pleadings disclose a cause of action. She was required to assume that the pleaded facts were true, read the claim generously, and not address the merits of the claims. Instead, the appellant says, the judge mischaracterized the nature of the claims, failed to take the pleaded facts as true, interpreted contentious wording in the respondent's published policies, and weighed evidence in making findings about the merits of the claims.

[5] For the reasons that follow, I would allow the appeal.

Background

The pleadings

The notice of civil claim

[6] The appellant is a resident of British Columbia. During the class period, he is said to have used Android phones to take pictures of himself and others, including

his young children, and the photos were automatically uploaded to Google Photos. It is alleged that the appellant did not consent to the respondent extracting, collecting, storing, and using his facial biometric identifiers, or those of his children, who are not users of Google Photos. (Part 1, paras. 6–8).

[7] The action is brought on behalf of users and non-users of Google Photos whose facial biometric identifiers were extracted and collected by the respondent. (Part 1, para. 9).

[8] The respondent's alleged misconduct is particularized in paras. 16–23 of Part 1 of the notice of civil claim. The appellant pleads that, without informing its users or obtaining their consent, the respondent uses facial recognition technology developed by its researchers to extract facial biometric identifiers from uploaded photos, and stores this biometric data in a database. It is alleged that the respondent engaged in this practice without consideration for whether the facial biometric data was being collected from a Google Photo user, or a non-user whose face happened to appear in an uploaded photo. The appellant pleads:

> 20. …This sensitive personal information has remained accessible to Google, its personnel, and any party that Google permits to access such data including, but not limited to, third-party developers through application program interfaces or APIs.
>
> 21. Google collected, retained, and used the facial biometric data of the plaintiff and other Class Members for its own competitive advantage in the marketplaces for photo-sharing and other services integrated with Google Photos, which services Google has monetized or may monetize through data mining and targeted advertising.

[9] The appellant alleges that the respondent did not obtain the consent of class members to the extraction, collection, storage, and use of facial biometric identifiers through Google Photos. Further, it is alleged that the respondent had no written, publicly available policy that identified the period of retention of such data or any guidelines for its destruction (Part 1, para. 22).

[10] Under the heading "Google's Privacy Misrepresentations" the appellant pleads:

> 23. During the Class Period, Google made representations in its terms of service and in its privacy policies about the nature of the personal information it collected, how it collected that information, and how its services used "*pattern* recognition". Those representations were objectively misleading because they omitted, or otherwise used ambiguity about, the material fact that Google was extracting, collecting, storing, and using Class Members' personal information in the form of facial biometric identifiers (the "Privacy Misrepresentations").

[11] At para. 23, the appellant quotes from the respondent's published notices, including its terms of service and privacy policies, as examples of the alleged Privacy Misrepresentations.

[12] In Part 3 (legal basis) of the notice of civil claim, the appellant pleads the three causes of action: (1) the statutory tort of breach of privacy, (2) the common law tort of intrusion upon seclusion, and (3) damages under provincial consumer protection legislation.

[13] In relation to the statutory tort, the appellant relies on s. 1(1) of the *Privacy Act*, R.S.B.C. 1996, c. 373, and analogous legislation in other provinces. He asserts that the respondent, wilfully and without a claim of right, violated the privacy of class members residing in British Columbia, and failed to obtain their consent to the extraction, collection, retention, and use of their facial biometric identifiers (Part 3, paras. 25–27).

[14] In relation to the common law tort of intrusion upon seclusion, the appellant pleads that the respondent's actions constitute an intentional or reckless intrusion on class members' seclusion that had no lawful justification and would be highly offensive to a reasonable person. The intrusion is said to be objectively highly offensive due to:

> (a) the scale of the intrusion, which encompassed the facial biometric identifiers of hundreds of thousands of Canadians, including thousands who were not users of Google Photos;
>
> (b) the type and sensitivity of the information that was collected and retained;
>
> (c) Google's disregard for its users' privacy rights despite its recognition of their expectations of privacy as reflected in Google's terms of service and privacy policies; and

> (d) Google's motivation for the intrusion, which was, directly or indirectly, and wholly or partially, its own financial interest or commercial gain.
>
> (Part 3, para. 39)

[15] Finally, the appellant pleads that under s. 1 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*], the respondent was a "supplier" and Google Photos was a "service" in the context of a "consumer transaction" with members of the user class. It is alleged that the respondent's conduct constituted "unfair and unconscionable practices" under the *BPCPA*, and "the parallel provisions of the Equivalent Consumer Protection Legislation" (Part 3, para. 45). The term "Equivalent Consumer Protection Legislation" is defined in the notice of civil claim by reference to six provincial statutes from other jurisdictions, without particularization of the provisions of those statutes that are said to be analogous.

The response to civil claim

[16] Prior to the certification hearing, the respondent filed a response to civil claim. In Part 1—response to notice of civil claim facts—the respondent describes "face grouping", a feature of Google Photos. The respondent pleads, in summary, that:

a) Face grouping uses algorithms to group photos together that are estimated to contain visually similar faces (Part 1, paras. 5, 16);

b) The algorithms used for face grouping do not attempt to identify a person from a photo; rather their only function is to create a "face template" that is then used to group photos (Part 1, paras. 21, 34);

c) The data used to create face groups are private to a user's account, and used only within that account for the purpose of facilitating the organization of the user's photos (Part 1, paras. 6, 22, 35);

d) The use of face grouping is disclosed to all users of Google Photos, and users may turn off the face grouping feature at any time (Part 1, paras. 7, 18–20, 24);

e) Third-party partners who use the Google Photos software interface to integrate their products with Google Photos are required to comply with Google's policies and cannot access user's data without their permission (Part 1, para. 36); and

f) Content stored on Google Photos is not used to target advertising (Part 1, paras. 8, 37).

[17] In Part 3—legal basis—of its response to civil claim, the respondent advances a jurisdictional defence, that the court lacks territorial competence, as well as pleading that none of the causes of action advanced by the appellant are viable.

The certification application

[18] The appellant applied under the *CPA* for an order certifying the action as a class proceeding. The action is brought on behalf of all users and non-users of Google Photos whose facial biometric identifiers were extracted and collected by the respondent during the class period. The proposed class period runs from October 28, 2015, the date the respondent introduced Google Photos, to the date the action is certified.

[19] In support of the application for certification, the appellant filed three affidavits: (1) his own affidavit, (2) the affidavit of Geoff Keeble, a lawyer from the firm representing the appellant, attaching various documents found on the respondent's website, and (3) the affidavit of Derek Ruths, an expert in the field of facial recognition technology, who describes facial recognition technologies and the "implications of their real-world use".

[20] The attachments to the Keeble affidavit include copies of the Google Terms of Service and Privacy Policy that were in effect through the class period, and a notice entitled "How Google uses pattern recognition to make sense of images" (the "Pattern Recognition Notice"). These are the documents excerpted at para. 23 of the notice of civil claim. As I will explain, the appellant maintains that these documents are objectively misleading to the extent that they omit mention of, or are ambiguous

about, the use of facial recognition technology to collect and store facial biometric data.

[21] In their response to the certification application, the respondent filed the affidavit of Yael Marzan, a Product Manager Lead of Google Photos. The Marzan affidavit explains how Google Photos and face grouping works, and how users were notified of this feature when Google Photos was launched. The affidavit appends various documents to illustrate the explanation, including pages from the Google Photos Help Center. Of particular importance to the present appeal is Exhibit B to the Marzan affidavit, which is described as a page of the Google Photos Help Center that is accessible by clicking on a "Learn more" link. Exhibit B includes the explanation that, when the face grouping feature is turned on, "algorithmic models are used to predict the similarity of different images and estimate whether 2 images represent the same face".

The chambers judgment

[22] In the introductory paragraphs of her reasons, the chambers judge describes the appellant's claim as centred on the "FG [face grouping] Function" of Google Photos: at paras. 2–4. As I will explain, the appellant says the judge erred in her conception of the appellant's claim, and this error tainted the balance of her analysis.

[23] The judge referenced the decision of the Superior Court of Québec in *Homsy c. Google*, 2022 QCCS 722, in which a companion proceeding was denied authorization to proceed as a class action in that jurisdiction: at para. 6. I note that this decision was reversed on appeal: *Homsy c. Google*, 2023 QCCA 1220.

[24] At paras. 18–21 of her reasons, the judge reviewed the general principles that apply in assessing the cause of action criterion under s. 4(1)(a) of the *CPA*. As the judge noted, the test to be applied under s. 4(1)(a) of the *CPA* is akin to that applicable to an application to strike pleadings under R. 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*]. The question is whether, assuming the facts pleaded are true, the claim is bound to fail. The judge acknowledged that the test imposes a high standard that requires a court to read the claim as

generously as possible, and with regard to possible amendments that may cure any deficiencies. She cited, among other cases, *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19, in support of the proposition that "more than symbolic scrutiny" of the pleadings is required in order for the court to perform its gatekeeping role in screening out claims that are bound to fail. No issue is taken on appeal with the judge's statement of the governing principles.

[25] There was a dispute between the parties regarding the extent to which the judge could consider evidence filed by the parties on the certification application in assessing the sufficiency of the pleading. The judge cited case law supporting the proposition that where a document has been incorporated into a pleading, the court may consider the entire document for the purpose of the cause of action analysis: at para. 24. She found that the notice of civil claim incorporated by reference the documents appended to the Keeble affidavit—the Terms of Service, Privacy Policy and Pattern Recognition Notice—and therefore these documents form part of the factual matrix of the claim. Portions of these documents are quoted at para. 23 of the notice of civil claim: at paras. 31–37.

[26] The exhibits to the Marzan affidavit were more controversial. For the most part, the judge found that the notice of civil claim did not incorporate these exhibits by reference. The exception was Exhibit B, which contains a more specific explanation of the use of facial recognition technology. The judge's findings with regard to Exhibit B are somewhat ambiguous. She appears to find that Exhibit B is incorporated by reference because it could be accessed through a hyperlink in the Pattern Recognition Notice: at para. 41. However, she also concluded there was no evidence establishing that Exhibit B of the Marzan affidavit could be accessed through the hyperlink throughout the class period: at paras. 42, 149.

The privacy torts

[27] The judge first addressed the pleaded privacy claims. She divided the allegations into three categories: (1) the "FG [face grouping] Conduct", consisting of the allegation—which I note parenthetically is not actually pleaded in the notice of civil claim—that the respondent extracted facial biometric data and used it to create

face templates to operate the face grouping function in Google Photos, (2) the "Access Allegation", consisting of the allegation in para. 20 of the notice of civil claim that the facial biometric data is accessible to third parties, and (3) the "Integrated Services Allegation", consisting of the allegation in para. 21 of the notice of civil claim that the respondent uses the facial biometric data for its own competitive advantage for photo-sharing and "other services integrated with Google Photos".

[28] The judge found that the Access Allegation and the Integrated Services Allegation are "vague and speculative", and unsupported by material facts: at para. 50. Specifically, she found there are no material facts pleaded upon which it could be found that:

> [52] …
>
> a) Google disclosed face templates to anyone outside Google;
>
> b) Google used face templates for any purpose other than the FG Function;
>
> c) Google has allowed anyone else to use face templates for any purpose other than the FG Function; or
>
> d) The face templates created from the uploaded content of any given [Google Photos] user are disclosed by Google to any other [Google Photos] user.

[29] The judge was satisfied that the notice of civil claim does, or could by amendment, set out material facts capable of supporting that the respondent engaged in the "FG Conduct": at para. 46. However, she also found that there was inconsistency between the pleaded facts and the incorporated documents:

> [53] The allegation that notice of the FG Conduct was not given to the User Class is inconsistent with incorporated documents:
>
> a) The Terms of Service and Privacy Policy advised [Google Photo] users that by using Google Services (GP) they were licensing Google to use their uploaded content (photographs), including use to make derivative works (face templates) for the purpose of operating or improving Google Services ("General Notice");
>
> b) The Pattern Recognition Notice advised GP users that data pattern recognition technology was being used to detect similar faces and group photos of those faces together to enable GP users to search and manage their photos ("Specific Notice"); and

> c) The Terms of Service gave GP users notice that they were responsible for ensuring they were entitled to license Google to use the content in the photos they uploaded to GP ("Reliance Notice):
>
> When you upload, submit store, send or receive content to or through our Services, you give Google (and those we work with) a worldwide license to use, host, store, reproduce, modify, create derivative works. … Make sure you have the necessary rights to grant us this license for any content that you submit to our Services.
>
> [Emphasis in original.]

[30] In the balance of her analysis, the judge assumed that the appellant's claims are limited to the allegation that the respondent used facial biometric data from photos uploaded to Google Photos to operate the face grouping function.

[31] The judge noted, at para. 57, that to establish an actionable breach of privacy under the *Privacy Act*, a plaintiff must show that the defendant's conduct:

> a) was wilful,
> b) was without a claim of right, and
> c) violated the plaintiff's privacy.

[32] The judge also set out, at para. 66, the elements of the common law tort of intrusion upon seclusion:

> a) the defendant invaded, without lawful justification, the plaintiff's private affairs or concerns;
> b) the defendant's conduct was intentional; and
> c) a reasonable person would regard the invasion as highly offensive and as causing distress, humiliation, or anguish.

[33] The judge interpreted the notice of civil claim to rely on the same privacy interest to ground the statutory and common law privacy torts. As pleaded by the appellant: facial biometric identifiers are "biologically unique and intrinsically private"; each class member has a right to control their own facial biometric identifiers; and by extracting and collecting such data without lawful justification, the respondent invaded the private affairs of class members: at paras. 64–65. The judge assumed that these paragraphs gave content to the asserted privacy interests.

[34] The judge did not accept the respondent's argument that facial biometric data is not information about private affairs or concerns because it is merely a different version of information already in the public domain. The cases cited by the respondent did not, in the judge's view, involve facts that required the courts to engage in "any nuanced consideration". By contrast, the judge characterized the pleaded facts in this case as "far more complicated", and involving "many shades of grey": at para. 83. She held as follows:

> [87] I conclude that it is an open question as to whether a retained collection of facial biometric data may be information capable of implicating one's "private affairs and concerns" for purposes of intrusion on seclusion. Thus, the Plaintiff is entitled to advance the argument that it is, both with respect to the alleged violation by intrusion under the statutory tort and the common law tort.

[35] The judge nevertheless found that the pleading did not disclose a cause of action, whether based in statute or the common law, for the violation of this privacy interest.

[36] In relation to the claim under the *Privacy Act*, the judge found that allegations that the respondent's conduct was wilful and without a claim of right amounted to "bald allegations" that were not supported by material facts: at paras. 88, 90. She also concluded that these allegations were inconsistent with the Terms of Service, Privacy Policy, and Pattern Recognition notice that were issued by the respondent, and incorporated into the notice of civil claim. The judge held that these notices, which she interpreted to grant the respondent a licence to use uploaded content, "plainly ground a claim of right in respect of the FG Conduct": at paras. 91, 93.

[37] In relation to the tort of intrusion upon seclusion, the judge found it was plain and obvious that factual allegations in the notice of civil claim did not establish that: (1) the defendant's conduct was without lawful justification, and (2) a reasonable person would not regard the use of facial biometric data for the purpose of the face grouping function in Google Photos to be highly offensive. The first conclusion was based on the Terms of Service, Privacy Policy, and Pattern Recognition notice. The second conclusion reflected certain characteristics of the face grouping function that the judge found to be significant. These characteristics include: there is no

suggestion that facial biometric data is accessible by Google Photos users; the face grouping function does not exploit facial biometric data, such as for targeted advertising purposes; the only photos that are grouped are those that users already possess and are able to view; and the face grouping function does not ascertain the identity of any individuals. The judge concluded:

> [110] These characteristics all suggest that a reasonable person would view a privacy invasion arising from the use of biometric data to make face templates to enable operation of the FG Function as relatively inoffensive.

[38] Furthermore, the judge held, the relevant context includes the notices issued by the respondent, which she found were sufficient to ground a claim of right. She reasoned that a reasonable person "is unlikely to consider conduct taken within the scope of a *bona fide* claim of right to be a highly offensive intrusion": at para. 111.

[39] Accordingly, the judge found it was plain and obvious that the statutory and common law privacy torts cannot succeed: at paras. 125–127.

The consumer protection statute claims

[40] The judge identified a number of deficiencies in the appellant's claim for remedies under consumer protection legislation.

[41] First, there are no material facts pleaded which bring the services provided by the respondent through Google Photos within the statutory definition of a "consumer transaction" under the *BPCPA*. The definition requires the services to be "for purposes that are primarily personal, family or household". The judge found it "self-evident" that Google Photos could be used for non-qualifying purposes: at para. 133.

[42] Second, the notice of civil claim fails to cite the specific *BPCPA* provisions that are alleged to have been contravened and pursuant to which damages are claimed: at para. 134.

[43] Third, there are no material facts pleaded to establish that the respondent engaged in conduct that was unconscionable or that had the capability, tendency, or effect of deceiving or misleading consumers. On the latter point, the judge found that

even if the respondent had made representations that led Google Photos users to expect that their privacy and personal information would be protected, the notice of civil claim does not disclose any material facts capable of supporting a conclusion that these representations were untrue: at paras. 135, 144–146.

[44] Fourth, the notice of civil claim pleads breaches of "equivalent" consumer protection laws in other provincial jurisdictions without identifying the specific provisions that are alleged to be equivalent, or pleading material facts to show a breach of those laws: at paras. 137–138.

[45] The judge, therefore, found that the notice of civil claim did not disclose a viable cause of action on any of the consumer protection claims: at para. 138.

Remedy

[46] Having concluded that the notice of civil claim failed to disclose any cause of action, the judge then considered whether the appellant ought to have a chance to cure the deficiencies through amendment. She cited *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at paras. 59–60 [*Revolution Resource Recovery*], for the factors relevant to the exercise of her remedial discretion. The judge found that the defects in the pleadings were "fundamental". She was satisfied that if the appellant had material facts capable of supporting the causes of action, he would have pleaded or raised them by the time of the certification hearing. The judge therefore declined to grant the appellant leave to amend the pleading, and she dismissed the certification application: at paras. 150–154.

On appeal

The issues

[47] The appellant alleges two broad errors made by the chambers judge:

a) She erred in law in failing to apply the correct test for determining whether the notice of civil claim disclosed a cause of action, in particular by:

i. fundamentally mischaracterizing the appellant's claim;

ii. not treating the facts alleged in the notice of civil claim as true on their face; and

iii. relying on contentious evidence filed by the respondent on the certification application to assess the merits of the claim.

b) In declining to give the appellant an opportunity to amend his pleading, the judge erred in principle by failing to consider the relevant factor that the appellant had a right to amend under R. 6–1(1)(a) of the *SCCR*.

The standard of review

[48] The parties disagree as to the standard of review that applies to the first alleged error, which concerns the judge's conclusion that the notice of civil claim does not disclose a cause of action. The appellant says that this decision involves a question of law, that is reviewable on a standard of correctness. The respondent says that the decision was a discretionary one, and is subject to a deferential standard of review on appeal. The respondent points to the two lines of authority that are described in *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111:

> [42] The standard of review applicable to the question of whether the pleadings disclose a cause of action has been described differently in different cases. In *Godfrey* at para. 54, Savage J.A. explained that appellate intervention is justified in the face of an error of law or principle:
>
> > [54] The law concerning the standard of review to be applied to a chambers judge's decision under s. 4(1)(a) was recently summarized in *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240. In *Sherry*, the Court observed that recent decisions have suggested that "an appellate court must defer to a conclusion reached under s. 4(1)(a) of the *Class Proceedings Act* in the absence of an error of law or principle, or the failure of the judge below to consider or weigh all relevant factors". (Para. 54.) The Court further noted another line of case law providing that the question of whether a pleading discloses a cause of action is a question of law, thus subject to the standard of correctness. (Para. 55.) The Court stated that these two lines of authority may be reconciled on the basis that the exercise of discretion may raise an extricable question of law and that, in any event, "both standards contemplate appellate intervention where an error of law or principle is found". (Para. 55.)

[49] In this case, the respondent says the errors alleged by the appellant relate to the judge's interpretation of the causes of action advanced in the notice of civil claim, which are findings of "mixed fact and law". The respondent says that appellate interference is justified only if the appellant demonstrates a palpable and overriding error: Respondent's factum at para. 35.

[50] The respondent's submission on standard of review is not consistent with more current authorities. As reflected in para. 42 of *Kirk*, there are older cases which suggest that decisions under s. 9-5(1)(a) of the *SCCR*—and, by analogy, s. 4(1)(a) of the *CPA*—are discretionary. However, the prevailing view is that the determination of whether a pleading discloses a cause of action is a pure question of law. In *Kamoto Holdings Ltd. v. Central Kootenay (Regional District)*, 2022 BCCA 282, Justice Groberman summarized the law as follows:

> [37] Although some older cases did suggest that all decisions under subrule 9-5(1)(a) are discretionary, more recent cases recognize that the issue of whether a claim discloses a reasonable cause of action is a pure issue of law and is to be reviewed on a standard of correctness: See, for example, *Scott v. Canada (Attorney General)*, 2017 BCCA 422 at paras. 39–44; *Watchel v. British Columbia*, 2020 BCCA 100 at para. 28; *Kindylides v. Does*, 2020 BCCA 330 at para. 19.
>
> [38] That is not to say that decisions under Rule 9-5(1) are never discretionary. The judge does have a degree of remedial discretion. For example, where a judge finds that part of a claim fails to disclose a reasonable cause of action, the judge has discretion as to how to go about striking the offending portion of the claim. Similarly, where a claim is deficient in some way, a judge has discretion to allow the plaintiff to amend it.

[51] *Kamoto* has been applied on subsequent occasions: *Canada (Attorney General) v. Frazier*, 2022 BCCA 379 at para. 21 [*Frazier*]; *Yen v. Ghahramani*, 2023 BCCA 403 at paras. 42–44. Other recent decisions of this Court have similarly held, without referring to *Kamoto*, that the question of whether pleadings disclose a cause of action is a pure question of law: *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22 at para. 41; *Sharifi v. WestJet Airlines Ltd.*, 2022 BCCA 149 at para. 30; *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 at para. 33; *Rorison v. Insurance Corporation of British Columbia*, 2023 BCCA 474 at para. 28.

[52] It is clear, in my view, that the question of whether the notice of civil claim discloses a cause of action is a pure question of law, reviewable for correctness. A judge's assessment of the sufficiency of a pleading is not, as the respondent argues, a fact-finding process. The judge must, assuming the pleaded facts to be true, determine whether those facts arguably establish a cause of action. This is a legal question.

[53] The parties agree that the second error alleged by the appellant—the refusal of the judge to allow an amendment to the pleading—involves an exercise of remedial discretion. A discretionary decision is subject to a deferential standard of review. An appellate court may only interfere if the judge erred in principle, gave no or insufficient weight to relevant considerations, or made a palpable and overriding factual error: *British Columbia (Superintendent of Motor Vehicles) v. Chahal*, 2022 BCCA 416 at para. 9.

Analysis

The first issue: the sufficiency of the pleading

The general legal framework

[54] The first issue raised on appeal turns on whether "the pleadings disclose a cause of action", as required by s. 4(1)(a) of the *CPA*. As the judge noted, this criterion is assessed on the same standard that applies to a motion to strike pleadings under R. 9-5(1)(a) of the *SCCR*. The test was succinctly stated by Justice Griffin in *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198:

> [56] The question under R. 9-5(1)(a) and s. 4(1)(a) of the *CPA* is whether it is "plain and obvious", based on the respondent's Notice of Civil Claim alone, assuming the facts as pleaded are true, that the pleading discloses no reasonable cause of action. Another way of putting it is whether the claim as pleaded has "no reasonable prospect of success". The novelty or complexity of a claim is not a basis for striking it, unless it is plainly doomed to fail: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980 [*Hunt*]; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at paras. 18–19 [*Atlantic Lottery*]; *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2021 BCCA 142 at paras. 48–55 [*H.M.B. Holdings*].

[55] In assessing the sufficiency of a pleading, the court should read the claim generously, and accommodate inadequacies that are merely the result of drafting deficiencies: *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 at para. 22. Evidence may not be considered in determining whether the cause of action requirement in s. 4(1)(a) of the *CPA* is met: *Revolution Resource Recovery* at para. 34.

[56] A claim may be struck if it does not "set out a concise statement of the material facts giving rise to the claim", as required by R. 3-1(2)(a) of the *SCCR*. "Material facts are facts that must be pleaded and proven to sustain a cause of action or defence": *0848052 B.C. Ltd. v. 0782484 B.C. Ltd.,* 2023 BCCA 95 at para. 46. "Bare allegations" that are based on speculation and are incapable of proof are not material facts. However, a court should be cautious about striking a pleading on the basis that the pleaded facts are "speculative". As explained by Justice Voith in *FORCOMP*:

> [36] … [A] plaintiff is positively required, at the outset, to plead the facts that they rely on. Those facts are taken to be true. Some of the assertions or inferences that are based on those facts might, at an early stage, be viewed as "speculative," but significant care should be taken before striking a pleading on this basis. Whether an inference can properly be drawn from the facts alleged or whether the proposed inference is "speculative" is a fact-finding exercise. That exercise has no role in a R. 9-5(1)(a) application. In saying this, I draw a distinction between facts that are pleaded but that are "manifestly incapable of being proven": *Imperial Tobacco* at para. 22.

[57] Material facts must be pleaded in sufficient detail to provide notice and define the issues to be tried so that the court and opposing parties are not left to speculate as to how the facts will support the cause of action: *Frazier* at para. 69.

The alleged errors of the chambers judge

Mischaracterization of the claim and failure to take pleaded facts as true

[58] I will deal with these alleged errors together as they are interrelated.

[59] The starting point is the judge's finding that certain of the facts pleaded in the notice of civil claim cannot be relied on to support the claims because they are "vague and speculative" or "bald assertions". These include the factual allegations in

para. 20 of the notice of civil claim that facial biometric data stored by the respondent remains accessible to the respondent's employees and third parties (the "Access Allegation"), and in para. 21 that the respondent has used facial biometric data for its own competitive advantage (the "Integrated Services Allegation"). For ease of reference, I will reproduce paras. 20 and 21 of the notice of civil claim:

> 20. Without the knowledge and consent of Class Members, Google collected and stored the Class Members' facial biometric identifiers extracted from photos. This sensitive personal information has remained accessible to Google, its personnel, and any party that Google permits to access such data including, but not limited to, third-party developers through application program interfaces or APIs.
>
> 21. Google collected, retained, and used the facial biometric data of the plaintiff and other Class Members for its own competitive advantage in the marketplaces for photo-sharing and other services integrated with Google Photos, which services Google has monetized or may monetize through data mining and targeted advertising.

[60] The judge concluded that these allegations are vague, speculative, and unsupported by material facts. Accordingly, she found that the only potentially viable pleaded claim is that the respondent extracted facial biometric data to create face templates for the purpose of operating the face grouping function in Google Photos—the "FG Conduct".

[61] In characterizing the allegations in paras. 20 and 21 of the notice of civil claim as "vague and speculative", the judge observed that no facts were pleaded to show that the respondent disclosed the face templates to anyone outside of Google, or used, or allowed the use of, the face templates for any purpose other than the face grouping function: at para. 52. This observation is inaccurate. The appellant pleads, in paras. 20 and 21, that the stored data is accessible to third parties and that the respondent has used class members' facial biometric data for its own competitive advantage in the marketplaces for photo-sharing and other services integrated with Google Photos. This pleading is not, in my respectful view, vague and speculative. The fact that the appellant cannot, at this stage of the proceeding and without the benefit of discovery, plead with precision the use that the respondent has made of the data, or the extent to which it has permitted others to access the data, does not make the allegations in paras. 20 and 21 "vague and speculative". The allegations

may prove to be factually untrue, but that is a matter for trial. The pleaded facts must be assumed to be true for the purpose of the cause of action analysis.

[62] Paragraphs 20 and 21 are sufficient to fulfill the purpose of pleadings in providing notice to the court and the other parties about the case that is advanced. The respondent does not say it is unable to defend the claim, as currently pleaded. Rather, it says that its use of facial recognition technology was limited to the face grouping feature in Google Photos. This factual assertion was seemingly accepted by the judge, despite it being directly contradicted by the pleaded facts. There was no summary trial application, or even summary judgment application, before the judge. It was not open to her to resolve contested factual questions on a pleadings motion.

[63] Furthermore, I agree with the appellant that the judge's analysis of paras. 20 and 21 of the notice of civil claim reflects her mischaracterization of the claim. The appellant's claim is not that the respondent collected facial biometric data for the purpose of the face grouping function. Rather, the appellant alleges that the respondent used facial recognition technology to extract, collect, store, and use facial biometric data from photos uploaded to Google Photos without the consent or knowledge of affected individuals. The facial biometric data is alleged to be intrinsically private in the same way as fingerprints or DNA. While the specific use that the respondent made of the data—and its vulnerability to third party access—may be relevant to the scope of the privacy breach, it is the extraction, collection and storage of facial biometric data that, in itself, is said to be an actionable violation of class members' privacy. The appellant pleads that each class member has a right to control their own facial biometric identifiers, and that control was not ceded by the act of uploading a photograph.

[64] Having dismissed the Access Allegation and the Integrated Services Allegation as vague and speculative, the judge narrowed the appellant's claim to one centred on the Google Photos face grouping function, and the "FG Conduct". In doing so, she altered the fundamental nature of the claim. The notice of civil claim does not allege that the respondent's misconduct arose from, related to, or was

limited to a face grouping feature in Google Photos. Instead, the notice of civil claim pleads that the actionable misconduct is the respondent's undisclosed use of facial recognition technology to extract, collect, store, and use facial biometric data from users and non-users, and the issuance of public statements that were misleading about this practice. Whether the facial biometric data collected from class members was used, exclusively or otherwise, for the purpose of the face grouping function is, as the appellant argues, largely irrelevant to the viability of the pleaded causes of action.

[65] The judge's mischaracterization of the claim impacted her analysis of the causes of action. In addressing the elements of the claim under the *Privacy Act*, the judge concluded that the respondent's Terms of Service and Privacy Policy grounded a claim of right "in respect of the FG Conduct": at paras. 91, 93. She found that the tort of intrusion upon seclusion was not made out because a reasonable person would not find the use of biometrics to "enable operation of the FG Function" to be highly offensive: at para. 110. In my view, the judge erred in assessing the elements of the causes of action through the lens of a claim the appellant was not, in fact, advancing.

Engaging in evidence-based assessment of the merits

[66] This alleged error relates to the judge's use of the documents that she found were incorporated in the notice of civil claim: the Terms of Service, Privacy Policy, and Pattern Recognition notice. The appellant says the judge went beyond the permitted use of such documents on a pleadings motion, and relied on the documents to make findings on contested issues of interpretation.

[67] The law appears well-settled that a document referenced in a notice of civil claim can be considered on an application to strike the claim. This does not offend the prohibition on the receipt of evidence on an application under R. 9-1(5)(a) of the *SCCR* (or under s. 4(1)(a) of the *CPA*), because the document is not evidence but, rather, part of the pleading itself: *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789 at para. 44, leave to appeal to SCC ref'd, 38915 (4 October 2019); *Shoppers Drug Mart Inc. v. Mang*, 2021 BCSC 928 at para. 14. It is unnecessary to

consider the precise parameters of the use that can be made of incorporated documents on a pleadings motion. It is common ground that a court should not engage in interpretive issues that go beyond the court's limited role of determining the legal question of whether it is plain and obvious that the facts pleaded, assuming them to be true, do not disclose a cause of action: *Bowman v. Ontario*, 2022 ONCA 477 at paras. 40–41. The point of contention between the parties is whether the judge impermissibly engaged in such an interpretive process here.

[68] The appellant points to a number of instances in which he says the judge improperly engaged in an assessment of the merits of his claim. For the purpose of the issues on appeal, it is only necessary for me to address one of these instances. This is the judge's interpretation—without evidence or reference to principles of contractual interpretation—of the following provision in the respondent's Terms of Service:

> When you upload, submit, store, send, or receive content to or through our Services, you give Google (and those we work with) a worldwide licence to use, host, store, reproduce, modify, create derivative works (such as those resulting from translations, adaptations or other changes we make so that your content works better with our Services) …. The rights you grant in this license are for the limited purpose of operating, promoting, and improving our Services, and to develop new ones.
>
> [Emphasis added.]

[69] The judge interpreted the term "derivative works" in this passage to include face templates, and presumably the facial biometric data used to create them: at paras. 53, 91. In so doing, she effectively resolved the merits of a highly contentious issue of contractual interpretation. She then relied on this interpretation in support of her conclusions that the respondent's conduct was not wilful, that it had a claim of right, and a reasonable person would not find the respondent's conduct to be highly offensive.

[70] Respectfully, I consider that the judge's findings went beyond the question of law she had to decide under s. 4(1)(a) of the *CPA*. It may have been open to the judge to consider the incorporated documents in deciding whether it was plain and obvious that the pleaded facts did not disclose a cause of action. However, it was

not open to her to conclusively determine the meaning of disputed language in the Terms of Service in the absence of an evidentiary record which would permit the court to engage in the "inherently fact specific" process of interpreting the parties' objective intentions in light of the surrounding circumstances: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 50–57. It is not plain and obvious that the term "derivative works" in the Terms of Service encompasses the creation of face templates, much less the collection and storage of the facial biometric data that is used to create face templates.

[71] Before concluding on this point, it is necessary to say a word about Exhibit B to the Marzan affidavit, which was a focus of submissions at the hearing of the appeal. The respondent relies on Exhibit B, as I understand the argument, because it contains the most explicit reference to the respondent's use of "algorithmic models" to predict the similarity of different images, and thus adds force to the respondent's position that users have authorized the respondent to engage in the practices that are impugned by the appellant. The respondent's submissions were directed at persuading the Court that it could be inferred on the evidence that Exhibit B was in effect throughout the class period, contrary to the judge's conclusion that the evidence did not establish this fact.

[72] I would decline to engage in such an exercise. First, the question of the duration of time that Exhibit B was in effect is a matter of evidence, and therefore is not one that can be resolved on a pleadings motion. Second, the question is irrelevant in any event. Even if Exhibit B is properly construed as an incorporated document that could be considered in assessing the sufficiency of the pleading, it is not plain and obvious from Exhibit B that the respondent had a claim of right, that it did not act wilfully, or that a reasonable person would not find the impugned conduct to be highly offensive. These are all issues for trial.

Does the notice of civil claim disclose a cause of action?

[73] Having addressed the errors of the judge in her approach to the pleading, I will consider afresh the question of whether the notice of civil claim discloses a cause of action.

The statutory privacy tort

[74] Section 1 of the *Privacy Act* provides:

> **1** (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
>
> (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
>
> (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.
>
> (4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

[75] The determination of liability for breach of privacy, including the question of what is a reasonable expectation of privacy, depends on the facts of the case: *Insurance Corporation of British Columbia v. Ari*, 2023 BCCA 331 at paras. 42, 119.

[76] The judge found that the pleading was sufficient to establish an arguable violation of privacy. On appeal, the respondent argues, as an alternative basis for upholding the dismissal order, that the judge erred in this finding. The respondent's argument is premised on the assertion that there is no basis for a finding that the face templates were used for any purpose other than face grouping within the confines of a user's private Google Photos account. On this basis, the respondent says that it is plain and obvious that there is no privacy violation.

[77] I do not accept the respondent's position. For the reasons I have already explained, this submission misconceives the appellant's claim. The appellant pleads that: facial biometric data contains physical characteristics that are unique to the individual; such data can be used to identify an individual through comparison against a vast array of images available on the internet or via surreptitious surveillance; class members have the right to control their own facial biometric data; the respondent has collected and stored class members' facial biometric identifiers extracted from photos without their knowledge or consent; the data is accessible to employees and third parties at the respondent's election; and the data is used by the

respondent for its own competitive advantage. In my view, the judge was correct to conclude that this pleading discloses an arguable violation of the privacy of class members.

[78] The remaining elements of the statutory tort are that the defendant's conduct was wilful, and without claim of right.

Wilful

[79] The meaning of the term "wilful" in the *Privacy Act* has not been given detailed consideration: *Duncan v. Lessing*, 2018 BCCA 9 at para. 83. In the present case, the judge cited the following passage from the judgment of Lambert J.A. in *Hollingsworth v. BCTV* (1998), 59 B.C.L.R. (3d) 121, 1998 CanLII 6527 (C.A.) at para. 29:

> [29] I turn first to the word "wilfully". In my opinion the word "wilfully" does not apply broadly to any intentional act that has the effect of violating privacy but more narrowly to an intention to do an act which the person doing the act knew or should have known would violate the privacy of another person. That was not established in this case.

[80] The judge interpreted the law to provide that a pleading of recklessness was sufficient to establish an arguable claim that the defendant acted wilfully: at para. 61. This is a point of some controversy, which is unnecessary to resolve on this appeal. Even assuming that "wilfulness" under the *Privacy Act* requires subjective knowledge on the part of the defendant that their conduct will violate the plaintiff's privacy, the notice of civil claim sufficiently pleads this element of the statutory tort.

[81] The notice of civil claim alleges that since October 2015, the respondent has extracted, collected, stored, and used the facial biometric identifiers of thousands of individuals without their knowledge or consent. It is alleged that the respondent engaged in this practice without consideration for whether a particular face appearing in an uploaded photo belonged to a user or non-user, and without publishing policies regarding the retention of such data. The respondent is alleged to have disregarded the privacy rights of users, despite its recognition of their expectation of privacy as reflected in the respondent's Terms of Service and Privacy

Policy. The respondent is alleged to have collected, retained, and used facial biometric data for its own competitive advantage in the marketplace. The respondent's conduct is alleged to have been wilful.

[82] I have already addressed the judge's error in interpreting the Terms of Service to grant the respondent a licence to engage in such conduct, rather than confining herself to the legal question of whether the facts alleged in the notice of civil claim disclose a cause of action. The judge also found that the plea of wilfulness in the notice of civil claim was a "bald legal allegation" unsupported by material facts: at para. 88. As is evident, I do not agree with that characterization. The plea of wilfulness, combined with the pleaded facts that I have summarized above, are sufficient to establish this element of the statutory cause of action.

Without claim of right

[83] In *Hollingsworth*, this Court interpreted the words "without a claim of right" to mean that the defendant had "an honest belief in a state of facts which, if it existed, would be a legal justification or excuse": at para. 30.

[84] I have already addressed the judge's error in finding, on a pleadings motion, that the Terms of Service plainly and obviously grounded a claim of right because its provisions granted the respondent a licence to engage in the impugned practices. The judge also found that the allegation that the respondent acted without claim of right was a "bald allegation": at para. 90. However, the judge did not refer to R. 3-7(17) of the *SCCR*, which provides that it is sufficient to allege "malice, fraudulent intention, knowledge or other condition of the mind of a person" without setting out the circumstances from which it is to be inferred (emphasis added). In pleading that the respondent's conduct was without claim of right, the appellant alleged that the respondent did not have an honest belief in a state of facts which would be a legal justification or excuse for the privacy violation. This was sufficient to establish this element of the cause of action.

Conclusion on the Privacy Act claim

[85] In summary, I conclude that the notice of civil claim discloses a cause of action under the *Privacy Act*. The judge erred in law in concluding otherwise. On this basis, I would set aside her order dismissing the certification application and the action.

The common law tort of intrusion upon seclusion

[86] For the reasons I have already stated, in my view the judge erred in finding that the appellant did not sufficiently plead the elements of the tort of intrusion upon seclusion. The pleadings I have reviewed are sufficient to establish the elements that the conduct was intentional and that a reasonable person would regard the invasion as highly offensive. The judge erred in her analysis in resolving the merits of contested factual issues in determining that the pleading did not disclose a cause of action.

[87] On appeal, the parties did not address the contentious question of whether a common law privacy tort exists in British Columbia. This question also does not appear to have been raised before the judge, and it is not addressed in her judgment. The tort of intrusion upon seclusion was first recognized in Canada by the Ontario Court of Appeal in *Jones v. Tsige*, 2012 ONCA 32. Unlike British Columbia, Ontario does not have a statutory privacy tort. There is some authority in this jurisdiction for the proposition that there is no common law cause of action for breach of privacy in British Columbia. In *Tucci v. Peoples Trust Company*, 2020 BCCA 246, this Court commented that it may be time to revisit this jurisprudence: at paras. 53–68.

[88] The question of whether the statutory cause of action for breach of privacy in British Columbia precludes recognition of a common law tort is a difficult one. Its resolution would at least require an analysis of whether the *Privacy Act* evidences a legislative intent to create a comprehensive and exclusive code: *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298 at 1315–1316, 1990 Can LII 110; *Pioneer Corp. v. Godfrey*, 2019 SCC

42 at paras. 85–89. It is not clear to me from the record, in any event, whether it is necessary to undertake such an analysis, or whether the appellant intended to limit the claim for damages for intrusion upon seclusion to class members residing in jurisdictions that do not have a statutory privacy tort.

[89] In the circumstances, I consider it unsafe and unwise for this Court to delve into the question of whether there is a viable common law cause of action for breach of privacy in British Columbia when there is no decision from the court below and no submissions from the parties on the point. Given that I propose to remit the case back to the Supreme Court, this is an issue that can be raised, as necessary, on the remittal.

The consumer protection legislation claims

[90] The notice of civil claim is clearly deficient in its pleading of the consumer protection legislation claims. The deficiencies include: (1) there are no material facts pleaded that would establish that the respondent's practices are unconscionable; (2) the appellant does not cite the provisions of the *BPCPA* which are alleged to have been contravened and pursuant to which damages are claimed; and (3) the appellant also does not cite the provisions of the Equivalent Consumer Protection Legislation which are said to be analogous to the relevant provisions of the *BPCPA*. At the hearing of the appeal, I did not understand the appellant to contest that the notice of civil claim was deficient in these respects. The issue is whether he ought to have an opportunity to cure the deficiencies through amendments to the pleading.

[91] The judge declined to permit the appellant an opportunity to amend the pleading, at least in part because she found the defects in the pleading to be fundamental. By that, I take the judge to have concluded that the deficiencies could not be remedied by amendment. As it relates to the claims under the *BPCPA*, this reflects the judge's view that no claim could be maintained in light of the content of the respondent's published statements, which could not be construed as containing misrepresentations. For the reasons that follow, I conclude that the judge erred in this aspect of her analysis of the consumer protection legislation claims.

[92] The judge held that the notice of civil claim failed to disclose any material facts on which it could be found that the statements relied upon by the appellants to establish the consumer protection claims had the capability, tendency, or effect of deceiving or misleading any consumers. She found that consumer protection legislation could not be "stretched to accommodate complaints of benign (alleged) ambiguity": at para. 146. This finding is directly contrary to the allegation in para. 23 of the notice of civil claim that the representations in the respondent's Terms of Service, Privacy Policy, and Pattern Recognition Notice were objectively misleading because they omitted, or used ambiguity about, the material fact that the respondent was extracting, collecting, storing, and using class members' facial biometric identifiers. The judge appears to have resolved the respondent's allegation of a material omission by finding, without detailed analysis, that the quoted statements contained, at most, "benign ambiguity".

[93] However, the alleged Privacy Misrepresentations also raised issues of disputed fact that could not be resolved on a pleadings motion. The term "facial biometric data" is not found anywhere in the Terms of Service, Privacy Policy, or Pattern Recognition notice, which is a point of some importance to the pleaded claims. The essence of the pleading at para. 23 of the notice of civil claim is that the respondent's public statements regarding its privacy policies and collection of personal information were objectively misleading because they omitted the material fact that it was extracting, collecting, storing and using class members' facial biometric identifiers. Whether the alleged Privacy Misrepresentations had the "capability, tendency or effect of deciding or misleading any consumer" is a question that goes to the factual merits of the claim, and should not have been resolved on a pleadings motion.

[94] Accordingly, I conclude that the judge erred in principle in exercising her remedial discretion. The deficiencies I have identified are capable of being remedied by amendment. Furthermore, as there has been no previous amendment to the notice of civil claim, and a notice of trial has not been served, the appellant is entitled as of right to amend his pleading pursuant to R. 6-1(1) of the *SCCR*.

Disposition

[95] In summary, I conclude that the notice of civil claim discloses a cause of action under the *Privacy Act*. The notice of civil claim also sufficiently pleads the elements of the common law tort of intrusion upon seclusion. The viability of a common law privacy tort in British Columbia should be addressed before the Supreme Court on the remittal. The notice of civil claim does not disclose the material facts to support a claim under the *BPCPA* and analogous legislation in other jurisdictions. However, the appellant should have an opportunity to amend his pleading to cure the deficiencies.

[96] I would therefore allow the appeal, and make the following orders:

a) The order dismissing the action and the certification application be set aside;

b) The matter be remitted to the Supreme Court of British Columbia to address the remaining issues on the certification hearing.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Justice Griffin"