

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *RateMDs Inc. v. Bleuler*,  
2025 BCCA 329

Date: 20250922  
Docket: CA49857

Between:

**RateMDs Inc., VerticalScope Holdings Inc. and  
VerticalScope Inc.**

Appellants/  
Respondents on Cross Appeal  
(Defendants)

And

**Ramona Bleuler**

Respondent/  
Appellant on Cross Appeal  
(Plaintiff)

Before: The Honourable Madam Justice Horsman  
The Honourable Justice Edelmann  
The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated  
May 3, 2024 (*Bleuler v. RateMDs Inc.*, 2024 BCSC 755,  
Vancouver Docket S224632).

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Place and Date of Hearing:

Vancouver, British Columbia  
May 29, 2025

Place and Date of Judgment:

Vancouver, British Columbia  
September 22, 2025

**Written Reasons by:**

The Honourable Madam Justice Horsman

**Concurred in by:**

The Honourable Justice Edlmann

The Honourable Justice MacNaughton

**Summary:**

*The chambers judge certified a class proceeding brought on behalf of health professionals who had a profile posted on RateMDs.com. The website contains the name and contact information of health professionals, ratings and reviews posted by third parties, and a comparative ranking of health professionals providing similar services in a region. The chambers judge found that the conditions for certification in s. 4(1) of the Class Proceedings Act were established, including that the respondent's pleading disclosed a cause of action. The pleaded claims were based on the torts of violation of privacy and unauthorized use of the name or portrait of another under provincial privacy legislation. The chambers judge declined to certify claims of Quebec residents because he found that the respondent had not adequately pleaded Quebec law. The appellants appealed the judge's decision to certify the action as a class proceeding, and the respondent cross appealed the exclusion of Quebec residents.*

*Held: Appeal allowed, cross appeal dismissed. The respondent's pleading did not disclose a cause of action for either of the privacy torts. There were no material facts pleaded to establish that the respondent, and class members, had a reasonable expectation of privacy in the information posted on RateMDs.com. The respondent relied on her right to control the use of her personal information, but that right was dependent on the existence of a reasonable expectation of privacy in the information itself. It was also plain and obvious that the respondent's claim based on the unauthorized use of her name was bound to fail because there were no material facts pleaded to establish that the appellants had commercially exploited the respondent's identity, and the identity of other class members, to promote sales. The certification order is set aside, and the action is dismissed. As such, it is unnecessary to address the cross appeal.*

**Reasons for Judgment of the Honourable Madam Justice Horsman:**

[1] The appellants appeal the certification of a class proceeding on behalf of health professionals in British Columbia, and certain other provinces, who have had a profile posted on the "RateMDs.com" website. Each of the appellants is alleged to play a role in the creation and operation of the website. The website contains profiles of health professionals from across Canada, including their name, contact information, ratings, reviews, and comments from anonymous third parties. The website solicits feedback from individuals about the health professionals. The health professionals are then ranked in comparison to other health professionals offering similar health services within the region based on those individual ratings and reviews.

[2] The respondent, Dr. Ramona Bleuler, is a physician who practices medicine in British Columbia. She alleges that she discovered that she had a profile on RateMDs.com, which contained a number of reviews. Dr. Bleuler commenced an action alleging that the appellants' conduct in operating RateMDs.com constituted a tort under s. 1 (violation of privacy) and s. 3(2) (unauthorized use of name or portrait of another) of the *Privacy Act*, R.S.B.C. 1996, c. 373 [*BC Privacy Act*]. She sought to certify a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], on behalf of health professionals in British Columbia, and other provinces with statutory privacy torts, who had a profile on RateMDs.com.

[3] The chambers judge certified the action as a class proceeding. He found it was not plain and obvious that the respondent's pleaded privacy claims could not succeed, thus the requirement in s. 4(1)(a) that the pleading disclose a cause of action was met. He also found that the respondent had established the remaining criteria for certification in s. 4(1) of the *CPA*.

[4] In my view, the judge erred in finding that the pleading disclosed a cause of action. The respondent's pleaded privacy torts may be novel, but they were novel claims that had no prospect of success. For this reason, I would allow the appeal and dismiss the action. In light of this conclusion, it is unnecessary for me to address the respondent's cross appeal from the judge's refusal to certify a claim on behalf of Quebec residents.

### **The pleadings**

[5] The respondent's current pleading is the Further Amended Notice of Civil Claim ("FANOCC"), filed on October 25, 2024. In the FANOCC, she pleads that the profile for a health professional on RateMDs.com includes:

- a. the name of the health professional, including any specialty;
- b. the contact information of the professional, including their website;
- c. a section of the profile for ratings, reviews, and/or comments about the health professional (the "**Reviews Section**") where third-parties can:

- i. anonymously rate the health professional on four criteria (Staff, Punctuality, Helpfulness, and Knowledge) on a scale of one to five;
  - ii. at the same time as providing the above ratings, also anonymously post comments about the health professional; and
  - iii. anonymously “like” the comments that have been posted about the health professional; and
- d. the relative ranking of the health professional compared to other health professionals within a specified geographical region.

[6] It is alleged that upon a class member discovering that a profile has been created for them on RateMDs.com, a class member can “claim” that profile, permitting them to respond to comments in the reviews section. A class member can also pay for a monthly subscription that allows them to select and hide a limited number of reviews.

[7] The FAN OCC further alleges that: (1) RateMDs.com is a profit-generating website that earns revenue for the appellants from a variety of sources, including paid subscriptions and third-party advertising; and (2) the appellants encourage or solicit health professionals to participate or advertise on the website even though such conduct is contrary to their ethical and professional obligations.

[8] The respondent pleads that the appellants knew or should have known that the following conduct on RateMDs.com would violate her privacy and the privacy of class members:

- a. the Defendants created and operate RateMDs.com for commercial gain,
- b. RateMDs.com creates a repository of and hosts the Profiles (some of which the Defendants themselves created from profiles on health regulators’ websites and the Defendants’ commercial usage of such websites is contrary to the terms and conditions for the health regulators’ websites),
- c. the Profiles contain reviews of the health professionals,
- d. the Defendants solicit reviews and rankings of the health professionals in a central repository, including reviews and rankings from anonymous and unverified internet users,

- e. the Defendants comparatively rank health professionals within geographical regions, and such rankings are the health professional's private information, and
- f. the Defendants do not allow health professionals to remove their Profiles.

[9] With respect to her own circumstances, the respondent pleads that in or about April 2021, she discovered that a profile on her had been created on RateMDs.com, which contained numerous reviews. She alleges that she did not authorize the appellants to create this profile, and did not consent to her name or personal information being used. She could not post responses to the reviews because she had not "claimed" her profile. The respondent asserts that she, like all class members, is entitled to be free from unwarranted or unwanted publicity, to withhold herself from public scrutiny, and to not have her name or other personal information used for commercial purposes without her consent. She pleads:

32. The Reviews Section [of RateMDs.com] contains anonymous reviews about the Plaintiff that are not true and affects her status as a health professional in the eyes of her current patients and prospective patients, and the Defendants do not permit the Plaintiff to exclude herself from the RateMDs.com website.

[10] The FANOCOC defines the class as all current or former health professionals in British Columbia, Saskatchewan, Manitoba, Quebec, and Newfoundland and Labrador who, during the class period, had a profile on RateMDs.com, excluding individuals who had a paid subscription. Each of these provinces have privacy legislation that is said to be analogous to the *BC Privacy Act*. The pleaded legislation for class members in Quebec is the *Civil Code of Québec*, C.Q.L.R. c. CCQ-1991, arts. 35–36, and the *Quebec Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12, art. 5. The relief sought in the FANOCOC includes a declaration that the appellants' conduct constitutes a tort under the *BC Privacy Act*, and privacy legislation in the other provinces included within the class definition.

[11] The appellants' conduct is alleged to be actionable under provincial privacy legislation in two respects.

[12] First, it is alleged that the appellants' conduct, as pleaded in the FANOCC, constitutes the tort of violation of privacy under s. 1 of the *BC Privacy Act* and the comparable privacy legislation in the other provinces. In this respect, the respondent pleads:

38. The Class Members all had the right to be left alone and also the right to be free from unwanted publicity. The Class Members have an expectation that the information they provided to regulators or patients would not be exploited by a for-profit company.

39. The Defendants' act of creating and operating the RateMDs.com website using the Class Members' information violates the Class Members' right to be left alone and the right to be free from unwarranted and/or unwanted publicity. The Defendants knew, or should have known, that the Defendants' creation and operation of the RateMDs.com website would violate the Class Members' right to be left alone and/or the right to be free from unwarranted and/or unwanted publicity.

[13] Second, it is alleged that the appellants' conduct constitutes an unauthorized use of the names of class members for commercial purposes, which is an actionable tort under s. 3(2) of the *BC Privacy Act*, and the analogous legislation in the other provinces. In this respect, the respondent pleads:

42. The RateMDs.com website included the Class Members' names for the purpose of RateMDs.com's for-profit venture that profits from the aggregating of the names of health professionals into a database, and making that database (including the names of those health professionals) available on RateMDs.com.

[14] The respondent alleges that the appellants have exploited the names of the class members for commercial gain, without their consent.

[15] In their Amended Response to Civil Claim, the appellants assert that the respondent has not pleaded a reasonable cause of action under either s. 1 or s. 3(2) of the *BC Privacy Act*. The appellants also plead reliance on the statutory defences and exceptions in the *BC Privacy Act*, including that the impugned publication fell within the statutory exceptions in s. 2(3), where the matter published: (1) is of public interest; (2) amounts to fair comment; and (3) is covered by qualified privilege.

**The chambers judgment: 2024 BCSC 755 (“RFJ”)**

[16] The judge reviewed the requirements for certification under ss. 4(1)(a)–(e) of the *CPA*, and the relevant case law discussing the requirements. No issue is taken on appeal with the judge’s description of the governing framework.

[17] The judge first addressed whether the FAN OCC disclosed a cause of action, as required by s. 4(1)(a) of the *CPA*.

[18] As reviewed by the judge, s. 1 of the *BC Privacy Act* provides that it is a tort, actionable without proof of damage, for a person “wilfully” and “without claim of right” to violate the privacy of another. The judge found the FAN OCC sufficiently pleaded that the appellants’ conduct was “wilful” and “without claim of right”. He then moved to the more contentious issue of whether the FAN OCC pleaded an arguable claim for the violation of the respondent’s privacy.

[19] The judge relied on *Insurance Corporation of British Columbia v. Ari*, 2023 BCCA 331 [*Ari*] for the propositions that: (1) a contextual approach is required to assess alleged privacy violations under the *BC Privacy Act*; and (2) the fact that the information at issue is publicly available is relevant to, but not determinative of, the privacy analysis.

[20] The judge found that part of the relevant context in assessing the alleged breach of privacy in this case was the provincial regulation of advertising by health professionals, which is said to restrict health professionals from using comparative advertising or featuring patient testimonials in their advertising. The judge reasoned that the provincial regulatory interest was part of the “lawful interests of others” consideration that properly informs whether the plaintiff’s expectation of privacy is reasonable in the circumstances: RFJ at para. 54. He stated:

[58] I find support for this view in the fact that health professionals are limited in their ability to respond to reviews on RateMDs.com that they consider to be a violation of privacy or damaging to their reputation without breaching patient confidentiality or violating restrictions on their advertising. The fact that they may flag reviews to be assessed by the defendants is insufficient. Health professionals may therefore find themselves in the difficult position of having to decide whether to participate on the website in a manner

that could violate their professional obligations or to simply allow reviews or ratings that are inaccurate, misleading, or not in the public interest to remain published and uncontested.

[21] The judge distinguished the decision of Justice Fenlon, as she then was, in *Niemela v. Malamas*, 2015 BCSC 1024, dismissing a lawyer’s claim for breach of privacy in relation to statements made about his professional conduct that could be found through Google searches. In explaining the distinguishing features of *Niemela*, the judge stated:

[60] ...The information at issue in *Niemela* was allegedly defamatory words published through snippets attached to URLs in Google search results. This case, on the other hand, concerns a website which solicits and creates a repository of reviews and rankings linked with specific health professionals, without their consent, in a manner that would violate professional regulatory bodies’ policies for advertising by those health professionals. The website is a commercial enterprise that derives its value from the public’s demand for this information, some of which the defendants admit to having obtained in violation of the terms of use of administrative regulatory bodies’ websites.

[61] The privacy interests alleged to be at stake in this case extend beyond the health professionals’ names, contact information and the manner in which they perform their professional activities. Rather, they include the plaintiff’s claimed privacy interest in not having all of that information solicited, collected, centralized and comparatively ranked against other health professionals by a commercial entity for the purpose of generating profit.

[Emphasis added.]

[22] Accordingly, the judge concluded it was not plain and obvious that the respondent did not have a reasonable expectation of privacy over the information published on RateMDs.com. Further, he concluded it was not plain and obvious at this stage of the proceeding that any of the statutory defences in s. 2(3) of the *BC Privacy Act* applied.

[23] The judge also held that the FAN OCC disclosed an arguable claim that the appellants breached s. 3(2) of the *BC Privacy Act*, which prohibits the use of a person’s name or portrait without their consent “for the purpose of advertising or promoting the sale of a service”. He found that the issues to be decided in relation to the cause of action under s. 3(2) of the *BC Privacy Act* were similar to the issues under s. 1, and that both causes of action required factual findings to resolve.

[24] The judge concluded that the privacy statutes in force in Saskatchewan, Manitoba, and Newfoundland and Labrador were sufficiently similar to the *BC Privacy Act* to support the existence of viable claims under those statutes as well. He reached a different conclusion in relation to the Quebec legislation. The judge interpreted *Campbell v. Capital One Financial Corporation*, 2022 BCSC 928, aff'd 2024 BCCA 253, to establish a rule that where a plaintiff seeks to include Quebec residents as part of a multi-jurisdictional class action, their pleadings must address the “distinctive nature of Quebec law”: RFJ at para. 80. He found that the claims under Quebec law in the FANOCC did not meet this requirement.

[25] The judge held that there was “some basis in fact” to support the remaining certification requirements in ss. 4(1)(b)–(e) of the *CPA*, specifically that: there is an identifiable class of two or more persons; the claims of the class members raise common issues; a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and Dr. Bleuler would fairly and adequately represent the interests of class members, other than residents of Quebec. As such, he certified the action as a class proceeding, with Quebec residents excluded from the class definition.

### **On appeal**

[26] The appellants raise two broad issues on appeal:

- a) the judge erred in finding that the FANOCC disclosed a cause of action under either ss. 1 or 3(2) of the *BC Privacy Act*, and
- b) the judge erred in finding there was sufficient commonality between class members to conclude that a class proceeding was the preferable procedure for resolving the claims.

[27] In her cross appeal, the respondent alleges that the judge erred in declining to certify the claims of class members in Quebec, and specifically that he erred in interpreting *Campbell* to impose a legal requirement with respect to the adequacy of pleadings in relation to Quebec law for the purpose of s. 4(1)(a) of the *CPA*.

[28] As I have indicated, I conclude that the judge erred in finding that the FANOCC disclosed a cause of action, as required by s. 4(1)(a) of the *CPA*, and I would allow the appeal on that basis. For this reason, it is unnecessary for me to address either the appellants' second issue (concerning the commonality issue) or the cross appeal (concerning the issue of Quebec residents).

### **Standard of review**

[29] In assessing whether a pleading meets the cause of action requirement in s. 4(1)(a) of the *CPA*, a chambers judge must assume the pleaded facts to be true and determine whether those facts arguably establish a cause of action. This is a question of law. Accordingly, a judge's determination of whether the notice of civil claim discloses a cause of action is subject to review on appeal on a standard of correctness: *Situmorang v. Google, LLC*, 2024 BCCA 9 at paras. 48–52.

### **The test under s. 4(1)(a) of the CPA**

[30] The standard to be applied under s. 4(1)(a) of the *CPA* is the same as on an application to strike a pleading under R. 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009: assuming the facts pleaded are true, is it plain and obvious that the plaintiff's claim cannot succeed? Another way of putting the test is whether the pleaded claims have "no reasonable prospect of success": *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 14 [*Babstock*]; *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198 at para. 56.

[31] In assessing the sufficiency of the pleading, the court should read the notice of civil claim generously. The novelty or complexity of the claim is not a basis to strike the pleading, unless the claim is plainly doomed to fail: *Situmorang* at para. 55; *Pearce* at para. 56.

[32] At the same time, the novelty of a claim is not a basis in itself to permit it to proceed to trial. As stated by the majority in *Babstock*:

[18] ...It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, *including novel claims*, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present "no legal justification for a protracted and expensive trial"

(*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 19). If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy (see e.g. *Imperial Tobacco; Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Syl Apps; Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261).

[33] See also *Canada (Attorney General) v. Hideaway II Ventures Ltd.*, 2023 BCCA 223 at para. 39.

**Issue 1: Does Dr. Bleuler’s claim of a privacy violation under s. 1 of the BC Privacy Act disclose a cause of action?**

**Section 1: the tort of violation of privacy**

[34] Section 1 of the *BC 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.

[35] This Court reviewed the scope of the right of action created by s. 1 of the *BC Privacy Act* in its recent decisions in *Ari* and *G.D. v. South Coast British Columbia Transportation Authority*, 2024 BCCA 252. It is unnecessary for me to repeat the Court’s detailed analysis in those cases. Instead, I will summarize the relevant principles as they relate to the issues under appeal in the present case.

[36] The privacy interests protected by the *BC Privacy Act* have quasi-constitutional status and must be interpreted broadly: *G.D.* at para. 74. As set out in s. 1(2) of the *BC Privacy Act*, a person is entitled to the nature and degree of privacy that is reasonable in the circumstances. In determining whether a plaintiff’s privacy has been violated, the court must consider “the full context of circumstances,

including the nature, incidence and occasion of the act or conduct, and the relationship between the parties”: *G.D.* at para. 117; *BC Privacy Act*, s. 1(3). Section 1(2) also requires that due regard must be given to the lawful interests of others: *Ari* at para. 86.

[37] An alleged violation of privacy cannot be analyzed “without understanding the scope of a privacy interest said to be violated”: *G.D.* at para. 116. As explained by Justice Griffin, writing for the Court in *G.D.*:

[119] The proper perspective to analyze whether conduct is a violation of privacy must therefore start from considering what is the privacy interest at issue. This requires considering the complaining person’s reasonable expectation of privacy in the circumstances of the case. This perspective incorporates elements that are both subjective (the person’s own circumstances and expectations), and objective (what is a “reasonable” expectation): [citations omitted].

[Emphasis added.]

[38] The Court in *G.D.* (at para. 142) suggested that where a privacy claim under the *BC Privacy Act* is based on informational privacy, the court can analyze the claim by asking these questions:

- (1) Did the plaintiff have a subjective expectation of privacy in the information, and what was it?
- (2) Was the plaintiff’s expectation of privacy reasonable in all the circumstances?
- (3) What was the act or conduct of the defendant said to violate that reasonable expectation of privacy?
- (4) Does any defence under the statute apply to the defendant’s act or conduct, such as a “claim of right”, or any of the defences in s. 2? If a defence applies, it may not be necessary to consider the next question and whether the conduct was a violation of privacy.
- (5) Was the defendant’s act or conduct (including omissions), a wilful violation of the plaintiff’s privacy, having in mind the reasonable expectation of privacy at issue in the case and considering the nature, incidence and occasion of the act or conduct and any domestic or other relationship between the parties and any other relevant circumstances?

[39] The Canadian legal and social environment, and the protection it affords to privacy, helps inform the content of a reasonable expectation of privacy under the

*BC Privacy Act. Ari* at para. 94. For this reason, the case law interpreting the scope of the protection of a reasonable expectation of privacy under s. 8 of the *Canadian Charter of Rights and Freedoms* [*Charter*] may be helpful, by analogy, in assessing an alleged violation of privacy under s. 1 of the *BC Privacy Act*. Cases addressing alleged breaches of s. 8 of the *Charter* and alleged torts under the *BC Privacy Act* “are not separate and mutually exclusive silos of analysis”: *Ari* at para. 74. In *Ari*, for example, this Court drew on the Supreme Court of Canada’s s. 8 *Charter* jurisprudence in the area of informational privacy in analyzing a claim under s. 1 of the *BC Privacy Act*.

[40] Similarly, an allegation that a defendant has failed to meet its obligations to protect privacy under its own policies or under a statute such as the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, is relevant to the claim for breach of privacy under the *BC Privacy Act. G.D.* at para. 160; *Ari* at paras. 93–94.

### **Positions of the parties**

#### ***The appellants***

[41] The appellants argue the judge erred in failing to understand the diametrically inconsistent nature of the respondent’s claim. The respondent insists the content of the reviews posted on RateMDs.com is not relevant to the alleged privacy violation, while at the same time she pleads that the reviews about her: contained private information; were unverified and inaccurate; and affected her status. The appellants contend that the positions the respondent has taken over time imply that the content of the reviews on RateMDs.com is a significant part of the privacy analysis, even though she maintains on appeal that the content is not material. Further, if the content of the reviews is significant to the privacy analysis, then there is no commonality to the claims of class members.

[42] The appellants submit that even though it is essential to the privacy analysis, the judge failed to address a material element of the privacy torts: namely, the nature of the personal or private information over which the respondent claims an

expectation of privacy. Instead, the judge accepted a bare plea of a “right to be left alone”—alternatively characterized by the respondent as a right to control the use of her personal information—without analyzing whether the asserted right related to information that could be considered private.

[43] The appellants acknowledge that there could conceivably be a privacy claim where a particular review contains personal information over which a class member has a reasonable expectation of privacy. However, that is not the nature of the claim advanced here. Here, the respondent maintains that the content of the reviews is irrelevant. The appellants say that health professionals do not have a reasonable expectation that their personal information will not be posted on RateMDs.com. Relying on *Niemela* at para. 45, they say there is no reasonable expectation of privacy in how a person performs their professional work because work is in general a public aspect of a person’s life. The appellants argue that the judge failed to distinguish *Niemela* adequately even though it was binding on him as a matter of *stare decisis*.

[44] Further, the appellants say that the judge failed to distinguish, on any principled basis, the posting of a single review of a health professional on Google—which the respondent acknowledges is not a breach of privacy—from the compilation of reviews and development of a ranking system based on those reviews. Relatedly, the appellants say the judge wrongly relied on the policy rationale for regulating health professionals as a basis on which a right to privacy might be implicated by the operation of RateMDs.com. The appellants say that the objectives of the regulation are irrelevant to the privacy analysis.

[45] The appellants also argue that the judge erred in finding it was not plain and obvious that the statutory exceptions in s. 2(3) of the *BC Privacy Act* apply in this case. In particular, the appellants emphasize the public interest exception in s. 2(3)(a) of the *BC Privacy Act*. Contrary to the judge’s finding that the applicability of the public interest exception required a trial to resolve, the appellants argue that the question of whether a publication is a matter of public interest is a question of law. The appellants argue that it is plain and obvious that Internet reviews of

individuals offering professional services to the public are a matter of public interest, and that this has been recognized by the courts and the Office of the Privacy Commissioner of Canada (the “OPC”).

***The respondent***

[46] The respondent contends that the appellants’ submissions misconstrue the nature of the claim she is advancing. She says that her case is focussed on privacy as control; that is, the right of an individual to determine for themselves when, how and to what extent information about them is communicated. Relying on *Ari*, she argues that privacy rights do not vanish once information is in the public domain—they simply take on a different form. While information about how a professional performs their work may not give rise to a reasonable expectation of privacy in the sense of secrecy, the right to privacy may nonetheless protect certain reasonable expectations about how and by whom that information may be used.

[47] Accordingly, the respondent says the appellants’ arguments are based on the flawed premise that it is the content of the reviews posted on RateMDs.com that determine the right to privacy, rather than control over the use of the information. While the content of the reviews may provide context for the broader privacy analysis, her pleaded causes of action do not turn on the content. Rather, her case is that the breach of privacy consists of the appellants’ use of health professionals’ personal information without their consent in order to profit from a website that aggregates patient reviews and establishes a ranking system. The respondent says that *Niemela* is distinguishable because it concerned a client’s disclosure of information about a professional service, as opposed to the appellants’ aggregate compilation of reviews of health professionals that is driven by a profit motive.

[48] The respondent maintains that denying a person’s right to control the use at issue in this case is legally capable of constituting a privacy violation. She accepts that nobody can claim absolute control over where, when, how, and for what purposes information about them is used or disclosed. However, she says where the tortious conduct involves the use of information, then the question should be framed

in terms of whether the alleged tortious use should reasonably be expected to require consent.

[49] The respondent argues that the judge was also correct to leave consideration of the statutory defences, including the question of whether the appellants' conduct was in the public interest, to trial. She says that the cases relied upon by the appellants in support of the proposition that whether a publication is in the public interest is a question of law are distinguishable because they were decided in the context of claims for defamation.

### Analysis

[50] As a starting point, it is important to make clear what this case is not about. This case is not about specific reviews published on RateMDs.com that may be inaccurate, defamatory, or contain information about a health professional that is subject to a reasonable expectation of privacy. A health professional may have a viable cause of action, including for the tort of violation of privacy under s. 1 of the *BC Privacy Act*, arising from the content of particular reviews. The respondent's claim, by contrast, depends on the proposition that the very act of posting (and hosting) reviews on RateMDs, without consideration of the content of those reviews, violates the privacy of health professionals in the class.

[51] It cannot be seriously disputed that the respondent is advancing a novel privacy claim. The point of dispute between the parties is whether it is a novel claim that stands an arguable chance of success in light of the developing law of privacy, or whether it is a novel claim that is doomed to fail. The respondent argues that her pleaded claims are simply an extension of established law that recognizes the right of an individual to control the use of their personal information as an important component of the right to privacy. She relies heavily on *Ari* as an analogous precedent.

[52] For the reasons that follow, I do not agree that the respondent's pleading advances a viable claim for a violation of privacy, or that her claims are simply an extension of established law. Rather, the respondent advances a claim with no

support in the case law: a right to control the use of personal information without consideration of the content of the information or whether it can properly be considered to give rise to a reasonable expectation of privacy. To explain my conclusion, it is necessary to review the case law relied on by the respondent. She places particular emphasis on the Supreme Court of Canada's s. 8 *Charter* jurisprudence and this Court's decision in *Ari* that drew on *Charter* jurisprudence in analyzing a tort claim under the *BC Privacy Act*. These cases confirm that the right to exercise control over the use of personal information arises only in respect of information that can properly be considered to give rise to a reasonable expectation of privacy.

### ***Privacy under s. 8 of the Charter***

[53] Section 8 of the *Charter* provides that everyone “has the right to be secure against unreasonable search or seizure”. The Supreme Court of Canada has adopted a purposive approach to s. 8, informed by its underlying values of dignity, integrity and autonomy, in which privacy is the “dominant organizing principle”: *R. v. Tessling*, 2004 SCC 67 at paras. 18–19. Section 8 protects individuals against unjustified intrusions on their reasonable expectation of privacy. The provision applies “where a person has a reasonable privacy interest in the object or subject matter of the state action and the information to which it gives access”: *R. v. Cole*, 2012 SCC 53 at para. 34. To claim the protection of s. 8, a person must have a subjective expectation of privacy, and that expectation must be objectively reasonable. In assessing whether a claimant had a reasonable expectation of privacy, the court considers the “totality of the circumstances”: *Tessling* at para. 19.

[54] The Supreme Court of Canada has identified three broad types of privacy interests protected by s. 8: personal privacy, territorial privacy, and informational privacy. While these categories may overlap, they have proven helpful in identifying the privacy interests at stake in a particular case: *R. v. Spencer*, 2014 SCC 43. It is informational privacy that is at stake in this appeal.

[55] Informational privacy has been defined as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent

information about them is communicated to others”: *Tessling* at para. 23, quoting A.F. Westin, *Privacy and Freedom* (1970) at p. 7; *Spencer* at para. 44. A number of Supreme Court of Canada cases have defined the scope of informational privacy.

[56] *R. v. Dyment*, [1988] 2 S.C.R. 417, 1988 CanLII 10, is an important early judgment of the Supreme Court of Canada addressing informational privacy. The facts of *Dyment* provide an example of informational privacy engaging information of the most intimate and personal nature. A doctor at a hospital took a blood sample for medical purposes without Mr. Dyment’s knowledge or consent as he was unconscious at the time. The doctor gave the sample to a police officer who had attended at the scene of Mr. Dyment’s car accident. An analysis of the blood sample was later used to charge and convict Mr. Dyment of impaired driving. The issue was whether the police taking the blood sample amounted to a seizure within the meaning of s. 8 of the *Charter*. The Crown argued the police had not demanded or seized the sample, but rather the doctor provided it voluntarily.

[57] Justice La Forest, writing for the majority in *Dyment*, explained that a reasonable expectation of privacy may exist in relation to information. The concept of informational privacy “derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit”: at 429, quoting *Privacy and Computers*, the Report of the Task Force established by the Department of Communications/Department of Justice (1972) at p. 13. Where information is private, the right to privacy may include an ability to exercise some control over how the information is used. Justice La Forest explained (at 429–30):

In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained; see, for example, the *Privacy Act*, S.C. 1980-81-82-83, c. 111.

[58] Justice La Forest observed that even if Mr. Dymont had given consent to the taking of the blood sample, the consent would have been restricted to doing so for medical purposes. Justice La Forest concluded that the use of a person's body without consent to obtain information "invades an area of personal privacy essential to the maintenance of his human dignity": at 432. Justice La Forest described the blood sample as "intimately personal" and "information of a most intimate character": at 432–33. When the police officer took the sample from the doctor, "he took something that the doctor held for medical purposes only, subject to a well-founded expectation that it was to be kept private": at 434. The action of the police officer in taking the sample therefore violated Mr. Dymont's right to privacy and constituted a seizure within the meaning of s. 8 of the *Charter*.

[59] In *R. v. Plant*, [1993] 3 S.C.R. 281, 1993 CanLII 70, the Court again considered informational privacy. *Plant* involved a warrantless police review of publicly accessible computerized records of electric utility consumption at residential properties. The police used the information they obtained in support of a search warrant of a residence suspected to be a marijuana grow operation. The Court had to determine, among other issues, whether the police review of the electrical consumption records constituted a search or seizure under s. 8 of the *Charter*. This, in turn, raised the question of whether the accused had a reasonable expectation of privacy over the records.

[60] *Plant* confirmed that s. 8 of the *Charter* protected a person's reasonable expectation of privacy where the information sought by the state is "personal and confidential in nature". Justice Sopinka, for the majority, stated (at 293):

...In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

[61] The majority in *Plant* concluded that the computer records in issue, while revealing a pattern of electricity consumption in the residence "cannot reasonably be said to reveal intimate details of the appellant's life since electricity consumption

reveals very little about the personal lifestyle or private decisions of the occupant of the residence”: at 293. Furthermore, the records were accessible to the public, the relationship between the appellant and the electricity service provider could not be viewed as confidential, and the police did not intrude into any private space in accessing the information. The Court concluded that the appellant did not have a reasonable expectation of privacy in the electricity records that outweighed the state interest in enforcing laws relating to narcotics offences, and therefore s. 8 of the *Charter* was not engaged.

[62] In *Tessling*, the Court clarified that the reference in *Plant* to “intimate details of the lifestyle and personal choices” is illustrative, and not exhaustive, of the type of information that may be protected by s. 8: at para. 26. However, “*Plant* clearly establishes that not all information an individual may wish to keep confidential necessarily enjoys s. 8 protection”: at para. 26.

[63] The question in *Tessling* was whether the conduct of the police in using an airplane equipped with a thermal imaging device, that showed heat radiating from a building, infringed the accused’s s. 8 *Charter* rights. The Court concluded that this was not information in which the accused had a reasonable expectation of privacy because the thermal imaging “offers no insight into [the accused’s] private life, and reveals nothing of [the accused’s] biographical core of personal information”: at para. 63. The disclosure of the information did not affect the accused’s dignity, integrity, and autonomy.

[64] Shifting to a different context, in *Spencer*, the Court addressed informational privacy arising from a police request to an Internet service provider to provide the name and address of a subscriber associated with an individual Internet Protocol (“IP”) address. Justice Cromwell, for the Court, noted that while informational privacy is often equated with secrecy or confidentiality, it also includes the wider concepts of control and anonymity. The understanding of informational privacy as control, as observed in *Dyment*, “derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit”. The concept of privacy as anonymity may protect an individual’s

privacy in public spaces, including the Internet, where a person may engage in public conduct while still maintaining a reasonable expectation that their anonymity will be preserved: *Spencer* at paras. 41–48.

[65] In the circumstances of *Spencer*, the police request to link a particular IP address to subscriber information was in effect a request to link “a specific person...to specific online activities”: at para. 50. The Court found that this type of request engaged the anonymity aspect of informational privacy by attempting to link the suspect to their “anonymously undertaken online activities”, which have been recognized by the Court in other circumstances as engaging a significant privacy interest: at para. 50. An accused’s expectation of privacy in these circumstances is objectively reasonable because the disclosure of the requested information to the police will often amount to “the identification of a user with intimate or sensitive activities being carried out online, usually on the understanding that these activities would be anonymous”: at para. 66. As such, a police request that an Internet service provider disclose such information voluntarily constituted a search under s. 8 of the *Charter*.

[66] Subsequent decisions of the Supreme Court of Canada concerning informational privacy interests under s. 8 of the *Charter* have built on *Dyment*, *Plant*, and *Spencer*, including *R. v. Marakah*, 2017 SCC 59 and *R. v. Bykovets*, 2024 SCC 6.

[67] In *Marakah*, the Court held that the accused had a reasonable expectation of privacy in text messages he sent to his co-accused. The Court described text messaging as a private means of communication that “broadcasts a wealth of personal information capable of revealing personal and core biographical information about the participants in the conversation”: at para. 33.

[68] In *Bykovets*, the Court held that an IP address attracts a reasonable expectation of privacy under s. 8 of the *Charter*. The Court concluded that an IP address may “betray an intensely private array of information, touching directly on

the intimate details of the lifestyle and personal choices of an individual user”: at para. 70.

[69] For present purposes, it is sufficient to observe that *Marakah* and *Bykovets* do not override the basic principles that: (1) a person may have a reasonable expectation of privacy in relation to information that is “personal and confidential” (per *Plant*), such as information that tends to reveal intimate details of their lifestyle and personal choices; and (2) the right to informational privacy under s. 8 of the *Charter* may allow a person a degree of control over the use of such personal and confidential information. Confidential in this sense is not binary, as either confidential from all or from no one. A right to informational privacy may include an ability to control who receives the information, but the fact that the person has allowed it to be disclosed to some persons does not mean the person has lost all right to privacy in the information. The s. 8 *Charter* jurisprudence does not, however, establish that an individual has the right to control the use of any information they wish to remain confidential. For example, and as illustrated by *Plant* and *Tessling*, where information is publicly accessible and offers no insight into a person’s “biographical core”, the information may not attract a reasonable expectation of privacy.

### ***The Court of Appeal judgment in Ari***

[70] The respondent relies heavily on the judgment of this Court in *Ari* to support the viability of her claim for a violation of privacy. Indeed, she argues that this appeal can be dismissed on a “straightforward application” of *Ari*. To assess whether this is so, it is necessary to review *Ari* in greater detail.

[71] *Ari* concerned an appeal from a trial judge’s finding that ICBC was vicariously liable for its employee’s commission of the tort of violation privacy under s. 1 of the *BC Privacy Act*. ICBC acquires and retains personal information from drivers in British Columbia, including: their names, residential addresses and driver’s licence numbers; vehicle descriptions and vehicle identification numbers; licence plate numbers; and claims histories. An ICBC claims adjuster accessed, and sold, the private information of 78 customers by running their licence plate numbers. The information was ultimately used to target some of the customers in acts of arson,

shootings, and vandalism. The court certified a class action arising from these events.

[72] The trial judge in *Ari* found that the personal information provided by the plaintiff and class members to ICBC, which included residential addresses, attracted a reasonable expectation of privacy. The reasonable expectation was that ICBC would only use the information for legitimate business purposes and would not make it available to third parties in the absence of a compelling lawful interest.

[73] ICBC appealed the finding of liability, arguing, among other things, that the information accessed by the claims adjuster was contact information that was publicly available and, therefore, there could be no reasonable expectation of privacy over it. Relatedly, ICBC argued that the judge erred in considering ICBC's internal policies in finding a reasonable expectation of privacy, and also in relying on s. 8 *Charter* jurisprudence.

[74] On the appeal in *Ari*, this Court rejected ICBC's various arguments. First, the Court held that the trial judge was entitled to consider ICBC's internal policies, which had been put in issue by ICBC's own pleadings and evidence. Those policies provided that ICBC employees were responsible for protecting the privacy of customers' personal information. Second, the Court held that the trial judge did not err in referring to s. 8 *Charter* cases, including *Spencer*, in considering whether ICBC had committed the tort of violation of privacy under the *BC Privacy Act*. The Court held that the consideration of the protection of privacy in other contexts may be helpful by analogy in determining claims under the *BC Privacy Act*.

[75] The Court in *Ari* reviewed the case law and academic literature concerning the notion of an individual's ability to control the use of information as an aspect of the right to privacy. The Court found, based on these authorities, that the assessment of a claim that there is a reasonable expectation of privacy must consider not only the information that is subject to the claim of privacy, but also the reasonably expected uses of the information and the relationship between the party

claiming the privacy interest and the alleged violator of that interest. The Court stated:

[84] In focusing solely on the *type* of information at issue in this case, ICBC overlooks that the reasonable expectation of privacy is concerned also with the *use of the information* in the circumstances of the case. One use of personal information might not be an invasion of privacy; another use of the same information might be. Further, an accused might succeed in showing that the accused's s. 8 *Charter* right to privacy was violated, but might not succeed in a civil claim for breach of privacy under the *Privacy Act*, and *vice versa*. It all depends on the circumstances including the use of the information.

...

[90] I also do not accept the repeated implication in ICBC's argument that the information at issue in this case has no inherent privacy interest as it is publicly available information. This argument begs the question: if the information linking a license plate to a person's name and address was not private because it was available publicly, why did someone need to pay ICBC's employee in order to obtain that information? ICBC's proposition would surprise many people including those who park their motor vehicles at the airport to go on holiday.

[76] It was uncontested in *Ari* that drivers were required to provide personal information to ICBC in order to obtain a driver's licence and vehicle registration. The wrongful use of the information by the ICBC employee was in linking a list of vehicle licence plates to the individual drivers' residential addresses and then providing the information to a malicious person. The Court agreed with the trial judge's conclusion that a reasonable person providing that information would expect ICBC to use it only for purposes relating to its statutory functions.

[77] Before turning to the question of the application of *Ari* to the pleaded facts in the present case, I will first review another authority relied on by both parties: the report of the OPC concerning RateMDs.com.

### ***The OPC report***

[78] In their submissions on appeal both the appellants and the respondent referred to the OPC's report on a complaint under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [*PIPEDA*], regarding the operation of RateMDs.com: PIPEDA Findings #2020-002 [the "OPC Report"].

*PIPEDA* applies to organizations in their collection and use of personal information in the course of commercial activities. Both parties contend that the OPC Report supports their respective positions. A statute such as *PIPEDA* may form part of the relevant context in assessing an alleged violation of privacy under the *BC Privacy Act*. *G.D.* at para. 160; *Ari* at paras. 93–94. Therefore, it is useful to review the findings in the OPC Report.

[79] The complainant was a dentist practising in British Columbia who claimed that RateMDs Inc. (“RateMDs”) placed her personal information on its website for lucrative purposes without her consent. This was said to contravene Principle 4.3 of Schedule 1 to *PIPEDA*, which provides that the knowledge and consent of the individual is generally required for “the collection, use, or disclosure of personal information, except where inappropriate”. In its description of the complaint details, the OPC explained that the RateMDs page for the complainant listed her name, area of practice, the name and address of her clinic, and several anonymous reviews and ratings regarding her practice. The reviews were both positive and negative. The content of the reviews included commentary about her business and staff, and views about her character and patients’ experiences with her as a dentist.

[80] For the purpose of addressing the complaint, the OPC identified two categories of information in issue: (1) the complainant’s business contact details, and (2) the reviews and ratings on the website from RateMDs’ users about their experiences with her work.

[81] The OPC concluded that the first category of information—business contact details—was publicly available within the meaning of the *Regulations Specifying Publicly Available Information*, SOR 2001-7, and therefore RateMDs did not require the complainant’s consent to collect, use, and disclose it. Specifically, the complainant’s business contact information, including her name and profession, was publicly available through online professional or business directories and the website of her governing regulatory body (the College of Dental Surgeons of British Columbia).

[82] Regarding the second category of information—the reviews and ratings—the OPC noted that the definition of “personal information” under the *PIPEDA* is broad enough to include the views or opinions expressed by others about an individual, and information about an individual in relation to their employment or profession. As to the circumstances of this particular complaint, the OPC stated:

49. The provision of reviews is a feature of many ratings sites offered on the Internet for goods and services. In this case, reviews and ratings that are posted by users on a health professional’s profile page often contain information that is reflective of the character or professional competency of the health professional. In the Complainant’s case, comments referring to her personality or her conduct directly relate to her reputation, character and proficiency at her profession. We are therefore satisfied that the reviews and ratings of her constitute the Complainant’s personal information.

[Emphasis added.]

[83] The OPC found that the determination of the complaint was complicated by the fact that other individuals had posted the ratings and reviews of the complainant. As the reviews and ratings reflected the users’ views and opinions with respect to the complainant and their experiences with her, they were also the personal information of the users who posted them. That being the case, Principle 4.3 of the Schedule to *PIPEDA* appeared to require the consent of both parties to publish these reviews and ratings, which could not realistically be obtained given the conflicting interests. The OPC observed that while *PIPEDA* did not “provide a ready-made solution for this type of conflict”, it was ultimately necessarily to undertake a balancing exercise:

57. ...[W]e must consider the consent of patients who have decided to post their personal experiences on RateMDs and the extent to which the posting of that information serves the public interest, as well as the interests of the Complainant, who did not consent to the publication of views about her and whose reputation can be negatively (or positively) affected by the reviews and ratings on the website.

58. Ultimately, the ratings and reviews, to the extent they represent the opinions and views of patients, generally serve a legitimate public interest. On the RateMDs website, comments relate to health professionals who provide services to the public. Having these reviews and ratings available serves the public by informing their decisions about whether or not to engage with certain health professionals.

[84] The OPC reasoned if the complainant refused to consent to the publication of the reviews and ratings, this would mean the interests of the patients would not be respected and the broader public benefits of the website would be negated. Accordingly, the OPC concluded that on a balancing of the interests, the complainant's assertion that her consent should be required for RateMDs to post reviews and rankings about her was not well-founded.

[85] While dismissing the complaint as it related to consent, the OPC noted that the complainant still had a reasonable expectation of privacy in these circumstances, "including an interest in protecting her reputation and capacity to earn a livelihood": at para. 60. As such, *PIPEDA* required that RateMDs ensure the accuracy of information about health professionals on its website, and allow health professionals to challenge, and have corrected, inaccurate information about them. While this was not a specific aspect of the complaint, the OPC clarified that RateMDs should provide to the complainants, and other health professionals on its site, a fair and accessible process by which to challenge the accuracy and completeness of the published information. In the absence of evidence that the complainant's RateMDs profile contained inaccurate, incomplete, or out-of-date information, the OPC declined to opine further on the fairness of the RateMDs process for correcting reviews.

[86] The OPC commented on two further aspects of the operation of the RateMDs website. First, the OPC expressed concern about the transparency of RateMDs' process for alerting health professionals that they may request a correction or amendment to information about themselves. RateMDs agreed to implement language in its Terms of Use and Frequently Asked Questions to address the lack of transparency. Second, the OPC expressed concern about RateMDs' policy of allowing health professionals who were subscribers to hide up to three negative reviews from their profile. RateMDs agreed to discontinue this practice.

### Discussion

[87] To address the question of whether the respondent has pleaded a viable claim that the appellants' conduct violated her privacy, it is useful to clarify what that claim consists of.

[88] The respondent's theory is that RateMDs.com violates her right, and the right of class members, "to be left alone" and to be "free from unwanted publicity". She says that her reasonable expectation of privacy is not dependent on the content of the reviews, rather it is the appellants' use of her information without her consent that grounds the violation of privacy. Health professionals fall within the class definition if they had a profile on RateMDs.com during the class period, and did not have a paid subscription, regardless of the content of the information in the reviews posted about them. On this theory, by way of illustration, it would be a violation of privacy if a health professional had a profile on RateMDs.com with a single review that stated:

Dr. Jones's office is conveniently located, and their staff are pleasant.

[89] I am not persuaded that a claim for a violation of privacy can be advanced without considering the information that is said to be covered by a reasonable expectation of privacy. The precondition to an individual's right to control the use of their personal information is that the information itself attracts a reasonable expectation of privacy in the context of which the breach of privacy is said to arise. The Supreme Court of Canada's s. 8 *Charter* jurisprudence does not support the proposition that a reasonable expectation of privacy arises any time an individual wishes to control the use of their personal information. Instead, the right to exercise control over the use of personal information is a consequence of an individual's privacy interest in the information.

[90] The respondent's argument essentially turns the right to privacy on its head by treating the respondent's refusal to consent to the appellants' use of her personal information as creating a right to privacy. However, without some consideration of the content of the information that the respondent asserts is private, her analysis is

incomplete. “Simply put, defining privacy as a claim to control information relating to one’s self does little to help us know what information is in fact private”: Hunt, Chris D.L. “*Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for the Development of Canada’s Fledgling Privacy Tort*” (2011), 37 Queen’s L.J. 167 at 187.

[91] I also do not agree that the judgment of this Court in *Ari* assists the respondent in her theory of the tort of violation of privacy. The respondent interprets *Ari* as recognizing a “right to control the use of personal information, and the degree to which it is disclosed”. This is an overly broad reading of *Ari*. Certainly, *Ari* recognized that a reasonable expectation of privacy may include the right to exercise control over the use of personal information. However, *Ari* does not hold that the right to control the use of information can independently establish a violation of privacy without considering the private nature of the information. In *Ari*, this Court found that it was “not just the nature of the personal information that is relevant, but also the context of the nature and degree of disclosure of the information”: at para. 88, emphasis added. The Court upheld the trial judge’s conclusion that class members had a reasonable expectation of privacy because they were compelled to provide personal information to ICBC; ICBC’s policies committed it to protect the confidentiality of the information; and the claims adjuster was able to use the ICBC database to link licence plates with personal information that led to targeted criminal acts against customers. In other words, the Court in *Ari* upheld the judge’s finding that the information that was disclosed by ICBC was private in this context, even though some of the information could be publicly accessed by other means.

[92] In its later decision in *G.D.*, this Court confirmed that the analysis of whether an alleged violation of privacy has occurred must start from a consideration of “the privacy interest in issue”: at para. 119. The Court in *G.D.* suggested that the first issue a court should consider in analyzing an alleged breach of informational privacy is the existence and nature of a plaintiff’s expectation of privacy in the information. This issue was not addressed by the chambers judge in this case.

***Does the information attract a reasonable expectation of privacy?***

[93] In considering the respondent's reasonable expectation of privacy in the information published on RateMDs.com, I will return to the respondent's claim as pleaded in the FAN OCC. She pleads that the profile of each health professional on RateMDs.com includes: (1) the name of the health care professional, including any speciality; (2) the contact details of the professional, including their website; (3) a section for ratings, reviews, and comments about the health professional; and (4) the relative ranking of the health professional as compared to other health professionals.

[94] The respondent does not plead that health professionals have an expectation of privacy in their name and business contact information in this context. The respondent, and each member of the class, offer a professional service to the public, and their name and business contact information is readily available online, including through the website of their professional governing bodies (in this jurisdiction, the College of Physicians and Surgeons of British Columbia). As the chambers judge noted, the respondent conceded that individual patient reviews of health professionals that are posted on the Internet do not violate her privacy: RFJ at para. 11. This is an understandable concession given the public nature of the respondent's professional life.

[95] The respondent also does not plead that she has an expectation of privacy in the content of the reviews about her that are posted on RateMDs.com. Indeed, as I have noted, on her theory of this case the content of the reviews is immaterial. The OPC Report, although not determinative, provides some support for the argument that a health professional has a reasonable expectation of privacy in relation to opinions expressed by patients about their professional services. However, the OPC's analysis was content specific. The complainant's reasonable expectation of privacy in that case related to the possibility that negative reviews could impact her reputation and capacity to earn a living. Furthermore, and in any event, the respondent's concession that individual patient reviews posted on the Internet do not violate her privacy undermined any argument that the reviews on RateMDs.com violate the privacy of health professionals regardless of their content.

[96] The judge cited two bases for distinguishing the operation of RateMD.com from individual patient reviews.

[97] First, he reasoned that the operation of RateMDs.com could violate provincial regulatory restrictions on advertising by health professionals, who may be prohibited on their own from advertising or ranking themselves against other professionals. The judge cited *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, 1990 CanLII 121, for the proposition that the two main objectives of such regulation are: (1) the maintenance of a high standard of professionalism in the profession; and (2) the protection of the public from misleading advertising. The judge stated, without elaboration, that the “underlying policy interests in regulating advertising by health professionals are similar to the issues raised here”: RFJ at para. 39. The judge reasoned that the province’s “legitimate policy interest in regulating advertising by health professionals” fell within the concept of “lawful interests of others” under s. 1(2) of the *BC Privacy Act* and thus could inform the issue of whether the respondent’s expectation of privacy is reasonable: RFJ at para. 54.

[98] I do not agree that the provincial interest in regulating advertising by health professionals properly informs the analysis under s. 1 of the *BC Privacy Act*. The reference to “lawful interest of others” under s. 1(2) of the *BC Privacy Act* is primarily directed at ensuring that a defendant’s lawful interests in the information, and perhaps the defendant’s obligations to others with lawful interests in the information, are considered in the assessment of a plaintiff’s reasonable expectation of privacy. The interests of third parties might be relevant to this balancing, for example the interests of patients in publishing information on RateMDs.com, and also having access to the information published on the website. However, the interest of provincial regulators in restricting advertising by health professionals has no obvious connection to the respondent’s asserted privacy interest. The regulatory concern is to protect the public, not to protect the privacy of health professionals. That regulatory interest has nothing to do with the plaintiff’s reasonable expectation of privacy.

[99] The second basis the judge identified for distinguishing single patient reviews from RateMDs.com is the aggregate nature of the presentation of the reviews and the motive of commercial profit. The judge stated that the privacy interest at stake extended “beyond the health professionals’ names, contact information and the manner in which they perform their professional activities”: RFJ at para. 61. He defined the respondent’s privacy interest as an interest in:

[61] ...not having all of that information solicited, collected, centralized and comparatively ranked against other health professionals by a commercial entity for the purpose of generating profit.

[100] I accept that the operation of RateMDs.com is factually distinct from a single patient review because it aggregates reviews, provides comparative rankings, and does so with a profit motive. What is not clear, and what the judge does not explain, is why those distinctions matter from the perspective of the privacy interests of class members.

[101] The respondent contends, in effect, that she has a reasonable expectation that she can control the manner in which information about her provision of professional services is organized and reported to the public on the Internet, and by whom, without regard to its content. I have already explained why I do not accept the basic premise of this argument: that the right to control the use of information exists without consideration of whether there is a reasonable expectation of privacy in the information itself. There is no question that the respondent does not wish to have a profile on RateMDs.com. She may have legitimate concern about the business model on which RateMDs.com operates. However, her objection to having her professional and public information published on RateMDs.com does not translate into a reasonable expectation of privacy.

[102] The respondent emphasizes that the right to informational privacy is not limited to information that can be considered intimate, or within a person’s “biographical core”. I accept that this is so. However, it is also clear that a reasonable expectation of privacy does not exist in relation to all information that an

individual wishes to control the use of. This, in essence, is the premise of the respondent's claim to privacy, and in my view, it is a flawed premise.

[103] As the appellants highlight, individuals who publicly offer professional services on the Internet are routinely subject to scrutiny in the form of public reviews of their services on sites such as Yelp, Google and Facebook. Newspapers and magazines publish "Best of" lists, ranking the professional services provided in a variety of sectors. In this context, it simply cannot be said that a health professional has a reasonable expectation that information about their services is private, and that they can exercise control over which websites will be permitted to publish this type of information.

***Does the FANOC disclose a claim for violation of privacy?***

[104] For the reasons I have given, in my view it is plain and obvious that the FANOC does not disclose a cause of action for violation of privacy under s. 1 of the *BC Privacy Act* because it does not plead material facts to establish that the respondent, and class members, had a reasonable expectation of privacy.

[105] In her submissions on appeal, the respondent emphasized that the law of privacy is evolving, and that it is necessary to the proper evolution of the law to allow novel causes of action of this nature to proceed to trial. I acknowledge that the issues raised by the respondent's pleading are complex, as is the law on which her claim is based. However, as the Supreme Court of Canada observed in *Babstock*, the fact that a claim is novel, and may involve complex questions of law, is not a reason to allow it to proceed to trial if the claim has no reasonable prospect of success.

[106] In my view, the pleaded claim is not simply an extension of the law of privacy, but a departure from it. I see no reasonable prospect that the appellant will succeed in establishing that the right to privacy includes a right to control the use of information when the information itself does not attract a reasonable expectation of privacy. As such, there is no justification to engage the parties, and the court, in a protracted and expensive litigation process to address this claim.

**Issue 2: Does Dr. Bleuler’s claim for the unauthorized use of her name under s. 3(2) of the BC Privacy Act disclose a cause of action?**

**Section 3(2): the tort of unauthorized use of the name or portrait of another**

[107] The common law tort of misappropriation of personality involves “using a person’s name, likeness, or voice for the purpose of advertising or promoting goods or services, or otherwise for the user’s own gain, without the person’s consent”: Barbara Von Tigerstrom, *Information and Privacy Law in Canada* (Toronto: Irwin Law Inc., 2020) at 73–74 [Von Tigerstrom]. The tort is only actionable if the person is identifiable and the user exploited the person’s name, likeness, or voice intentionally: Von Tigerstrom at 74.

[108] The privacy statutes in Manitoba, Saskatchewan, and Newfoundland recognize a general tort of invasion of privacy and then list the unauthorized appropriation of a person’s name or likeness as an example of an invasion of privacy: *Privacy Act*, C.C.S.M., c. P125, ss. 2–3; *Privacy Act*, R.S.S. 1978, c. P-24, ss. 2–3; *Privacy Act*, R.S.N.L. 1990, c. P-22, ss. 3–4.

[109] In contrast, the *BC Privacy Act* creates separate torts of violation of privacy and misappropriation of personality. The misappropriation of personality tort is codified in s. 3(2):

**3 (2)** It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on the other's behalf, consents to the use for that purpose.

[110] The statutory tort bears some relationship to the common law tort of misappropriation of personality, although the precise relationship between them is unsettled: *Bao v. Welltrend United Consulting Inc.*, 2025 BCCA 3 at paras. 33–34. The few decided Canadian cases addressing the common law tort have been restricted to situations in which the defendant wrongfully uses a plaintiff’s “celebrity status” in the advertising of the defendant’s business, service or product: *Konstan v. Berkovits*, 2023 ONSC 497 at para. 343, varied on other grounds 2024 ONCA 510.

[111] Of relevance to the present case is the distinction that has been drawn in the case law between “sales” and “subject” for the purpose of the tort. This distinction was explained in *Gould Estate v. Stoddart Publishing Co.*, (1996), 30 O.R. (3d) 520 at 527, 1996 CanLII 8209 (S.C.), aff’d on other grounds, (1998) 39 O.R. (3d) 545, 1998 CanLII 5513 (C.A.), leave to appeal ref’d, [1998] S.C.C.A. No. 373 [*Gould*] as follows:

In the end then, and perhaps at the risk of oversimplifying, it seems that the courts have drawn a ‘sales vs. subject’ distinction. Sales constitute commercial exploitation and invoke the tort of appropriation of personality. The identity of the celebrity is merely being used in some fashion. The activity cannot be said to be about the celebrity. This is in contrast to situations in which the celebrity is the actual subject of the work or enterprise, with biographies perhaps being the clearest example. These activities would not be within the ambit of the tort. To take a more concrete example, in endorsement situations, posters and board games, the essence of the activity is not the celebrity. It is the use of some attributes of the celebrity for another purpose. Biographies, other books, plays, and satirical skits are by their nature different. The subject of the activity is the celebrity and the work is an attempt to provide some insights about that celebrity.

[Emphasis added.]

[112] Under this distinction, cases in the “sales” category constitute commercial exploitation and would thus invoke the tort of misappropriation of personality because the identity of the plaintiff is being used or exploited for the primary purpose of promoting sales. In contrast, the “subject” category includes circumstances in which the plaintiff is the actual subject of the work or enterprise. Biographies are one obvious example of cases that fall within the “subject” category. Others listed in *Gould* include books, plays, and satirical skits.

### **Analysis**

[113] The judge concluded that the similarity of issues to be decided in the action as between ss. 1 and 3 of the *BC Privacy Act*, “force[d]” him to conclude that the respondent had pleaded a viable claim for misappropriation of personality under s. 3(2): RFJ at para. 75. He rejected the appellants’ argument that the pleaded facts clearly placed the case on the “subject” side of the “sales v. subject” distinction. The judge held that the application of that distinction turned on a “detailed analysis of the

purpose for which the health professionals' names are used and whether the publication serves a public purpose": RFJ at para. 74.

[114] The appellants argue that the judge erred in declining to strike the claim under s. 3(2) of the *BC Privacy Act* due to its similarity to the cause of action under s. 1. They maintain that the judge failed to meaningfully address their argument, relying on the common law tort of misappropriation of personality, that because the class members are the subject of their profiles on RateMDs.com, their identity is not being exploited to promote the appellants' sales.

[115] The respondent says the judge was correct to find that the claim was not bound to fail because on the pleaded facts there was commercial exploitation in this case, and in any event s. 3(2) of the *BC Privacy Act* does not precisely mirror the common law.

[116] The judge's reasons for finding that the respondent had pleaded a viable claim of misappropriation of personality are brief, and he does not refer to any cases other than *Gould*. There are a limited number of cases that have addressed this tort in Canada. Fewer have addressed the statutory tort under the *BC Privacy Act*. A review of the jurisprudence is helpful to understand the parameters of the tort.

### ***The case law***

[117] *Krouse v. Chrysler Canada Ltd. et. al*, (1973) 1 O.R. (2d) 225, 1973 CanLII 574 (C.A.), is one of the earliest cases recognizing misappropriation of personality as a common law tort. The Ontario Court of Appeal noted there was some support in Canadian law for recognizing a remedy for the appropriation for commercial purposes of another's likeness, voice, or personality. Further, the Court found that the common law contemplates a concept in the law of torts that "may be broadly classified as an appropriation of one's personality": at 238.

[118] In *Krouse*, the Court found the tort was not made out on the facts of the case. Krouse was a CFL football player. He alleged Chrysler Canada had, without his authorization, used his image for commercial purposes in an advertising piece called

the Spotter. Krouse's image was featured in the Spotter—his jersey number was displayed and his back was toward the camera. The Court acknowledged that there is some minor loss of privacy and loss of potential for commercial exploitation that must be expected to occur as part of the express or implied license to publicize the institution of the professional sport. The Court found it was the game of football rather than Krouse's personality that had been incorporated into the advertising piece, and thus the claim for damages for appropriation of personality did not succeed.

[119] Relying on *Krouse*, the Ontario High Court of Justice in *Athans v. Canadian Adventure Camps Ltd. et. al*, (1977) 17 O.R. (2d) 425, 1977 CanLII 1255 (S.C.), found a plaintiff had a proprietary right in the exclusive marketing for gain of his personality, image, and name, and that the law entitled him to protect that right, if it was invaded. In that case, the plaintiff was an internationally recognized water-skier who had a distinct photograph of himself water-skiing. He used this photo for commercial purposes. A public relations firm copied the photograph and used it as a line drawing in a brochure they prepared for advertising for a children's summer camp. The Court found the defendants liable for appropriating the plaintiff's personality.

[120] In British Columbia, *Joseph v. Daniels*, (1986) 4 B.C.L.R. (2d) 239, 1986 CanLII 1106 (S.C.), considered the appropriation of personality tort under both the common law and s. 3 of the *BC Privacy Act*. The plaintiff was an amateur body builder who sued a self-employed photographer for using a portrait of the plaintiff on posters and greeting cards. The defendant used a picture of the plaintiff holding a kitten for an ad publicizing a cat show. This photograph made it to the cover of Vancouver Magazine and received considerable attention. Only the plaintiff's torso was shown in the photograph. The Court referred to both *Krouse* and *Athans* as recognizing a common law claim in tort for the wrongful appropriation by another of one's personality.

[121] The Court in *Joseph* considered whether the defendant had appropriated the plaintiff's personality when he made use of the photograph without the plaintiff's

consent or authority and with a view to obtaining a monetary benefit. The Court stated that “the unauthorized use of a name or likeness of a person as a symbol of his identity” constitutes the essential element of the tort of misappropriation of personality: at 244. The cause of action is proprietary in nature and the interest protected is that of the individual in their exclusive use of their own identity insofar as it is represented by their name, reputation, likeness, or other value. For there to be a finding of liability then, the defendant must be taking advantage of the plaintiff’s name, reputation, likeness, or some other component of their individuality or personality that a viewer would associate with the plaintiff. On the facts of *Joseph*, the Court found the plaintiff had not established the necessary part of the claim for misappropriation of personality, or the statutory tort under s. 3(2) of the *BC Privacy Act*, because the plaintiff was not identifiable in the photograph.

[122] *Gould* remains the leading case on the distinction to be drawn between sales and subject in determining whether there has been a misappropriation of personality under the common law tort. In *Gould*, the estate of renowned Canadian pianist Glenn Gould made a claim relating to the publication of interviews and photographs taken of him during the 1950s. Nearly 40 years later, the defendant published a book about Gould’s career that included extracts of the interviews and photographs. The estate claimed that the use of the photographs amounted to an appropriation of personality. The trial court dismissed this claim, finding that there was a public interest in knowing about Gould; therefore, the public fell within the protected category because of this public interest, and it could not be said that his personality was unlawfully appropriated.

[123] The Court’s decision in *Gould* was upheld on appeal (on different grounds) and leave to appeal to the Supreme Court of Canada was refused.

[124] Finally, while each of these examples have involved cases where there is an image or portrait of a celebrity or personality in issue, a claim may also be advanced where it is alleged that a person’s name has been misappropriated.

[125] In *Dubrulle v. Dubrulle French Culinary School Ltd. et. al.*, 2000 BCSC 1193, the issue was the use of the name “Dubrulle”. Dubrulle was a classically trained chef who had a distinguished career and public reputation in French culinary methodology. He consented to the use of his name in association with a culinary school, conditional on one of the founders being involved in the running of the school. The Court found that “the school has its own distinct name and personality” and that viewed on the whole of the evidence “people generally would not associate the plaintiff with this business”: at para. 20. As the school had not commercially exploited the plaintiff’s name or reputation, the plaintiff could not establish liability on the part of the school under either the common law tort of misappropriation of personality or s. 3(2) of the *BC Privacy Act*.

### **Discussion**

[126] I acknowledge that, as the respondent argues, it cannot be assumed that the statutory tort in s. 3(2) of the *BC Privacy Act* precisely mirrors the common law tort of misappropriation of personality. However, the two causes of action are directed at substantially the same misconduct by a defendant: the commercial exploitation of the portrait or name of the plaintiff in order to promote sales. Both the statutory and common law tort protect the proprietary interest of the plaintiff in the commercial value of their name or likeness. The “sales v. subject” distinction recognized in the cases discussing the common law tort of misappropriation of personality serves the function of restricting the tort to its intended target: the misappropriation of personality by the defendant primarily as a means of commercial exploitation. What is exempted in the “subject” category is a portrayal of the plaintiff (whether their portrait or name) in a manner that serves the purpose of providing information about the plaintiff that the public has an interest in receiving.

[127] In my view, the “sales v. subject” distinction, and its underlying rationale, is also useful in understanding the parameters of the statutory tort under s. 3(2) of the *BC Privacy Act*. To establish a cause of action under s. 3(2), it must be shown that the defendant’s unauthorized use of the plaintiff’s name or portrait was “for the purpose of advertising or promoting the sale of...property or services”. Consistent

with the language of s. 3(2), the reach of the tort should be limited to what is necessary to protect against the commercial exploitation of a plaintiff's name or likeness by another party. The "sales v. subject" distinction is directed at identifying such prohibited uses while protecting the legitimate use of a plaintiff's name or likeness if the purpose of the publication is not commercial exploitation. If a publication is intended to provide information about the plaintiff that the public has an interest in receiving—for example, a biography of the plaintiff—then the use of the plaintiff's portrait or name is not caught by the section, even if the publisher might profit from the work. Conversely, if the primary purpose of using the plaintiff's name or portrait is commercial exploitation, for example, the use of an individual's name or portrait to give the appearance of an endorsement in order to increase sales, then the tort may be made out.

[128] I accept the respondent's submission that the tort of misappropriation of personality under s. 3(2) of the *BC Privacy Act* may not be limited to the commercial exploitation of a celebrity's name or portrait to give the appearance of an endorsement, although this is an obvious example of the "sales" category. Further, I accept that there may be cases in which it is difficult to determine whether an allegedly unauthorized use of the plaintiff's name or portrait falls within the "sales" or "subject" category.

[129] However, I do not view the pleaded facts in this case as difficult to categorize. RateMDs.com contains information about the respondent and class members that can be used by members of the public to inform their decisions about which health professionals to engage. It is no different in that respect from any other for-profit website that collects and discloses reviews about those who provide professional services to the public. The health professionals are the subject of the profiles on RateMDs.com in the same way that Mr. Gould was the subject of the biography in issue in *Gould*.

[130] On the pleaded facts, it is plain and obvious that the plaintiff's name, and the names of class members, are not being commercially exploited for the purpose of increasing sales. Instead, the respondent and class members are the subject of the

reviews posted on RateMDs.com, and those reviews provide information of value to the public about the class members who are providing a public service. It is true, as the respondent pleads, that the appellants earn, or least intend to earn, a profit from the operation of RateMDs.com. However, the tort of misappropriation of property in s. 3(2) of the *BC Privacy Act* is not designed to capture any use of a plaintiff's name or portrait by a defendant who expects to profit from that use.

[131] It follows that, in my view, the judge erred in concluding that a trial was necessary to determine the question of the appellants' liability under s. 3(2) of the *BC Privacy Act*. Assuming the pleaded facts to be true, this claim also has no reasonable prospect of success.

**Disposition**

[132] I would allow the appeal, set aside the certification order, and dismiss the action. Accordingly, I would also dismiss the cross appeal.

“The Honourable Madam Justice Horsman”

I AGREE:

“The Honourable Justice Edelman”

I AGREE:

“The Honourable Justice MacNaughton”