IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *C.D. v. Facebook, Inc. (Meta Platforms Inc.),*
2024 BCSC 2081

Date: 20241115
Docket: S223013
Registry: Vancouver

2024 BCSC 2081 (CanLII)

Between:

C.D. and Amber Rutherford, Infant, by her Litigation Guardian, Winter Sprowl

Plaintiffs

And

Facebook, Inc. (now known as Meta Platforms Inc.), Facebook Canada Ltd., Instagram Inc., and Instagram, LLC

Defendants

Before: The Honourable Justice Tammen

Reasons for Judgment

Counsel for Plaintiffs:	A. Leoni J.D. Winstanley A. Johnson A. Fidler-Werner
Counsel for Defendants:	M.A. Feder, K.C. C. Bildfell G. Kerr
Place and Dates of Hearing:	Vancouver, B.C. June 6-7, 2024
Place and Date of Judgment:	Vancouver, B.C. November 15, 2024

Table of Contents

INTRODUCTION AND OVERVIEW **3**
PRELIMINARY OBSERVATIONS **4**
DISCUSSION AND ANALYSIS **8**
Lee Affidavit – Statista Reports 9
Lee Affidavit – WSJ Documents 10
Lee Affidavit – Gizmodo Documents 12
Lee Affidavit – Axios Article 12
Lee Affidavit – 2021 U.S. Surgeon General Report 13
Kendall Affidavit – California Complaint 14
Kendall Affidavit – Bejar Materials 14
Kendall Affidavit – 2023 U.S. Surgeon General Report 15
Kendall Affidavit – Zuckerberg Testimony Link 16
Kendall Affidavit – Tech Policy Article 17
CONCLUSION **17**

2024 BCSC 2081 (CanLII)

2024 BCSC 2081 (CanLII)

INTRODUCTION AND OVERVIEW

[1] This is a proposed class proceeding in which the representative plaintiffs seek to certify an action against the defendants, Facebook, Inc. (now known as Meta Platforms Inc.), Facebook Canada Ltd., Instagram Inc. and Instagram, LLC (collectively "Meta"). The proposed action is said to be a products liability case, although Meta appears to dispute that characterization. In broad strokes, the plaintiffs claim that Meta deliberately designed Facebook and Instagram to expose minors to third-party content that causes disease, injury, or illness, including a medical condition called social media addiction.

[2] As a matter of fact, it is beyond dispute that, prior to this litigation commencing, similar complaints have been levelled against Meta in various fora in the United States. As far as I am aware, none of those claims has been proven in any court proceeding to date.

[3] A certification motion was scheduled to be heard in early June 2024. The plaintiffs served their application record on the defendants in advance of that motion. The record consists of affidavits of five fact witnesses, including the proposed representative plaintiffs; affidavits of four proposed expert witnesses; and affidavits of a legal assistant, Ying Lee (the Lee Affidavit), and a lawyer, Jesse Kendall (Kendall Affidavit), from one of the law firms representing the plaintiffs.

[4] The defendants then filed two applications which I heard on June 6 and 7, 2024, instead of the certification motion.

[5] The first of those applications sought leave to cross-examine the expert witnesses and representative plaintiffs. I granted leave with respect to the former, but denied leave with respect to the latter, in oral reasons delivered June 27, 2024.

[6] On this application, the defendants seek to strike several paragraphs and many exhibits from both the Lee Affidavit and the Kendall Affidavit (Affidavits). The objections to admissibility are primarily based on non-authentication of documents and hearsay. There are also discrete objections that some of the appended exhibits

contain impermissible opinion evidence or are devoid of probative value, and are thus wholly irrelevant.

[7] For completeness, I reproduce the specific orders sought in the defendants' Notice of Application (NoA):

> An order striking the following paragraphs and exhibits from Affidavit #1 of Ying Lee:
>
> > paragraphs 3-5 and Exhibits B-D (the "Statista Reports");
> >
> > paragraphs 9-10 and Exhibits N-U (the "WSJ Documents");
> >
> > paragraph 11 and Exhibits V-TT (the "Gizmodo Documents");
> >
> > paragraph 12 and Exhibit UU (the "Axios Article"); and
> >
> > paragraph 13 and Exhibit VV (the "2021 U.S. Surgeon General Report");
>
> An order striking the following paragraphs and exhibits from Affidavit #1 of Jesse Kendall:
>
> > paragraph 2 and Exhibit A (the "California Complaint");
> >
> > paragraph 3 and Exhibit B (the "Bejar Statement");
> >
> > paragraph 4 and Exhibit C (the "Bejar Documents");
> >
> > paragraph 5 and Exhibit D (the "Bejar Email");
> >
> > paragraph 6 and Exhibit E (the "2023 U.S. Surgeon General Report");
> >
> > paragraph 7 (the "Zuckerberg Testimony Link"); and
> >
> > paragraph 8 and Exhibit F (the "Tech Policy Article").

[8] For the reasons that follow, I am persuaded that most of the objections to admissibility made by Meta are valid, and that significant portions of both Affidavits and appended exhibits must be struck.

PRELIMINARY OBSERVATIONS

[9] Before turning to the specific objections, I will address the overarching considerations which apply on an application to strike, and I will comment on some of the positions taken by the plaintiffs in responding to this application.

[10] The criteria for certification are set out in s. 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ([*CPA*] which reads:

2024 BCSC 2081 (CanLII)

2024 BCSC 2081 (CanLII)

> Class certification
>
> **4** (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[11] A plaintiff is required to show some basis in fact for each of the certification requirements set out in the *CPA*, other than the requirement that the pleadings disclose a cause of action: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 25. It is for that reason that evidence is received on a certification motion.

[12] The rules and principles governing admissibility of evidence on a certification motion are the same as for other civil proceedings. The rules of evidentiary admissibility are not relaxed: *Ernewein* at para. 31.

[13] The court on certification plays an important gatekeeping role with respect to the admissibility of evidence. While the “some basis in fact” test creates a modest evidentiary hurdle, that hurdle must be discharged by evidence which meets the usual criteria for admissibility: *Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts*, 2021 BCSC 837 at para. 15. The presiding judge should rule on evidence of questionable admissibility and not simply assess

objections as part of the weighing exercise: *Huebner* at para. 15; *O'Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371 at para. 72.

[14] Paragraphs in affidavits and their appended exhibits which offend the rules of evidence should be struck and therefore should not form part of the certification record.

[15] The sole "evidentiary shortcut" available to plaintiffs on a certification motion is that which applies on all interlocutory applications. Specifically, hearsay is admissible so long as a specific source of the hearsay is identified: *Supreme Court Civil Rules*, R. 22-2(13). Hearsay remains inadmissible if it is unattributed or at multiple levels, subject to application of the specific exceptions or the principled approach.

[16] Unfortunately, the manner in which the plaintiffs approached and litigated this motion was not particularly helpful. In their application response, the plaintiffs asserted that the defendants' objections were "imprecise" and "speculative", but that criticism was unfounded. Indeed, Meta set out specific objections to each of the paragraphs and exhibits sought to be struck. Conversely, the plaintiffs did not address those specific objections in their written application response. Mid-hearing, the plaintiffs handed up a chart which addressed some, not all, of the individual objections.

[17] The plaintiffs took inconsistent positions on the critical issue of permissible hearsay at a certification motion. Their written response acknowledged that normal evidentiary rules, including those in relation to hearsay, apply at a certification motion as they would on any other interlocutory application.

[18] Mid-hearing, plaintiffs' counsel retreated somewhat from that position and advocated for a different standard to screen potential hearsay on a certification motion.

[19] Also in oral submissions, plaintiffs' counsel took the untenable position that it is insufficient for the defendants to object on the basis of hearsay, and that the

2024 BCSC 2081 (CanLII)

defendants must demonstrate that there is no permissible, non-hearsay purpose for which the impugned evidence could be used in order to succeed. That is not the law. Once an objection is made to evidence which appears to be hearsay, the burden falls to the party tendering the evidence to justify its reception, either as admissible hearsay or for a non-hearsay purpose: *R. v. Mapara*, 2005 SCC 23 at para. 13.

2024 BCSC 2081 (CanLII)

[20] Perhaps most critically, the plaintiffs failed to come to grips with the fundamental issue with both the WSJ Documents and Gizmodo Documents, namely a Gordian knot of hearsay and authentication problems. The issue was clearly identified at paragraph 3 of the "Overview" section of the defendants' NoA. After describing much of the plaintiffs' evidence as "unauthenticated triple hearsay presented in a factual vacuum", the NoA states: "The paralegal who appended these unauthenticated third-party documents to her affidavit has no personal knowledge whatsoever about the underlying documents or their authenticity." That is a factually correct statement.

[21] The plaintiffs' application response refers to these documents as "two collections of the defendants' internal documents, assembled by two former employees turned whistleblowers…and provided to the U.S. Congress and various news organizations in 2021 and 2023." In the balance of the application response, the plaintiffs treat the documents as if they have been authenticated, and they point out that the public statements of representatives of Meta, including those made by its CEO, have not directly challenged authenticity.

[22] However, that position ignores the fact that the plaintiffs' affidavit material fails entirely to authenticate the documents. For example, at para. 9 of her affidavit, Ms. Lee states that in 2021, Frances Haugen, a former employee of the defendants, shared a cache of more than 1,300 documents with certain newspapers and then testified before Congress. Paragraph 10 then lists the documents allegedly shared by Ms. Haugen with the Wall Street Journal, appended as Exhibits N through U.

[23] In oral submissions, plaintiffs' counsel conceded, as he must, that para. 9 is hearsay. The deponent, Ms. Lee, has no personal knowledge of any of the asserted

facts nor does she state the source of that information. Thus, the only evidence of authentication, i.e. that the documents are what the plaintiffs purport them to be, is classic hearsay. The documents are thus unauthenticated. At no time throughout this hearing did the plaintiffs acknowledge the legal hurdle created by that fundamental fact, nor its impact on their claim of admissibility.

2024 BCSC 2081 (CanLII)

[24] Finally, the plaintiffs filed an affidavit of a legal administrative assistant, Sharon Wang (Wang Affidavit), from the other law firm representing the plaintiffs on this motion. It appears that the Wang Affidavit is an attempt to shore up the authentication issue. For the most part, the affidavit appends various things Ms. Wang downloaded from websites maintained by Meta, many of which refer in some fashion to hearings before both the U.S. Senate and Congress.

[25] I decline to consider the Wang Affidavit on this application. I will decide the admissibility objections to material contained within the plaintiffs' certification record based on the record itself and the submissions of counsel. In my view, it is not appropriate to permit the plaintiff to present further evidence in response to a basic evidentiary objection. I also note that on a cursory review of the material appended to the Wang Affidavit, I tend to agree with the defendants' submission that it fails to adequately address the majority of the evidentiary concerns.

DISCUSSION AND ANALYSIS

[26] Before I address Meta's objections seriatim, I will comment further on the legal analysis engaged by this application.

[27] As noted above, many of the defendants' objections are to paragraphs of the Affidavits which simply refer to and append documents obtained from various internet websites. The objections are based both on hearsay and authentication principles.

[28] Hearsay is an out of court statement relied on by the tendering party for the truth of its contents: *R. v. Baldree*, 2013 SCC 35 at para. 1.

[29] The basic rule regarding authentication of documentary evidence is that the party tendering a document must prove it is what it purports to be as a *sine qua non* to admissibility. The most common form of proof is a witness who either created the document or can otherwise attest to its provenance, although threshold authenticity may also be established through circumstantial evidence: *British Columbia (Securities Commission) v. Alexander*, 2013 BCCA 111 at para. 65.

[30] With those principles in mind, I turn to the evidence in issue.

Lee Affidavit – Statista Reports

[31] The Statista Reports are referred to at paras. 3-5 of the Lee Affidavit and appended as Exhibits B-D. Ms. Lee deposes that Statista is a commercial research firm, and that Statista compiled the data in the reports. Ms. Lee obtained the reports from a website apparently hosted by Statista.

[32] In essence, the reports appear to be data concerning the number of users of Instagram, Facebook, and Meta, broken down into various age groups. If the plaintiffs are not tendering the reports for a hearsay purpose, then they have no evidentiary value. In the chart provided by the plaintiffs during oral submissions, the stated non-hearsay purpose is to provide some basis in fact that there is an identifiable class of two or more persons and that a class action is the preferable procedure. Clearly, in order to be probative on those issues, the reports would need to be received for the truth of their contents. Thus, there is no legitimate non-hearsay purpose offered by the plaintiffs.

[33] Equally clearly, the documents are not properly authenticated. Ms. Lee cannot speak to their authenticity; she merely collected them from the internet. There is no evidence from the maker of the reports or anyone else who can attest to their authenticity.

[34] Thus, paragraphs 3-5 and Exhibits B-D of the Lee Affidavit are inadmissible and are struck.

2024 BCSC 2081 (CanLII)

Lee Affidavit – WSJ Documents

[35] The WSJ Documents are a series of articles published by the Wall Street Journal, mainly in September 2021. Ms. Lee obtained the articles in March 2023 from the WSJ website.

2024 BCSC 2081 (CanLII)

[36] Paragraph 9 of the Lee Affidavit, under the heading “The Whistleblower Document Leaks and the Defendants’ Knowledge of Harm”, reads:

> In 2021, Frances Haugen, a former member of the Civic Integrity team employed by the Defendants, shared a cache of more than 1,300 internal documents of the Defendants (the **“Internal Documents”**) with certain newspapers, and eventually testified before the United States Congress.

[37] Thereafter, at para. 10, Ms. Lee appends Exhibits N-U, the WSJ articles, and in the case of Exhibit U, a partial transcript of an interview Ms. Haugen apparently gave to a WSJ reporter. The WSJ articles either refer to the leaked documents or purport to reproduce photographs of some of the leaked documents.

[38] The plaintiffs, as noted, concede that para. 9 of the Lee Affidavit is hearsay, yet nonetheless assert that it and the exhibits referred to at para. 10 are admissible. I do not agree.

[39] Exhibit N is a newspaper article which has no evidentiary value. The plaintiffs did not specifically set out a non-hearsay use for this article in their chart. I can conceive of none.

[40] Nor did the plaintiffs specifically address a non-hearsay use for Exhibit U, the transcript of an interview with Ms. Haugen. Clearly, the transcript is not admissible for the truth of Ms. Haugen’s statements contained therein. Again, I can conceive of no permissible non-hearsay purpose.

[41] Exhibits O-T are all WSJ articles said to be part of a compendium called “The Facebook Files”, published by the WSJ in September 2021. Each article contains a brief description stating that what follows are documents posted internally by

Facebook on an internal site at some earlier time. The balance of each article consists of photographs of documents said to be internal Facebook documents.

[42] Thus, the only evidence of authentication is classic hearsay. There is insufficient circumstantial evidence contained within the documents themselves to permit a conclusion that they are what they purport to be, i.e. the defendants' own documents.

[43] Nor can I accept the reason for admissibility suggested by the plaintiffs, namely that the impugned exhibits provide some basis in fact for concluding that there are probative documents in the defendants' possession which are capable of assisting in the resolution of the common issues.

[44] That submission fails for two reasons. First and foremost, it fails to address the fundamental issue of authentication. Rather, it assumes authenticity, the very matter that must be proved to give force to the balance of the submission.

[45] Secondly, I find the plaintiffs' reliance on *Tietz v. Affinor Growers Inc*., 2022 BCCA 307, to be inapt. That case was an application to commence a derivative action. At issue was an affidavit which appended a series of other affidavits that were filed in related proceedings. The motion judge excluded the evidence based on a hearsay objection.

[46] In *Tietz*, at paras. 105-107, Willcock J.A. held that the impugned affidavit evidence should have been admitted in the proceedings below. Justice Willcock noted that the application required the judge to determine whether there was a "reasonable possibility" that the secondary market claim would be resolved in the plaintiff's favour at trial, in accordance with s. 140.8(2)(b) of the *Securities Act*, R.S.B.C. 1996, c. 418. In support of the application, the plaintiff could show that there was probative evidence that "it will be able to obtain."

[47] The evidence was admissible not for the proof of its contents, but to show the availability of such evidence at a subsequent trial: see *Tietz* at para. 107. This

2024 BCSC 2081 (CanLII)

prospective approach to hearsay evidence was enabled by the specific requirements for a leave application under the *Securities Act*.

[48] The *Securities Act* is not applicable in the instant case. Here, at certification, the plaintiff must show a present, not prospective, basis in fact for the various certification criteria. That question must be decided on admissible evidence presently available to the plaintiffs.

2024 BCSC 2081 (CanLII)

[49] The entirety of paras. 9 and 10 of the Lee Affidavit and the attached exhibits are inadmissible, based both on hearsay principles and the plaintiffs' failure to authenticate documentary evidence.

Lee Affidavit – Gizmodo Documents

[50] The same reasoning and conclusion apply to the Gizmodo Documents. The Gizmodo Documents are referred to at para. 11 of the Lee Affidavit and appended as Exhibits V-TT. At para. 11, Ms. Lee states her understanding that Gizmodo, a "tech blog", published some of the internal documents disclosed by Ms. Haugen and that she (Ms. Lee) accessed the attached exhibits on a Gizmodo website.

[51] The attached exhibits appear to be photographs of computer screen captures, of varying visual quality.

[52] As with the WSJ documents, the Gizmodo Documents are wholly unauthenticated. Ms. Lee has no personal knowledge about any of the documents she retrieved from the third-party website. Her purported knowledge as to the nature of the third-party entity, Gizmodo, is unattributed hearsay, as is her understanding that the documents published by Gizmodo were "disclosed by Ms. Haugen."

[53] Thus, para. 11 of the Lee Affidavit is inadmissible, as are the attached exhibits.

Lee Affidavit – Axios Article

[54] The Axios article is referred to at para. 12 of the Lee Affidavit. Axios appears to be an online publication, and Ms. Lee obtained the two-page article from an Axios

webpage. The article purports to set out candid comments made to the author by Sean Parker, one of the founders of Facebook. Mr. Parker's comments are highly critical of the design strategies used by Facebook and their potential impact on children's brains.

2024 BCSC 2081 (CanLII)

[55] Clearly, if tendered for the truth of its contents, the article would be inadmissible for several reasons. It suffers from authentication and hearsay frailties, and it also contains speculative opinion evidence.

[56] The sole basis on which the plaintiffs say the article is admissible is to show some basis in fact that witnesses exist and will be available at trial to provide probative evidence on common issues related to the defendants' knowledge and whether their conduct was calculated to cause harm.

[57] I decline to admit the evidence for that purpose. That is not a basis for admissibility on a certification motion. The potential existence of probative evidence is not one of the certification criteria.

Lee Affidavit – 2021 U.S. Surgeon General Report

[58] Exhibit VV of the Lee Affidavit, referred to at para. 12, is an advisory issued by the Surgeon General of the United States in 2021, titled "Protecting Youth Mental Health." The main objections to admissibility centre on hearsay and inadmissible opinion evidence, either because it is unqualified opinion or expert opinion which is non-compliant with the *Supreme Court Civil Rules*.

[59] The plaintiffs justify admission on the premise that the report provides some basis in fact that probative evidence will be available at trial on common questions related to whether Meta's products are addictive and capable of causing disease and injury. Thus, the plaintiffs clearly advocate for substantive use of the hearsay and expert opinion contained within the report.

[60] If the report is not received for consideration of the substance of the opinions expressed, it has no probative value. Primarily on the basis that the report is expert opinion evidence that is non-compliant with the *Rules*, it is inadmissible.

Kendall Affidavit – California Complaint

[61] Jesse Kendall is a lawyer with one of the two law firms representing the plaintiffs. Exhibit A to his affidavit, referred to at para. 2, is a complaint made by 33 attorneys general against Meta in 2023, filed with the U.S. District Court, Northern District of California. Apparently, that complaint makes similar allegations to those being made by the plaintiffs in this litigation. It also refers to the documents released by Ms. Haugen to various media outlets.

[62] I agree with the defendants' submissions that the California Complaint is devoid of probative value on the certification motion.

[63] The basis on which the plaintiffs say it is probative is to assist with a determination of the question of preferable procedure, because (1) the complaint provides some basis in fact to conclude that the plaintiffs' claims are matters of broad public interest; and (2) it is relevant on the question of whether a class proceeding will advance the objective of behaviour modification.

[64] I cannot accede to the plaintiffs' submissions. I will permit them to lead evidence of the existence of the complaint, but the lengthy pleading is wholly unnecessary and it would only clutter up the evidentiary record. Unproven allegations in another jurisdiction cannot assist the plaintiffs to show "some basis in fact" for the matters at issue. The fact that 33 attorneys general have filed the complaint has some probative value. The details of the allegations have none. For that reason, para. 2 of the Kendall Affidavit and Exhibit A are inadmissible.

Kendall Affidavit – Bejar Materials

[65] According to Mr. Kendall, Arturo Bejar is a former senior employee of Facebook and "whistleblower" who testified before a Unites States Senate Subcommittee on November 7, 2023 and shared some documents with the

2024 BCSC 2081 (CanLII)

2024 BCSC 2081 (CanLII)

Subcommittee. On March 26, 2024, Mr. Kendall accessed various documents from two different websites associated with those hearings. Mr. Kendall has appended some of those documents as Exhibits B, C, and D of his affidavit.

[66] Exhibit B is purportedly a copy of Mr. Bejar's written testimony of November 7, 2023.

[67] Exhibit C is purportedly a copy of documents Mr. Bejar shared with United States Senator Richard Blumenthal, all of which were entered at the hearing.

[68] Exhibit D is purportedly a copy of an email sent by Mr. Bejar to Mark Zuckerberg, CEO of Meta on October 5, 2021, which Mr. Kendall says he accessed on the websites associated with the hearings.

[69] The entirety of the Bejar Materials suffer from the same hearsay and authentication problems that plagued the WSJ and Gizmodo exhibits. Mr. Kendall has no personal knowledge of any of these documents and cannot attest to their provenance. He, like Ms. Lee, merely performed internet searches and unearthed the documents from two websites.

[70] The plaintiffs make the same submission on admissibility as with the WSJ and Gizmodo documents. They submit that the Bejar Materials provide some basis in fact to conclude that probative documents are in the defendants' possession and will be available at trial to resolve various of the proposed common issues. For reasons previously set out in this judgment, I do not accept that submission. The Bejar Materials are inadmissible because they are not authenticated. Moreover, even if authenticity were established, they do not provide "some basis in fact" for any of the relevant certification criteria.

Kendall Affidavit – 2023 U.S. Surgeon General Report

[71] Exhibit E, referred to at para. 6 of Mr. Kendall's affidavit, is a 2023 report of the U.S. Surgeon General. The parties' submissions on the admissibility of this document were identical to those in respect of the 2021 Surgeon General Report.

Thus, I reach the same conclusion as for that document. For the reasons noted at paras. 58-60, para. 6 and the 2023 U.S. Surgeon General Report are inadmissible.

Kendall Affidavit – Zuckerberg Testimony Link

[72] At para. 7 of his affidavit, Mr. Kendall deposes that Mark Zuckerberg testified at a U.S. Judiciary Committee hearing on January 31, 2024. On March 26, 2024, Mr. Kendall accessed a link to a video recording of Mr. Zuckerberg's testimony, and the URL is embedded within the affidavit. Mr. Kendall then deposes as follows:

> Pursuant to Rule 22-2(9)(c) of the Supreme Court Civil Rules, a video of his testimony will be made available for the use of the court and for prior inspection by the parties to this proceeding.

[73] The defendants' sole objection to admissibility is failure to comply with the "rules governing admissibility of video recordings." Specifically, the defendants submit that Mr. Kendall does not, and cannot, adequately authenticate the recording. I agree that appears to be the case, at least at this juncture. However, I view this objection as being purely technical, and potentially capable of being cured in advance of the certification hearing. I decline to exclude the video based on lack of authentication.

[74] I will provide the plaintiffs with an opportunity to properly authenticate the recording by filing further affidavit material which addresses that issue. I view this potential evidence quite differently than much of the evidence I have heretofore excluded. The fact of Mr. Zuckerberg's testimony is in the realm of notorious fact of which I can take judicial notice. It is common knowledge that he testified before a U.S. Senate subcommittee earlier this year, even to those of us with no social media presence or access. Mr. Zuckerberg's testimony was widely reported by mainstream media.

[75] If an official recording of Mr. Zuckerberg's testimony exists, authentication should be easily achieved, and the plaintiffs should be given that opportunity. If admissibility remains contentious, I will hear further submissions either prior to or at the commencement of the certification hearing.

2024 BCSC 2081 (CanLII)

2024 BCSC 2081 (CanLII)

Kendall Affidavit – Tech Policy Article

[76] Exhibit F of Mr. Kendall's affidavit, described at para. 8, is an online article published by Tech Policy Press. The substance of the article purports to be a "lightly edited transcript" of Mr. Zuckerberg's testimony before the U.S. Senate Subcommittee. I agree with the defendants' submission that the failure to properly authenticate this document is fatal to its admissibility. It stands on a very different footing than the video of the testimony. As noted, the transcript is neither official nor complete.

[77] Apart from authentication issues, the edited transcript could not form substantive evidence independent from the video or audio recording of the testimony. If either video or audio is obtained and authenticated, any transcript would then simply serve as an evidentiary aid or adjunct to the official recording. In that regard, any accompanying transcript should be complete and verified in some fashion as to accuracy. The Tech Policy version fails on this score and is therefore inadmissible.

CONCLUSION

[78] For the foregoing reasons, I grant most of the relief sought in the defendants' NoA to strike various paragraphs of affidavits and accompanying exhibits from the certification record filed by the plaintiffs.

[79] The sole exception is the item listed at para. 1(b)(vi) of the NoA, the Zuckerberg Testimony Link. I will hear further submissions about that piece of evidence at a future hearing.

[80] The defendants have been substantially successful on this application, and my nascent view is that they are entitled to costs in the cause payable at the

conclusion of the proceedings. However, if either party wishes to make further submissions on costs, I will hear those submissions at a time convenient to all.

“Tammen J.”

2024 BCSC 2081 (CanLII)