S.C.C. FILE NO. 36616

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

DEBORAH LOUISE DOUEZ

APPELLANT
(Respondent)

and

FACEBOOK, INC.

RESPONDENT
(Appellant)

APPELLANT'S FACTUM

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The appellant, Ms. Douez, seeks to represent a class of British Columbians whose statutory privacy rights were allegedly violated by the respondent, Facebook, Inc. ("Facebook"). Ms. Douez claims Facebook committed a statutory tort under B.C.'s *Privacy Act*, R.S.B.C. 1996, c. 373 (the "*Privacy Act*") when it harvested and sold her name and image, and the names and images of about 1.8 million B.C. residents for advertising purposes, all without proper consent. She seeks to have the question adjudicated in the B.C. Supreme Court, as provided for in the *Privacy Act*. Facebook counters that a forum selection clause buried within lengthy and ambiguous "terms of use" defeats Ms. Douez's – and the B.C. Legislature's – choice of forum.

2. The issue on this appeal is whether a website forum selection clause in a contract of adhesion, which purports to require about 40% of B.C.'s population to sue in a foreign court, prevails over B.C.'s public policy evidenced in statutory protections vesting jurisdiction with B.C. courts to hear and decide disputes arising from alleged breaches of the statute.

3. The B.C. Supreme Court's territorial competence is undisputed. Facebook accepts the B.C. court's subject matter and personal jurisdiction. Hence, the only questions are (1) whether the website forum selection clause is enforceable and, if so, (2) whether the B.C. Supreme Court should *refrain* from exercising jurisdiction.

4. The statutory jurisdiction clause in B.C.'s *Privacy Act* vests exclusive jurisdiction with the B.C. Supreme Court: "*Despite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court*".[1] In turn, the B.C. *Interpretation Act* states that "'*Supreme Court' means the Supreme Court of British Columbia*."[2]

5. In the face of this statutory jurisdiction clause, Facebook seeks to avoid the action by relying on a forum selection clause in "terms of use" on its website directing matters to the California courts as follows: "*You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or*

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[1] *Privacy Act*, s. 4, emphasis added [**Appellant's Book of Authorities ("ABA") Vol IV Tab 69**]
[2] *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29 [**ABA Vol IV Tab 68**]. To similar effect, see *Briones v. National Money Mart*, 2014 MBCA 57 at paras 25 to 35, leave refused, [2014] S.C.C.A. No. 355 [**ABA Vol I Tab 7**]

federal court located in Santa Clara County. . . ."[3] But elsewhere in the same "terms of use" Facebook promises to "*strive to respect local laws*" (emphasis added).[4]

6. The B.C. Supreme Court found the *Privacy Act*'s statutory jurisdiction clause prevails over Facebook's online contractual forum selection clause, and refused to stay the proceedings. Alternatively, the court found "strong cause" for not enforcing the forum selection clause. The B.C. Court of Appeal disagreed and stayed the action. In doing so it

a. applied this Court's decision in *Z.I. Pompey Industrie v. ECU-Line N.V.*[5] with no regard to the very different public policy issues at stake here; and

b. adopted an approach to *forum non conveniens* and forum clauses under the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (the "*CJPTA"*) inconsistent with Saskatchewan and Nova Scotia courts' approaches to the issue.

7. The following facts, developed below, call for this appeal to be granted and the decision of the B.C. Supreme Court reinstated. In this case we have:

a. an online consumer contract of adhesion between a sophisticated multi-billion dollar company (Facebook) and website users as young as 13 years of age;

b. Facebook's ambiguous and lengthy online "terms of use" which include not only a forum selection clause buried deep within, but also a conflicting promise to strive to respect local laws;

c. Facebook's alleged tort: placing about 1.8 million B.C. residents (about 40% of B.C.'s population) in ads without their consent in breach of B.C.'s *Privacy Act*;[6]

d. a B.C. statute – the *Privacy Act* – seeking to protect *quasi*-constitutional privacy rights and consumer rights; and

e. a statutory requirement that parties to this type of dispute bring their action before the B.C. Supreme Court.

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[3] Affidavit of S. Solanki [**Appellant's Record ("AR") Vol II Tabs 14C (p 132), 14D (p 138), 14E (p 143)**]
[4] Affidavit of S. Solanki [**AR Vol II Tabs 14C (p 133, clause 16), 14D (p 138, clause 16), 14E (p 143)**]
[5] 2003 SCC 27, [2003] 1 S.C.R. 450 ("*Pompey*") **[ABA Vol III Tab 49]**
[6] Judgment of BCSC at para 221 [**AR Vol I Tab 1**]

8. In B.C., the *Privacy Act*, *CJPTA* and *Class Proceedings Act* work together to assist in protecting consumers' *quasi*-constitutional privacy rights. As elaborated on below, protections granted by these statutes are furthered by empowering courts to carefully scrutinize forum selection clauses in contracts of adhesion. Such powers are properly invoked here.

B. Background to the Current Dispute

9. Facebook operates the social networking website "www.facebook.com". It invites people 13 years of age and older to join, upload their name and portrait, and create online connections with other members to form communities of "Friends" (using Facebook's language).[7] It generates revenue through website advertising.[8] It reported nearly $4.28 billion in revenue through its advertising business in 2012, with $2.06 billion generated in North America.[9]

10. The advertisements at issue are called "Sponsored Stories" (the "Ads"). Facebook created the Ads by combining the names or portraits of about 1.8 million B.C. website members (the putative class) with business words or logos to depict website members as endorsers of commercial products or services.[10] It selected members for inclusion in Ads based on their online conduct, such as playing online games or clicking "Like" buttons.[11] The plaintiff says Facebook used members in Ads without their consent and without disclosing the created Ads to members featured therein.[12] Facebook earned money by selling the Ads to its commercial customers[13] and did not pay members it featured in the Ads for the use of their name or portrait.[14]

11. Ms. Douez alleges Facebook's conduct directly violates her own and class members' statutory privacy rights in breach of s. 3(2) of the *Privacy Act*. That section creates the following statutory tort:

> 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

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[7] Judgment of BCSC at para 32 (infants form part of the putative class) **[AR Vol I Tab 1]**
[8] Judgment of BCSC at para 7 **[AR Vol I Tab 1]**
[9] Affidavit of Emily Unrau [**AR Vol III Tab 16E, p 40, 47**]
[10] Judgment of BCSC at para 7 (Ads) and para 221 (1.8 million B.C. residents in Ads) **[AR Vol I Tab 1]**
[11] Judgment of BCCA at para 4 **[AR Vol I Tab 3]**
[12] Judgment of BCSC at paras 8 and 9 **[AR Vol I Tab 1]**
[13] Judgment of BCSC at para 166 to 167 and 258 **[AR Vol I Tab 1]**
[14] Notice of Civil Claim, para 34 **[AR Vol I Tab 1, p 107]**

> of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

12. Facebook opposed certification and sought a stay of proceedings based on jurisdictional grounds. It did not contest the B.C. Supreme Court's territorial competence.[15] Rather, it asked the B.C. Supreme Court to decline to exercise its discretionary authority and decline to hear the case notwithstanding its territorial competence. Facebook's stay application depended upon a forum selection clause in its online "terms of use" providing as follows:[16]

> You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims.

13. However, elsewhere in its "terms of use", Facebook promised to "respect local laws", using language contradicting its forum selection and choice of law clause [emphasis added]:[17]

> We [Facebook] strive to create a global community with consistent standards for everyone, but <u>we also strive to respect local laws</u> . . .

14. Facebook argued that as a result of its contract of adhesion, California substantive law applies to this dispute "defeats the application of B.C.'s *Privacy Act*".[18] In response to Facebook's stay application, Ms. Douez raised a series of arguments including the above-referenced ambiguity in Facebook's "terms of use", the fact that, at minimum, the "terms of use" could not bind infants,[19] and upon the jurisdiction directed by s. 4 of the *Privacy Act*. She outlined important public policy grounds weighing against a stay of proceedings in B.C.

C. Judicial History

15. Justice Griffin heard the certification and stay applications together and issued judgment on May 30, 2014. She certified the action and refused to stay the proceedings. In her reasons for

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[15] Facebook's Jurisdictional Response **[AR Vol I Tab 7]**
[16] Affidavit of S. Solanki [**AR Vol II Tabs 14C (p 132), 14D (p 138), 14E (p 143)**]
[17] Judgment of BCSC at para 52 **[AR Vol I Tab 1];** Affidavit of S. Solanki [**AR Vol II Tabs 14C, 14D, 14E**]
[18] Judgment of BCSC below at para 303 **[AR Vol I Tab 1]**
[19] *Age of Majority Act*, R.S.B.C. 1996, c. 7 (the age of majority in B.C. is 19, *per* s. 1(1)) **[ABA Vol IV Tab 59]**; and see the *Infants Act*, R.S.B.C. 1996, c. 223, Part 3, in particular s. 19(1) regarding contracts **[ABA Vol IV Tab 67]**

judgment respecting the stay, she found the plaintiff raised a triable issue that the forum selection clause did not apply to *Privacy Act* claims given Facebook's online terms, read in their entirety.[20] As noted above, Facebook agreed to "*strive to respect local laws*". The plaintiff highlighted the ambiguity, arguing that if Facebook adhered to local law it would not seek to avoid the *Privacy Act*'s exclusive jurisdiction clause and substantive law remedies enacted in the public interest. However, Griffin J. did not finally decide this point, preferring to pursue two separate inquiries.[21]

16. She first asked whether s. 4 of the *Privacy Act*, standing alone, grants exclusive jurisdiction to the B.C. courts thus overriding the contractual forum selection clause. She explained that s. 4 of the *Privacy Act* confers exclusive jurisdiction on the B.C. Supreme Court to the exclusion of other courts, not simply to the exclusion of other local B.C. courts or tribunals.[22] Thus, on her analysis, s. 4 of the *Privacy Act* overrode the contractual forum clause.[23]

17. Griffin J. also considered whether, even assuming s. 4 of the *Privacy Act* did not override the contractual forum selection clause, sufficiently strong cause nevertheless existed to refuse enforcement of the contractual forum selection clause.[24] She highlighted public policy grounds supporting strong cause against enforcing the forum selection clause.[25] These included: (a) the public interest in protecting the privacy of B.C. residents; (b) minimizing costs by bringing local claims in local courts; (c) increasing the likelihood of notoriety and deterrent effects to further public policy goals of protecting privacy rights of British Columbians; (d) improving chances of protecting such privacy rights as B.C. courts may be more sensitive to social and cultural context relevant to privacy interests of British Columbians, compared to courts in foreign jurisdictions.[26]

18. Facebook offered no evidence that California would apply B.C.'s *Privacy Act*. Indeed, to the contrary, it explained to the B.C. court that California substantive law defeats application of

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[20] Judgment of BCSC at para 54 **[AR Vol I Tab 1]**
[21] Judgment of BCSC at para 54 **[AR Vol I Tab 1]**
[22] Judgment of BCSC at paras 56 to 67 **[AR Vol I Tab 1]** and citations to *Nord Resources Corp v. Nord Pacific Ltd*, 2003 NBQB 201, 263 N.B.R. (2d) 205 **[ABA Vol II Tab 31]** and *Gould v. Western Coal Corp.*, 2012 ONSC 5184 **[ABA Vol I Tab 15]**
[23] Judgment of BCSC at para 78 and 93 **[AR Vol I Tab 1]**
[24] Judgment of BCSC at paras 55 to 106 **[AR Vol I Tab 1]**
[25] Judgment of BCSC at paras 96 to 106 **[AR Vol I Tab 1]**
[26] Judgment of BCSC at para 75 **[AR Vol I Tab 1]**

B.C.'s *Privacy Act*.[27] For this and other reasons discussed below, if the matter is stayed in B.C., B.C.'s residents face a significant risk of losing local statutory protections enacted in the public interest under the *Privacy Act*.[28]

19. In addition to finding s. 4 of the *Privacy Act* defeats the contractual forum selection clause, Griffin J. considered the *forum non conveniens* factors outlined in the *CJPTA* s. 11. She found these factors also favoured proceeding in B.C.[29]

20. Finally, Griffin J. considered the impact of s. 12 of the *CJPTA* which provides as follows:

> 12. If there is a conflict or inconsistency between this Part and another Act of British Columbia or of Canada that expressly
>
> (a) confers jurisdiction or territorial competence on a court, or
>
> (b) denies jurisdiction or territorial competence on a court, that other Act prevails.

21. She found that by virtue of s. 12, the express conferral of jurisdiction upon another court by an Act of B.C. controls the operation of the s. 11 *CJPTA* analysis. Thus, the *CJPTA*'s statutory analysis is subordinate to the express grant of jurisdiction in the *Privacy Act*.[30]

22. The Court of Appeal disagreed with Griffin J.'s analysis. Bauman C.J. for the court began by finding the forum selection clause to be clear.[31] However, in doing so he failed to address the internal inconsistency within Facebook's "terms of use", highlighted by Griffin J., *i.e.*, on the one hand providing a forum selection and choice of law clause driving California process and substantive law, while on the other hand committing to respect local laws (*i.e.*, B.C.'s *Privacy Act*).[32] Bauman C.J. also failed to make a finding about the enforceability of the forum selection clause as against children. He merely noted that as the court was not certifying a class there was no need to consider the issue of enforceability in relation to infants.[33]

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[27] Judgment of BCSC at para 303 **[AR Vol I Tab 1]**
[28] Judgment of BCSC at para 52 ("strive to respect local laws" and para 303 (avoid *Privacy Act*)) **[AR Vol I Tab 1]**
[29] Judgment of BCSC at paras 96 to 129 **[AR Vol I Tab 1]**
[30] Judgment of BCSC at paras 130 to 133 **[AR Vol I Tab 1]**
[31] Judgment of BCCA at paras 42 to 43 **[[AR Vol I Tab 3]**
[32] Judgment of BCSC at paras 51 to 54 noting an "arguable case" respecting ambiguities in the terms of use, and at paras 303 to 308 noting potential unenforceability of choice of law provisions **[AR Vol I Tab 1]**
[33] Judgment of BCCA at para 44 **[AR Vol I Tab 3]**. Consider to contrary effect, the BCCA's decision to treat any uncertified action as an "action with ambition" in analyzing the availability of a cause of action in *MacKinnon v. National Money* Mart, 2004 BCCA 472, 33 B.C.L.R. (4th) 2 at para 33 **[ABA Vol II Tab 26]**. The Honourable

23. Turning to the "strong cause" analysis, Bauman C.J. identified as the first issue ". . . how the *Pompey* test for forum selection clauses relates to the analytical framework for *forum non conveniens* in the CJPTA . . ."[34] He had to address this question because in *Pompey* the proceeding was in the Federal Court and there is no *CJPTA* at the federal level. He asked, "… [w]hen the defendant relies upon a forum selection clause, should the court consider the *Pompey* test, and then, if necessary, carry out the *CJPTA* analysis, or should the court consider the *Pompey* test as part of the *CJPTA* analysis?" [35] [emphasis added]

24. Bauman C.J. adopted the former flawed approach. He ignored the *CJPTA* by disposing of the issue exclusively pursuant to the pre-*CJPTA Pompey* approach. He acknowledged the contrary analytical framework adopted by the Saskatchewan Court of Appeal[36] and noted the "apparent difficulty" [37] with his approach given this Court's decision in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*.[38] There, McLachlin C.J. (at para 22) described s. 11 of the *CJPTA* as "a complete codification of the common law test for *forum non conveniens*" that "admits of no exceptions".

25. Nevertheless, Bauman C.J. determined himself bound by B.C. appellate authorities *Viroforce Systems Inc. v. R&D Capital Inc*.[39] and *Preymann v. Ayus Technology Corp*.[40] He acknowledged that *Viroforce* failed to cite *Teck,* and that the B.C. Court of Appeal had relied upon the Ontario Court of Appeal's decision in *Momentous.ca v. Canadian American Assn. of Professional Baseball Ltd*.[41](even though Ontario lacks a *CJPTA*). He thus analyzed whether

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Chief Justice Winkler and Sharon Mathews explain that "neither plaintiff's counsel nor the court can ignore the interests of the putative class members…" (emphasis added) (see: *Caught in a Trap – Ethical Considerations for the Plaintiff's Lawyer in Class Proceedings*, online: Court of Appeal for Ontario <http://www.ontariocourts.on.ca/coa/en/ps/speeches/caught.htm>) **[Appellant's Supplementary Book of Authorities ("ASBA") Tab 2]**). The potential impact on absent class members should be considered, particularly when significant public interest rights are at stake. In *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 SCR 907 at para 87, this Court explained: ". . . courts must have regard to the need to do justice to the particular litigants who come before them as well as to the public interest in the efficient administration of bankrupt estates. . . .". [emphasis added] **[ABA Vol II Tab 19]**

[34] Judgment of BCCA at para 21**[[AR Vol I Tab 3]**

[35] Judgment of BCCA at para 21 **[AR Vol I Tab 3]**

[36] Judgment of BCCA at para 29 **[AR Vol I Tab 3]**

[37] Judgment of BCCA at para 25 **[AR Vol I Tab 3]**

[38] 2009 SCC 11, [2009] 1 S.C.R. 321 ("*Teck*") **[ABA Vol III Tab 41]**

[39] 2011 BCCA 260, 336 D.L.R. (4th) 570 ("*Viroforce*") **[ABA Vol III Tab 44]**

[40] 2012 BCCA 30, 32 B.C.L.R. (5th) 391 ("*Preymann*") **[ABA Vol II Tab 32]**; Judgment of BCCA below at para 31 **[AR Vol I Tab 3]**

[41] 2010 ONCA 722, 103 O.R. (3d) 467 ("*Momentous.ca*") **[ABA Vol II Tab 28]**

sufficiently strong cause avoided the forum selection clause all without considering the *CJPTA*. As a result, he considered the forum selection clause before the factors under s. 11 of the *CJPTA* and he did not consider the impact of s. 12 of the *CJPTA*. As noted above, s. 12 provides that the *forum non conveniens* analysis in s. 11 of the *CJPTA* is inapplicable if another statute vests jurisdiction with a court.

26. He then found s. 4 of the *Privacy Act* could not trump Facebook's forum selection clause due to "the principle of territoriality".[42] He held that "[t]he principle of territoriality is that B.C. law applies only in B.C. …"[43] He reasoned that s. 4 of B.C.'s *Privacy Act* cannot deprive California courts of territorial competence over the claims of B.C. residents. He found that s. 4 of the *Privacy Act* is a "… rule about subject matter competence…" and disagreed with Griffin J.'s finding that s. 4 of the *Privacy Act* precludes the B.C. court from declining jurisdiction.[44] He found s. 4 of the *Privacy Act* only applies *intra-state,* to distinguish amongst local courts.[45]

27. Bauman C.J. found that the plaintiff "…failed to provide the Court with any reason to conclude that this proceeding could not be heard in the courts of Santa Clara…"[46] He held that given his conclusion that s. 4 of the *Privacy Act* did not operate to avoid jurisdiction of California courts, ". . . Ms. Douez is left with no arguments capable of convincing this Court to decline to enforce the forum selection clause."[47] In reaching this conclusion he ignored all other factors relevant to strong cause, which were considered by Griffin J. Also, given his finding that the forum selection clause is considered without reference to the *CJPTA*, he found it unnecessary to even consider the *CJPTA*'s *forum non conveniens* factors: "In light of my conclusions on the *Pompey* test, it is unnecessary for me to consider Facebook's submission that the judge erred in concluding B.C. was not *forum non conveniens* within the *CJPTA* framework."[48]

PART II – STATEMENT OF ISSUES

28. The issue in this case is the proper approach to be taken to forum selection clauses in online contracts of adhesion in *CJPTA* jurisdictions, specifically in the face of local *quasi-*

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[42] Judgment of BCCA at para 47 **[[AR Vol I Tab 3]**
[43] Judgment of BCCA at para 48 **[AR Vol I Tab 3]**
[44] Judgment of BCCA at para 67 **[AR Vol I Tab 3]**
[45] Judgment of BCCA at paras 45 to 65 **[AR Vol I Tab 3]**
[46] Judgment of BCCA at para 77 **[AR Vol I Tab 3]**
[47] Judgment of BCCA at para 79 **[AR Vol I Tab 3]**
[48] Judgment of BCCA at para 81 **[AR Vol I Tab 3]**

constitutional consumer protection legislation creating a statutory tort and granting jurisdiction to local courts to enforce the subject statute. Particular questions include the following:

a. In what circumstances should online contract of adhesion forum selection clauses be found valid, clear, enforceable and applicable to the dispute?

b. To what extent should the "strong cause" test described by this Court in *Pompey* apply to online consumer contracts of adhesion?

c. To what extent do statutes requiring local courts to hear and determine disputes under such statutes constitute "strong cause" to avoid contractual forum selection clauses?

d. Is the forum selection clause considered as part of the statutory *forum non conveniens* analysis under the *CJPTA*? Or, must the plaintiff first demonstrate strong cause not to enforce the forum selection clause before receiving the statutory benefits of the *CJPTA*?

PART III – STATEMENT OF ARGUMENT

A. Is the Forum Selection Clause Valid?

29. The first question is whether Facebook's forum selection clause is valid, clear, enforceable and applicable to the dispute.[49] The appellant says Facebook has failed to discharge its burden under the first part of this analysis. Following we elaborate.

(i) The Context: Contracts of Adhesion

30. This case concerns a contract of adhesion between Facebook and individual B.C. consumers. Facebook seeks to make California courts the sole arbiters of all disputes with its B.C. consumers and, ambiguities in the contract aside, it says its contract is intended to make California law the sole law governing its relations with B.C. consumers. This despite strong interests states have in protecting their own citizens' privacy and consumer rights.

31. The analysis begins with a consideration of the sort of contract relied upon by Facebook: an online contract of adhesion. The U.S. District Court for the Eastern District of New York recently reviewed the nature of such contracts in *Berkson v. Gogo LLC*,[50] as follows:

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[49] *Preymann* at para 43 **[ABA Vol II Tab 32]**
[50] 97 F. Supp. 3d 359 (2015) ("*Berkson*") at 388 **[ABA Vol I Tab 4]**

> . . . A contract on a printed standardized form that is offered on a take-it or leave-it basis – usually by a merchant that monopolizes a particular market, or whose bargaining power significantly outweighs that of the consumer – is a contract of adhesion. Such a contract exists where a party of superior bargaining strength, e.g., a vendor, provides a subscribing party only with the opportunity to adhere to the contract or forfeit use, ownership or access to the vendor's services and goods. But, the assumption is that the parties have a reasonable opportunity to examine terms before adhering.

32. In *Berkson*, the court described the proper manner to assess validity and enforceability of online contracts of adhesion. In doing so, it described a nuanced test, as follows:[51]

> Analyzing established common law contract formation doctrine, alongside the general contract principles and cases regarding inquiry notice and the validity and enforceability of internet agreements, the following four-part inquiry in analyzing sign-in-wraps,[52] and electronic contracts of adhesion generally, is required:
>
> (1) Aside from clicking the equivalent of sign-in (e.g., log-in, buy-now, purchase, etc.), is there substantial evidence from the website that the user was aware that she was binding herself to more than an offer of services or goods in exchange for money? If not, the "terms of use," such as those dealing with venue and arbitration, should not be enforced against the purchaser.
>
> (2) Did the design and content of the website, including the homepage, make the "terms of use" (i.e., the contract details) readily and obviously available to the user? If not, the "terms of use," such as those dealing with venue and arbitration, should not be enforced against the purchaser.
>
> (3) Was the importance of the details of the contract obscured or minimized by the physical manifestation of assent expected of a consumer seeking to purchase or subscribe to a service or product? If yes, then the "terms of use," such as those dealing with venue and arbitration, should not be enforced against the purchaser.
>
> (4) Did the merchant <u>clearly draw the consumer's attention to material terms that would alter what a reasonable consumer would understand to be her default rights when initiating an online consumer transaction from the consumer's state of residence</u>: The right to (a) not have a payment source

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[51] *Berkson* at 402 **[ABA Vol I Tab 4]**

[52] The Court in *Berkson* explained that "*wrap*" contracts are those in which the adhering party does not have to use a pen. The term is derived from "shrink-wrap agreements", in which software was supplied in shrink-wrap with notice that upon opening the wrap, agreements included with the software became effective (*Berkson*, p 366, at fn 1). The Court identified different forms of electronic adhesion contracts at pp 394 to 395. One version, called *sign-in-wrap*, couples assent to the terms of a website with signing up for use of the site's services. Gogo used a *sign-in-wrap*. Facebook did the same. The Court details *sign-in wrap* at pp 399 to 401, noting such agreements are "questionable", and "Courts of Appeals have yet to rule on the validity and enforceability of the terms of such contracts." (p 399).

> charged without notice (i.e., automatic payment renewal); (b) bring a civil consumer protection action under the law of her state of residence and in the courts in her state of residence; and (c) participate in a class or collective action? If not, then (a), (b), or (c) should not be enforced against the consumer. [emphasis added]

33. This nuanced approach is appropriate where important consumer rights are at risk – such as privacy rights. Indeed, the House of Commons Standing Committee on Access to Information, Privacy and Ethics recently highlighted privacy issues in relation to online adhesion contracts:[53]

> Several witnesses, including Professor Ian Kerr and Mr. John Lawford of PIAC, saw reason for concern in the use of standard-form, "take it or leave it" contracts that leave users in a vulnerable position. Professor Kerr told the Committee that:
>
> > The biggest threat to privacy is the standard form contract. Under our current law, almost all privacy safeguards that are built into our privacy legislation can easily be circumvented by anyone who provides goods or services by way of a standard form agreement. By requiring users to click "I agree" to their terms on a "take it or leave it" basis, companies can use contract law to sidestep privacy obligations. In short, this is based on a mistaken approach to the issue of consent. [footnotes omitted, emphasis added]

34. With these general concerns in mind, we turn to Facebook's "terms of use".

(ii) Facebook's "Terms of Use" are Unclear

35. Griffin J. accepted, for purposes of Facebook's application, that Facebook had presented a *prima facie* case "…subject to the evidence and arguments at trial…" that the forum selection clause was valid, clear and enforceable.[54] But at the same time she found that due to ambiguities in Facebook's "terms of use", Ms. Douez has "…at least a triable issue on her argument that the Forum Selection Clause does not apply to the *Privacy Act* cause of action, based on a full interpretation of the Terms of Use…"[55] Ambiguity arose in the "terms of use" because Facebook inserted a promise to "also strive to respect local laws", while at the same time arguing a local law – the *Privacy Act* – did not apply. Facebook failed to clearly draw users' attention to the

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[53] House of Commons, *Report of the Standing Committee on Access to Information, Privacy and Ethics* (April 2013), online http://www.parl.gc.ca/content/hoc/Committee/411/ETHI/Reports/RP6094136/ethirp05/ethirp05-e.pdf at 14 ("Report of the Standing Committee") **[ABA Vol III Tab 54]**

[54] Judgment of BCSC at para 48 **[AR Vol I Tab 1]**

[55] Judgment of BCSC at para 54 and see also Griffin J.'s full analysis at paras 32 to 54 **[AR Vol I Tab 1]**

material terms at issue - the forum selection clause - buried deep within Facebook's "terms of use", using "tiny terms"[56] and the noted conflicting language.

36. Facebook seeks to apply its onerous "terms of use" to about 1.8 million B.C. residents, including infants.[57] If that is its intent, it ought to have secured consent of its members by using clear and unambiguous language. In the appellant's submission, as the onus rests with Facebook to establish its forum selection clause is valid, clear, enforceable, and applicable to the dispute, the matter could and should properly have been decided based on the foregoing analysis alone.

37. This issue is properly considered in light of *Berkson,* which marks a continued evolution in the law of forum selection clauses in online consumer contracts of adhesion. This evolution occurred after the case had been briefed and argued before the courts below.[58] The appellant respectfully says the new *Berkson* considerations ought to be considered by this Court.

38. Facebook's forum selection clause fails the *Berkson* test. Facebook created ambiguity, distracted attention away from and contradicted its forum clause by promising in the same "terms of use" to strive to respect "local laws". In B.C., "local laws" must include the *Privacy Act.*

39. Reading the forum selection clause harmoniously in conjunction with a clause promising to "strive to respect local laws" results in the following reasonable interpretation: the forum selection clause is inapplicable when it conflicts with contrary local law. A reasonable user would believe Facebook would adhere to local law. Yet Facebook seeks to deprive the appellant and the class of their procedural and substantive rights under the *Privacy Act* including access to B.C. courts. Doubt should be resolved against the defendant particularly where, as here, the case concerns *quasi*-constitutional privacy rights and consumer rights. We elaborate below.

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[56] Judgment of BCSC at para 38 **[AR Vol I Tab 1]**

[57] Above, at footnote 33 we highlighted the need to account for the interests of absent class members.

[58] Bauman C.J. noted that the B.C. Supreme Court decided, *arguendo*, that the clause was valid, clear and enforceable (para 42), and that Ms. Douez "appears to accept that Facebook met its burden under the *Pompey* test." (para 43) **[AR Vol I Tab 3]**. However, in fact, Griffin J. merely found that both parties raised triable issues in relation to certain aspects of the first stage of the analysis (see her reasons for judgment at paras 48 and 54) **[AR Vol I Tab 1]**. Furthermore, in her factum before the B.C. Court of Appeal, Ms. Douez again stressed the ambiguity in Facebook's "terms of use". This particular issue was also not central in the B.C. Court of Appeal's analysis because Facebook, as the appellant, focused its appeal on whether s. 4 of the *Privacy Act* trumped the online forum selection clause or whether the plaintiff showed strong cause to refuse enforcement of the forum selection clause. There was no basis or need for a cross-appeal as the plaintiff had succeeded at first instance and Griffin J. made no express finding on this first stage of the test. However, on this appeal, Facebook must establish its position on the entire operation of the test.

40. Facebook's position is indeed weaker than the *Berkson* defendant's position because Facebook created ambiguity in its "terms of use". The ambiguity precludes application of the forum selection clause. *Per Berkson*, the clause "should not be enforced against the consumer."

(iii) The Privacy Context: Heavy Burden to Prove Validity, Clarity, Enforceability, Applicability

41. *Berkson* fits neatly with Canadian requirements to first consider whether a defendant has proven its forum selection clause is valid, clear, enforceable and applicable before considering any strong cause to refuse its application[59] or before considering the *CJPTA* s. 11 factors.

42. Considering whether Facebook's "terms of use" are applicable requires an appreciation of the context of this case. We are concerned with privacy and consumer rights. With particular reference to privacy rights, this Court has stressed the need to narrowly interpret attempted exceptions from the rights, with doubt resolved in favour of preserving the rights and with the burden of persuasion resting on the person seeking exceptions from the rights.

43. The jurisprudence placing a heavy burden on Facebook in the context of this case is helpfully summarized by Feldman J.A. speaking for the Ontario Court of Appeal in *Cash Converters Canada Inc. v. Oshawa (City)*, as follows:[60]

> [29] The right to privacy of personal information is interpreted in the context of the history of privacy legislation in Canada and of the treatment of that right by the courts. The Supreme Court of Canada has characterized the federal *Privacy Act*, R.S.C. 1985, c. P-21 as quasi- constitutional because of the critical role that privacy plays in the preservation of a free and democratic society. In *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, Gonthier J. observed that exceptions from the rights set out in the act should be interpreted narrowly, with any doubt resolved in favour of preserving the right and with the burden of persuasion on the person asserting the exception (at paras. 30-31). In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, the court articulated the governing principles of privacy law including that protection of privacy is a fundamental value in modern democracies and is enshrined in ss. 7 and 8 of the *Charter*, and privacy rights are to be compromised only where there is a compelling state interest for doing so (at paras. 65, 66 and 71). And in *H.J. Heinz Co. of Canada Ltd. v. Canada*

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[59] *Preymann* at paras 43 to 44 **[ABA Vol II Tab 32]**

[60] 2007 ONCA 502, 86 O.R. (3d) 401 ("*Cash Converters*") **[ABA Vol I Tab 8]**. Re. consumer rights see *Seidel v. TELUS Communications*., 2011 SCC 15, [2011] 1 S.C.R. 531 at para 37 where Binnie J. noted that consumer protection legislation is to be "interpreted generously in favour of consumers". **[ABA Vol II Tab 35]**

> *(Attorney General)*, [2006] 1 S.C.R. 441, Deschamps J. stated [at para 26]: "[I]n a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information, except as prescribed by the legislation." [emphasis added]

44. If Facebook is correct concerning its intent in inserting its forum selection clause into its "terms of use", then it has ineptly and ambiguously attempted to alter what a reasonable consumer would understand to be her default rights: a right to bring a civil action before the B.C. Supreme Court under the *Privacy Act*. As noted above, the better approach is to simply read the "terms of use" as a whole, thus reading the forum selection clause as inapplicable when a local law contradicts its application.

45. The appellant's position on this issue rests on an ambiguity in a document. The appellant submits this Court may determine the issue. If this Court cannot determine whether Facebook met the burden to prove the clause is valid, clear, enforceable, and applicable to this dispute, the issue ought to be remitted to the trial judge for determination.[61]

B. The Contractual Forum Selection Clause is Unenforceable

46. Even if Facebook's forum selection clause is unambiguous, the legislated forum requirement at s. 4 of the *Privacy Act* precludes application of Facebook's clause. As such, analysis of "strong cause" or s. 11 of the *CJPTA* is unnecessary. The issue is determined at the first stage: whether Facebook has proven the clause is valid, clear, enforceable, and applicable.

47. In *Pompey*, this Court recognized that legislatures may override forum selection clauses, and where that occurs the legislation prevails and the strong cause test is unnecessary. In *Pompey*, legislation was enacted after the lower court had issued its decision, being s. 46(1) of the *Marine Liability Act*, S.C. 2001, c. 6. This Court explained that in future cases s. 46(1) would override forum selection clauses in favour of the Federal Court where the port of loading or discharge was within Canada.[62] And in that case Parliament used permissive language in the relevant provision, providing that a claimant "may" bring the claim in Canada.

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[61] Remitting to the trial judge is only necessary if the appeal is not allowed on the other issues *e.g.* s. 4 of the *Privacy Act*, "strong cause" not to enforce the forum selection clause, or on the factors in s. 11 of the *CJPTA*.
[62] *Pompey* at para 37 **[ABA Vol II Tab 32]**

48. This aspect of the reasoning in *Pompey* is particularly *apropos* consumer protection legislation, such as the *Privacy Act*, evidencing a legislative intent to protect privacy rights. The legislature's decision to vest local courts with exclusive jurisdiction to hear and decide disputes under the local statute furthers public policy goals expressed in the legislation.

49. However, the B.C. Court of Appeal held that parties may freely contract out of protections afforded by the *Privacy Act* notwithstanding a legislated requirement that *Privacy Act* disputes "*must be heard and determined by the Supreme Court*."[63] In brief reasons on this point, the Court of Appeal concluded that since the *Privacy Act* did not expressly prohibit contracts avoiding its application, it allowed such contracts.[64] In fact, the phrase "*must be heard and determined by the Supreme Court*" is sufficiently clear to prevent a contractual pull into another jurisdiction. *A fortiori*, Facebook's ambiguous attempt to avoid B.C.'s courts must fail.

50. In certain situations parties may contract out of statutory protections. However, the B.C. Court of Appeal's approach to this issue runs counter to the proper approach described by the Ontario Court of Appeal in *Jean Estate v. Wires Jolley*, which requires courts to balance competing public policy concerns before upholding forum selection clauses.[65]

51. In *Jean Estate*, in the context of a private agreement to arbitrate fee disputes between solicitor and client (*not* an online contract of adhesion), the majority *per* Weiler J.A., held that such private agreements will be unenforceable if they avoid statutory protections under the *Solicitors Act*. Like the *Privacy Act*, the *Solicitors Act* did not expressly prohibit contracting out, yet the Court concluded that public policy precluded doing so if it avoided statutory protections.

52. As Weiler J.A. explained in reasons concurred in by MacFarland J.A: "… a party cannot contract out of his or her [statutory] right to have an independent assessment of whether the contingency fee is fair and reasonable by an independent assessor."[66] Further, she explained that "[82] [t]he case law supports the respondent's position that a client cannot contract out of the protections in the *Solicitors Act* for reasons of public policy. . . ." [emphasis added].[67]

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[63] *Privacy Act*, s. 4 (emphasis added) **[ABA Vol IV Tab 69]**
[64] Judgment of BCCA at paras 70 to 71 **[AR Vol I Tab 3]**
[65] *Jean Estate v. Wires Jolley LLP*, 2009 ONCA 339, 96 O.R. (3d) 171 ("*Jean Estate*") **[ABA Vol II Tab 23]**
[66] *Jean Estate* at para 8 **[ABA Vol II Tab 23]**
[67] *Jean Estate* at para 82 **[ABA Vol II Tab 23]**

53. Weiler J.A. quoted from *Andrew Feldstein & Associates v. Keramidopulos*, wherein Murray J. held that "[t]o permit contracting out of the provisions of the *Solicitors Act* would defeat the whole purpose of those legislative provisions enacted in the public interest and designed to allow a client protection against unwarranted or unreasonable legal fees."[68]

54. To properly assess enforceability of the agreement to arbitrate, Weiler J.A. balanced public policy favouring arbitration against public policy ensuring statutory protections extending to the public. She concluded that should arbitration undermine substantive statutory rights, the agreement to arbitrate would be unenforceable. She emphasized that in cases upholding agreements to arbitrate, courts are concerned to ensure that "no substantive statutory rights affecting the merits of the dispute [are] lost."[69]

55. On the specific facts, Weiler J.A. found that substantive statutory rights would not be affected should arbitration proceed. But she qualified this: "[84] . . . public policy prevents the parties from contracting out of the statutory protections contained in the *Solicitors Act* and . . . any arbitration must be conducted in accordance with [the statutory protections] . . .".

56. In *Jean Estate*, the Ontario courts had jurisdiction over the parties to require that "any arbitration must be conducted" in accordance with *Solicitors Act* protections. In contrast, here the B.C. courts would lack continuing jurisdiction as the matter would be stayed in B.C.

57. The B.C. Court of Appeal suggested a contract pulling cases out of s. 4's designation of the B.C. Supreme Court as the arbiter of *Privacy Act* disputes does not conflict with s. 4 because it cannot be interpreted to apply outside B.C.'s borders.[70] Creating a local cause of action, and then requiring local courts to develop the cause of action when they have territorial competence, is not an instance of extraterritorial overreach. Rather, it is properly viewed as an effort to control incubation and development of the statutory cause of action within local territory.

58. The B.C. Court of Appeal also held that s. 4 was only intended to apply as between courts in British Columbia, *i.e.*, to determine which among various possible B.C. courts and tribunals has jurisdiction under the *Privacy Act*. However, this is too narrow a reading. Rather, the

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[68] *Jean Estate* at para 82 **[ABA Vol II Tab 23]**; *Andrew Feldstein & Associates v. Keramidopulos*, [2007] O.J. No. 3683, 160 A.C.W.S. (3d) 724 (Ont. S.C.J.) at para. 60 **[ABA Vol I Tab 2]**
[69] *Jean Estate* at para 84 **[ABA Vol II Tab 23]**
[70] Judgment of BCCA at paras 45 to 64 **[AR Vol I Tab 3]**

principle is that where a legislature gives jurisdiction to its courts it is those same courts that should have jurisdiction over the matter and not courts elsewhere.[71] The appellant says this principle should apply particularly where, as here, the same local statute contains the remedy being pursued.[72]

59. While the B.C. Court of Appeal found the statutory jurisdiction provision only applied to distinguish one B.C. court from other adjudicative forums in B.C., it did not apply the same reasoning to find Facebook's jurisdiction clause applied only to distinguish certain courts in California from other adjudicative forums in California. For the sake of consistency, the reasoning applied by the B.C. Court of Appeal should have at least extended to both the contractual and statutory forum clauses.

60. For all of these reasons, the appellant says that Facebook has not established that its forum selection clause is valid, clear, enforceable, and applicable to the cause of action.

C. Strong Cause

(i) Protecting Privacy & Consumer Rights

61. Even if this Court finds the forum selection clause is valid, clear, enforceable and applicable to the cause of action, the appellant says Griffin J. exercised her discretion appropriately and found sufficiently strong cause or properly weighed factors in s. 11 of the *CJPTA* to refuse to enforce the forum selection clause.

62. The forum selection clause must be viewed in the particular context of this case: a proposed privacy and consumer rights class proceeding. Thus, our discussion begins with a brief review of privacy rights, elaborating on aspects touched upon above.

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[71] See *Zi Corp v. Steinberg*, 2006 ABQB 92, 62 Alta L.R. (4th) 123 **[ABA Vol III Tab 49]**; *Voyage Co. Industries v. Craster*, 1998 CanLII 1776 (B.C.S.C.) **[ABA Vol III Tab 48]**; *Incorporated Broadcasters Ltd v. Canwest Global Communications Corp*, [2001] O.J. No. 4882, 20 B.L.R. (3d) 289 (S.C.) **[ABA Vol II Tab 21]**; *Nord Resources Corp v. Nord Pacific Ltd*, 2003 NBQB 201, 263 N.B.R. (2d) 205 **[ABA Vol II Tab 31]**; *Ironrod Investments Inc. v. Enquest Energy Services Corp.*, 2011 ONSC 308, [2011] O.J. No. 544 **[ABA Vol II Tab 22]**; *Gould v. Western Coal Corp.*, 2012 ONSC 5184 **[ABA Vol I Tab 15]**. See also the American case, *Taylor v. LSI Logic Corp*., 715 A.2d 837 (U.S. Del. Super. 1998) **[ABA Vol III Tab 40]**.

[72] See *Schwartz v. Ingenious Ideas Inc*., 2009 NSSC 255, 281 N.S.R. (2d) 233 at paras 20 to 22, to similar effect regarding copyright claims **[ABA Vol II Tab 34]**

63. Privacy is of great importance in Canada. Indeed, it is accorded *quasi*-constitutional status. In *A.B. v. Bragg Communications Inc*., this Court quoted the following passage from *Toronto Star Newspaper Ltd. v. R.*:[73]

> Privacy is recognized in Canadian constitutional jurisprudence as implicating liberty and security interests. In *Dyment* [[1988] 2 S.C.R. 417], the court stated that privacy is worthy of constitutional protection because it is "grounded in man's physical and moral autonomy," is "essential for the well-being of the individual," and is "at the heart of liberty in a modern state"…

64. The nature of the internet has clear potential to undermine privacy rights. Justice Griffin properly recognized this, expressing her concerns as follows:[74]

> Given the almost infinite life and scope of internet images and corresponding scale of harm caused by privacy breaches, BC residents have a significant interest in maintaining some means of policing privacy violations by multi-national internet or social media service providers.
>
> Working together the *CPA* and the *Privacy Act* provide practically the only tools for BC residents to obtain some access to justice on these issues.

65. Privacy concerns are heightened where, as here, consumers' personal information is used for the gain of service providers seeking to avoid domestic protective laws. As the House of Commons Standing Committee on Access to Information, Privacy and Ethics explained:[75]

> … the Committee is concerned that major social media companies, while doing business in Canada, prefer to be governed by laws other than those of this country. While the reasons for this may be economic, linguistic or business in nature, <u>it is important that Canadians who use these services be protected by their own laws and values</u>… [emphasis added]
>
> … the use of personal information as data facilitates the aggregation of that data and creates opportunities to monetize a user's personal information. As Tamir Israel of the Canadian Internet Policy and Public Interest Clinic (CIPPIC) put it, "all this data is collected, analyzed and refined into a sophisticated socio-economic categorization scheme."

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[73] *A.B. v. Bragg Communications Inc*., 2012 SCC 46, [2012] 2 S.C.R. 567 at para 12 **[ABA Vol I Tab 1]**; *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27 at para 41 **[ABA Vol III Tab 43]**. See also: *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502, 86 O.R. (3d) 401 at para 29 **[ABA Vol I Tab 8]**; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441 at para 26 **[ABA Vol II Tab 18]**; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, 148 D.L.R. (4th) 385 at para 65 **[ABA Vol I Tab 12]**

[74] Judgment of BCSC at paras 360, 361 **[AR Vol I Tab 1]**

[75] Report of the Standing Committee at 7 to 9 **[ABA Vol III Tab 54]**

66. And, noting the particular concerns respecting children:[76]

> Professor Sara Grimes of the University of Toronto explained to the Committee that studies show that "since the very early days of the World Wide Web, kids' privacy rights have been infringed upon for commercial purposes within certain online social forums." She finds that this happens with much greater frequency than with most of the other risks associated with children online; children's online interactions, she said, "are being surveilled and data-mined, most often without the full knowledge or consent of the kids involved, or that of their parents and guardians."
>
> Mr. Matthew Johnson of MediaSmarts, a non-profit centre for digital and media literacy, drew attention to his organization's research and that of others around the world that demonstrate how "the landscape online for young people is tremendously commercialized; that the majority of the sites most popular with young people are commercial sites," resulting in young people being "tracked online more aggressively than adults." Consequently, he cautioned, young people are subject to greater risks than adults when it comes to their online privacy.

67. In addition to protecting privacy rights, s. 3(2) of the *Privacy Act* has the salutary effect of protecting the public from misinformation flowing from false or misleading ads. Facebook held Ms. Douez and others out as spokespersons endorsing its commercial customers' products and services. The appellant says that Facebook did so without consent. An endorsement of a product or service purporting to issue from a person without the supposed endorser's consent runs the risk of being a false or exaggerated endorsement and, therefore, a misleading or false advertisement. B.C. and other jurisdictions are of course concerned to ensure local residents are not subjected to false or misleading advertisements, and this objective is assisted in B.C. through the *Privacy Act*. In *Seidel v. TELUS Communications Inc*., Binnie J. for the majority noted that consumer protection legislation is to be "interpreted generously in favour of consumers".[77]

68. The legislature enacted statutory protections specifically intended to protect privacy and certain consumer rights of B.C. residents and vested jurisdiction with the B.C. Supreme Court for that purpose. It chose to create a new local tort rather than leave the issue up to the potential evolution of the broader common law. This fact, standing alone or in conjunction with the other factors (discussed later), represents "strong cause" to avoid the contractual forum selection

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[76] Report of the Standing Committee at 23, footnotes omitted **[ABA Vol III Tab 54]**. See footnote 33, noting the need to consider the interest of absent class members.
[77] 2011 SCC 15, [2011] 1 S.C.R. 531 at para 37 **[ABA Vol II Tab 35]**

clause. Where the courts of a province have been granted jurisdiction to enforce a statutory tort, this represents "strong cause". The province's residents should be confident that their local statutes will secure to them protections intended by their legislature.

(ii) The "Strong Cause" Test and Consumers

69. The "strong cause" test was developed by this Court in *Pompey*, which concerned a forum selection clause in a bill of lading between sophisticated parties specifying Belgium as the forum to resolve disputes. In contrast to a bill of lading between sophisticated parties, the present case concerns a contract of adhesion between a sophisticated internet company and consumers, some only 13 years of age. Furthermore, and unlike *Pompey*, the proposed enforcement of a contract of adhesion must be viewed in the context of a competing forum selection clause contained in a public interest statute intended to protect the public.

70. This Court has not yet had the opportunity to consider whether the approach articulated in *Pompey* applies in the same way in the arena of consumer contracts or in the face of statutory public interest protections.[78] For its part, the B.C. Court of Appeal extended *Pompey* with little pause or consideration. In doing so, it failed to appreciate public policy differences between commercial and consumer contracts and public policy objectives underpinning the *Privacy Act*.

71. Forum selection clauses will not be enforced where there is "strong cause" not to do so. The "strong cause" test is met in this case for the reasons discussed above and elaborated on below. The test requires consideration of public policy: in particular, whether enforcing the forum clause will undermine public policy.[79] Where the concern is a forum selection clause in a consumer contract of adhesion, for the same reasons outlined in our discussion of such clauses' validity, etc., the strong cause test should be applied in a nuanced manner, accounting for parties' inherent inequality or consumers' lack of bargaining power.

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[78] Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010) at 128 to 129 **[ABA Vol IV Tab 57]**

[79] The need to consider public policy in such circumstances is highlighted by this Court in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 SCR 907 **[ABA Vol II Tab 19]**. See at para 35: "…the public policy expressed in our own bankruptcy laws is a relevant consideration…" And, at para 53: "Canadian public policy, expressed through the Act, strongly supports the rights of claimants whom we would regard as secured creditors. Our law considers it in the interests of commercial activity generally that secured rights be protected." Further, at para 87: "…courts must have regard to the need to do justice to the particular litigants who come before them as well as to the public interest in the efficient administration of bankrupt estates…"

72. Alternatively, the appellant says the "strong cause" test should be modified to place the burden on the defendant in the context of consumer contracts of adhesion. In other words, the burden should remain at all times on the party with the stronger bargaining position: the party that crafted the contract and its forum selection clause. That party should bear the burden to justify in all the circumstances why its forum selection clause ought to apply at all. This approach would fit well with s. 11 of the *CJPTA*. The contract and its forum selection clause are factors to be considered in the s. 11 analysis. The defendant has the onus to apply those factors to secure its stay of proceedings under the *CJPTA*. The court will exercise its discretion and accord the forum selection clause more or less weight with reference to the many factors that come to bear on that question. The appellant says that a forum selection clause in a standard form contract of adhesion should generally be accorded no weight or marginal weight in this analysis. Where the issue concerns a contract that is *not* a contract of adhesion, a presumption that the parties willingly bargained away a right to sue in a particular place carries more weight. Where the contract is one of adhesion, the argument loses considerable force.

73. Both approaches (a nuanced "strong cause" test and a direct application of s. 11 of the *CJPTA*) consider the forum selection clause through the lens of the consumer. Such approaches are particularly appropriate when a sophisticated corporation has (a) targeted a vast population within a domestic jurisdiction; (b) committed alleged statutory torts within the domestic jurisdiction; and (c) seeks to bind the domestic population to a foreign jurisdiction.

74. The Israeli Central District Court referenced such considerations when it very recently refused to enforce Facebook's forum selection clause in *Ben Hamo v. Facebook, Inc.*, explaining as follows (emphasis added) (translation):[80]

> [18] . . . While the common and accepted Dépeçage rules provide priority to a forum-selection clause that was established between the parties, thus awarding priority to the provider which determined that the litigation shall take place abroad . . . thus favouring the development of international trade and rendering it easier on producers and importers – it may well be the time to examine the matter from a different perspective, the consumer's perspective, primarily

[80] (June 10, 2016), Class Action File 46065-09-14 ("*Ben Hamo*") at paras 18-26 **[ASBA Tab 1]**. At para 31, the Court refers to the B.C. Court of Appeal's decision in the present case, but distinguishes it on the basis that Canadian and American Facebook members are "one group". In fact, B.C. residents are not part of the U.S. class action suit or settlement **[AR Vol II Tab 15A at p 159, para 1(a)]**

when it is a consumer of large international entities that compete for consumers around the globe.

It is a standard contract before us, which is used by a large public in Israel, and it is evident that Facebook had adjusted its website for the utilization of its users in Israel in Hebrew. Whether we have a personal claim before us, of a low monetary value, which then should be allowed to be litigated in Israel as outside of Israel it will not be heard at all, or whether it is a group's claim before us, in consumer matters.

It is possible that the right of a property owner, which had distributed it across the globe, to litigate in its place of residence and avoid being dragged to the place of residence of all its consumers, loses its weight when the property owner does not distribute its goods a bit here and a bit there, but amongst the majority of the country's residents. It is unclear that the weight of Facebook's right to litigate in one place in the world, as determined in the standard contracts over which it had signed-up its users, ranks higher than the weight of the rights of all its users to receive readily available remedies in their own countries. It seems that he who distributes its goods and services as stated above should be ready to litigate and be sued in each and every country it conducts business in a significant scope. Particularly so, when there is such a large gap between the size of Facebook in Israel, and presumably the value of its business activity, and the size of each of its users independently, or perhaps even all its users together. The burden imposed on each and every one of them to litigate abroad or in accordance with the laws of California is a significant burden, which may prevent such litigation in many cases.

[19] . . . It is reasonable to assume that there would be no personal incentive for anyone to submit an action of this nature and to litigate over the question of jurisdictional authority, outside the context of a class action suit. It shall not be redundant to add, that these are highly regarded consumer matters, which the Standard Contracts Act had set out to protect in the first place. Should it be so that when the possible contravention arrives from outside of Israel, but is applied and compromises users in Israel – the law should stand down from protecting consumers here?

[20] An approach that views the consumer's right to litigate in "his home" is supported by European procedural rules Brussels I Regulations, paragraph 16/1 . . .

[26] . . . Even if Facebook has an interest in concentrating the claims brought against it in the place of residence of the mother-company, one must balance this interest with the interest of a vast consumers group in Israel. The weight of that interest diminishes in light of the hard wired power gap between the parties and the agreement being a standard contract.

75. The proposed approaches also find support in Marty Gould's article "The Conflict Between Forum-Selection Clauses and State Consumer Protection Laws: Why Illinois Got it Right in *Jane Doe v. Match.com*". Gould explains (emphasis added): [81]

> While the policy arguments made in *Bremen* [*v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)] and its progeny certainly do raise important concerns, they should not be determinative to the issues at hand. Specifically, the economic efficiency and freedom of contract policy arguments are not equally persuasive in all circumstances. When determining whether to enforce forum selection clauses, courts must consider the type of parties involved in the contract, the circumstances in which the contract was agreed to, and the nature of the dispute. There is a stark difference between presuming the enforcement of forum selection clauses freely assented to and bargained for by sophisticated commercial entities, such as the contract between the parties in *Bremen*, and presuming the enforcement of forum selection clauses in personal injury cases involving contracts of adhesion, such as the contract at issue in the Match.com cases.
>
> First, personal injury claims are distinguishable from contract disputes. As a matter of principle, courts have "recognized that the interests of protecting and preserving human life weigh heavily when compared with that of protecting the economic integrity of various entities." Accordingly, in situations "where one must decide whether to implement a certain norm aimed at protecting the physical integrity of humans or one aimed at protecting economic welfare, preference should be given to the former."
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> …
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> Second, it is important to distinguish contracts of adhesion from those contracts that are freely negotiated. . . . There typically is no contemplation or negotiation over any of the terms of the contract, which are generally drafted by the "stronger party to the transaction.". . . . In these types of contracts, the public policy justifications for enforcement are diminished because contracts of adhesion, like the clickwrap agreements used by Match.com, are often not "accepted knowingly and voluntarily (and for consideration)." These types of contracts are often excessively long and contain legalese. The use of small print also makes them difficult to read and understand. Unsurprisingly, most consumers do not read them.
>
> …
>
> In addition, by enforcing forum selection and choice of law clauses promulgated en masse across the country, regardless of whether they conflict with a forum state's own laws, we risk the wholesale displacement of state consumer protection laws. . . . State legislatures ultimately lose their ability to protect consumers in their own state.

[81] (2015) 90 Chi.-Kent L. Rev. 671 at 697-699 [emphasis added, cites and footnotes omitted] **[ABA Vol III Tab 53]**

76. Both courts and legislatures have recognized that a different approach is warranted when dealing with contracts such as the one at issue in the case at bar. From a legislative perspective, we see the approach in article 3149 of the *Civil Code* of Québec, which provides that "Québec authorities also have jurisdiction to hear an action based on a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him."[82]

77. Also, as observed by the Israeli Central District Court in *Ben Hamo*, the European Union carves out exceptions for consumer contracts. Council Regulation (EC) No 44/2001 (referred to as Brussels I Regulation) sets out jurisdictional rules as between member states of the European Union.[83] At para 13 of the "Whereas" section: "[i]n relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for." Article 23(1) provides that if the courts have agreed that a court of a member state is to have jurisdiction that court has exclusive jurisdiction unless the parties agree otherwise. However, Article 23(5) provides that such agreements "shall have no legal force if they are contrary to Articles 13, 17 or 21". Article 17 is found in section 4 which deals with jurisdiction over consumer contracts. Article 17 provides that "[t]he provisions of the section may be departed from only by an agreement: (1) which is entered into after the dispute has arisen; (2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; (3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State."

78. Geneviève Saumier explains that one reason the Saskatchewan Court of Appeal expressed concerns about a "closed list" of factors in *Microcell Communications Inc. v. Frey*[84] is "the absence of protection for weaker parties bound to litigate in foreign courts by clauses in standard-form contracts."[85] To similar effect, many common law courts have already tempered the *Pompey* test and refused to enforce forum selection clauses in contracts of adhesion and in

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[82] *Civil Code of Quebec*, CQLR c. C-1991, art. 3149 **[ABA Vol IV Tab 61]**
[83] Council Regulation (EC) No 44/2001 **[ABA Vol IV Tab 64]**
[84] 2011 SKCA 136, 377 Sask. R. 156 ("*Microcell*") **[ABA Vol II Tab 27]**
[85] G. Saumier and J. Bagg, "Forum Selection Clauses before Canadian Courts: A Tale of Two (or Three?) Solitudes" (2013) 46 UBC L Rev 439 at 461 **[ABA Vol IV Tab 58]**

non-commercial contract situations. For example, in *Stubbs v. ATS International BV*, a defendant relied on a forum selection clause in favour of a court in Holland contained in an employee share purchase plan.[86] The Ontario Court of Appeal found "strong cause" for why the clause should not be enforced but added as follows: "[58] … I question whether the strong cause test applies without modification because the clause in this case arises in an employment context, rather than a commercial situation where the parties are assumed to have equal bargaining power."

79. In *Straus v. Decaire*, the Ontario Court of Appeal endorsed the motion judge's decision refusing to enforce an exclusive jurisdiction clause, based on a number of factors, including that "the respondents were relatively unsophisticated and there is no suggestion that Orion or Savage made any attempt to draw the exclusive jurisdiction clause to the respondents' attention" and "the exclusive jurisdiction clause was not the product of any negotiation between the parties, but is rather a term of the pre-printed contract which Orion requires its customers to sign."[87]

80. In *Negrich v. 2724316 Canada Inc.* [88] the court refused to enforce a forum selection clause in a consumer contract because doing so would "*probably sound a death knell to any litigation*". As the court explained:

> [21] . . . we are not dealing with a commercial contract such as a bill of lading involving sophisticated parties [as in *Pompey*] . . . On the contrary, this transaction involving the purchase of *airline* tickets from a travel agent is a consumer transaction with a sophisticated travel agency. . . . the contract is a standard form contract or a contract of adhesion, where the consumer has little or no chance of bargaining away standard terms with which he does not agree. …
>
> [23] I am not suggesting that there was in the case at hand "*grossly uneven bargaining power*" but as in most contracts of adhesion the adhering party (here, the plaintiffs) has no bargaining power. In the case of a "forum selection" clause that kind of contractual provision can produce real hardship and therefore, unfairness, where the plaintiff has to travel afar to get justice. In the case at bar <u>enforcing this clause would mean that these plaintiffs would be required to sue in a Quebec Court, which would probably sound a death knell to any litigation on their part</u>. [emphasis added]

[86] 2010 ONCA 879, 272 O.A.C. 386 **[ABA Vol III Tab 39]**
[87] 2007 ONCA 854, [2007] O.J. No. 4777 at para 5 **[ABA Vol III Tab 37]**
[88] 2011 CarswellOnt 16065 (S.C.J.) **[ABA Vol II Tab 30]**

81. In *Full House Entertainment Inc. v Auto Life RX*, [89] the Supreme Court of New York upheld a District Court decision refusing to enforce a forum selection clause requiring the New York resident plaintiff to arbitrate its claim in Arizona, holding as follows (at pp 2-3):

> A just basis for … denying enforcement of a forum selection clause may be found where the costs and inconvenience of litigating in a foreign forum would, for all intents and purposes, deprive the litigant of his day in court. . . .
>
> Here, concluding that enforcement of the forum selection clause of the warranty agreement would improperly chill or extinguish plaintiff's claims thereunder, and noting too the significant public policy interest in the enforceability of warranties, we find that the District Court properly denied appellant's motion to the extent that it sought an order compelling that the venue of the arbitration be Maricopa County, Arizona.

82. The U.S. District Court in the Northern District of California has provided a similar rationale for refusing to enforce forum selection clauses. In *Comb v. PayPal, Inc.*, [90] the plaintiffs sought injunctive relief and related remedies on behalf of a purported nationwide class alleging violations of state and federal law by PayPal, an internet transaction-payment service. PayPal moved to compel individual arbitration in Santa Clara County, California (the same jurisdiction where Facebook seeks to compel 1.8 million B.C. residents to sue) pursuant to an arbitration forum clause in its standard user agreement and under the *Federal Arbitration Act*. The U.S. District Court refused to grant the relief sought, reasoning in part as follows (pp 17 - 18):

> The User Agreement requires that any arbitration take place in Santa Clara County, California. . . .
>
> Although it is true that forum selection clauses generally are presumed *prima facie* valid, a forum selection clause may be unconscionable if the "place or manner" in which arbitration is to occur is unreasonable taking into account "the respective circumstances of the parties." . . . PayPal serves millions of customers across the United States and that the amount of the average transaction through PayPal is $55.00. . . . PayPal cites no California authority holding that it is reasonable for individual consumers from throughout the country to travel to one locale to arbitrate claims involving such minimal sums. Limiting venue to PayPal's backyard appears to be yet one more means by which the arbitration clause serves to shield PayPal from liability instead of providing a neutral forum in which to arbitrate disputes. See, e.g., Bolter, 87 Cal. App. 4th at 909 (finding that enforcement of forum selection clause providing that claims are arbitrated exclusively in Utah would be cost

[89] 31 Misc. 3d 64; 922 N.Y.S.2d 912; 2011 N.Y. Misc. LEXIS 888; 2011 NY Slip Op 21080 **[ABA Vol I Tab 14]**
[90] 218 F. Supp. 2d 1165 (N.D. Cal. 2002) **[ABA Vol I Tab 10]**

> prohibitive in light of fact that the potential claimants located around the country would be required to retain counsel familiar with Utah law).

83. The U.S. District Court (E. Dist. Penn.), applying California law followed the same approach in *Bragg v. Linden Research, Inc.*,[91] where the Court stated:

> The TOS [terms of service] also require that any arbitration take place in San Francisco, California. . . . In *Comb*, the Court found that a similar forum selection clause supported a finding of substantive unconscionability, because the place in which arbitration was to occur was unreasonable, taking into account "the respective circumstances of the parties." . . . . As in *Comb*, the record in this case shows that Linden serves millions of customers across the United States and that the average transaction through or with Second Life involves a relatively small amount. . . . In such circumstances, California law dictates that it is not "reasonable for individual consumers from throughout the country to travel to one locale to arbitrate claims involving such minimal sums." *Id*. Indeed, "[l]imiting venue to [Linden's] backyard appears to be yet one more means by which the arbitration clause serves to shield [Linden] from liability instead of providing a neutral forum in which to arbitrate disputes."

84. Also see *Aral v. Earthlink, Inc.*,[92] in which the California Court of Appeal held that "a forum selection clause that requires a consumer to travel 2,000 miles to recover a small sum is not reasonable."[93]

85. The public policy rationales outlined above are *apropos* the current case. Griffin J. was keenly aware of these issues, noting the legislature's intention in establishing privacy causes of action in B.C. for individuals through the *Privacy Act* and explaining as follows:[94]

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[91] 487 F. Supp. 2d 593 (E.D. Pa. 2007) at p 24 **[ABA Vol I Tab 5]**

[92] 134 Cal.App.4th 544, 561, 36 Cal. Rptr. 3d 229 (2005) **[ABA Vol I Tab 3]** at 20

[93] The appellant also notes the following cases: *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 2008 U.S. Dist. LEXIS 83724, 2008 WL 3876341, *10 (E.D. Cal.) **[ABA Vol I Tab 6]** at p 12 in which the court explained that under California law, a forum selection clause is unconscionable if its place and manner restrictions are unduly oppressive, or have the effect of shielding the stronger party from liability. *Williams v. America Online*, 2001 Mass. Super. LEXIS 11; 43 U.C.C. Rep. Serv. 2d (Callaghan) 1101 **[ABA Vol III Tab 47]**: "Public policy suggests that Massachusetts consumers who individually have damages of only a few hundred dollars should not have to pursue AOL in Virginia." *Scarcella v. America Online, Inc.*, 11 Misc. 3d 19; 811 N.Y.S.2d 858; 2005 N.Y. Misc. LEXIS 2943; 2005 NY Slip Op 25553 **[ABA Vol II Tab 33]** in which a New York appellate court refused to enforce a forum selection clause because doing so would "frustrate the stated legislative goal of providing a 'simple, informal and inexpensive procedure' for the disposition of small claims". And, *Strujan v AOL*, 12 Misc. 3d 1160(A); 819 N.Y.S.2d 213; 2006 N.Y. Misc. LEXIS 1285; 2006 NY Slip Op 50981(U) at 3 **[ABA Vol III Tab 38** in which the Civil Court of the City of New York held that "enforcement of the Agreement's forum selection clause would deprive her of this forum and provide no practical alternative. Accordingly, the court finds that the enforcement of the forum selection clause in this action would be unreasonable."

[94] Judgment of BCSC at para 75 (emphasis added)**[AR Vol I Tab 1]**

> [75] The legislature's intention in establishing privacy causes of action for individuals through the *Privacy Act* can be seen as aligned with an objective in conferring exclusive jurisdiction on this Court as follows:
>
> > (a) the actions do not require damages to be shown. This is recognition that even where there are no damages, there is a harm caused by these statutory torts and there is a public interest in protecting the privacy of and misappropriation of personality of BC residents;
> >
> > (b) cases where damages are not shown are likely to be cases where the expense of prosecuting the claim may outweigh an award of nominal damages. Providing for a local forum is one way of attempting to control and minimize the cost of bringing such claims, in contrast to having the claims heard in distant jurisdictions;
> >
> > (c) ensuring that such claims are brought locally also increases the likelihood that there will be notoriety and a general deterrent effect locally, thus furthering the public policy goal of protecting the privacy rights of British Columbians; and,
> >
> > (d) local courts may be more sensitive to the social and cultural context and background relevant to privacy interests of British Columbians, as compared to courts in a foreign jurisdiction. This could be important in determining the degree to which privacy interests have been violated and any damages that flow from this.

86. Added to this list is an intention to protect British Columbians from false or misleading advertisements: purported endorsements of commercial product and services where the "endorser" has in fact not consented to endorse the product or service.

87. We note Griffin J.'s concerns regarding the cost of litigating abroad already outlined above. Cost impediments are particularly concerning where, as here, such barriers can frustrate important protections intended by the local legislature, thus undermining local public policy.

88. Such barriers arise through costs the appellant will incur retaining foreign counsel and travelling to a foreign court. Furthermore, in California Ms. Douez faces the risk of having to pay Facebook's undoubtedly substantial legal costs should she not succeed,[95] a risk B.C. avoids

[95] "California's right of publicity law also includes a prevailing party fee provision stating that, 'the prevailing party in any action under this section **shall** . . . **be entitled to attorney's fees and costs**.' Cal. Civ. Code § 3344 [emphasis added]. This provision is mandatory for the prevailing party." *Cleopatra Records, Inc. v Bailey, et.al*, 2005 U.S. Dist. LEXIS 32780 (U.S. Dist. Ct., Central District of California) at 8 **[ABA Vol IV Tab 60; Vol I Tab 9]**

in a certified class action through operation of cost protections in the *Class Proceedings Act*.[96]

89. Furthermore, this case concerns statutory claims for nominal rather than compensatory damages. Griffin J. specifically certified the case with respect to those persons "…who do not seek to prove actual individual damage."[97] Thus, the class is effectively limited to persons seeking nominal damages, for whom the access to justice concerns are at their highest, and for whom any costs exposure will operate as a most effective deterrent to pursuing their legal rights.

90. Simply put, no rational British Columbia resident would travel to California to litigate nominal damages claims. As a result, enforcing Facebook's forum selection clause will frustrate the intentions of B.C. legislature outlined above.

91. For her part, Griffin J. properly identified public policy rationales that constitute "strong cause" to refuse to enforce contractual forum selection clauses. Her rationale is particularly appropriate in the context of an online consumer contract of adhesion. It is important to stress, as the Israeli Central District Court did in *Ben Hamo*, that Facebook injected itself into B.C. and sought to impose its adhesion arrangements with a vast segment of the B.C. public. Yet Facebook now seeks to avoid application of the very local laws it promised to "strive to respect". The public policy implications cannot be overstated.

92. The internet, explained Griffin J., has a reach that is almost infinite and timeless. Thus, serious social harm can flow from loss of privacy over the internet. This harm must be accounted for in considering whether there is strong cause to refuse to stay an action seeking to enforce such rights in the jurisdiction where the victim resides and the violation is felt most acutely. Griffin J. explained this as follows (emphasis added):[98]

> [102] Clearly the BC legislature thought it a matter of <u>important public policy</u> to protect the privacy interests of BC residents by the creation of statutory torts. While the *Privacy Act* was introduced in 1968, the policy reasons behind protecting the privacy rights of British Columbians have only expanded since that time.
>
> [103] The protection of privacy rights are now found to be consistent with the values of Canadians as expressed in the Canadian Charter of Rights. . . .

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[96] *Class Proceedings Act*, s.37 **[ABA Vol IV Tab 62]**
[97] Judgment of BCSC at para 320 **[AR Vol I Tab 1]**
[98] Judgment of BCSC at paras 102-105 **[AR Vol I Tab 1]**

> [104] Furthermore, with the creation and growth of the internet the potential implications for a loss of privacy are greater than ever. The difficulty in proving quantifiable damage remains great for an individual whose privacy is lost, but the social harm can be monumental if the loss of privacy includes publicity over the internet with its almost infinite reach and timelessness.
>
> [105] I conclude that the legislative conferral of exclusive jurisdiction on this Court for claims under the *Privacy Act* evidences both a legislative intention to override any forum selection clause to the contrary, and a strong public policy reason for not enforcing the Forum Selection Clause.

93. In failing to account for public policy objectives, the B.C. Court of Appeal departed from the approach proposed by the Ontario Court of Appeal in *Jean Estate*. In contrast, Griffin J. was well aware of differences between this case and *Pompey*, and she appropriately refined the analysis. She emphasized distinguishing features at paras. 83 to 93 of her reasons. She recognized that unlike *Pompey* this case concerns a contract of adhesion, not a bargained contract between sophisticated parties. At paragraph 90 she cited *Holt Cargo Systems Inc.* in which this Court explained that loss of juridical advantage can preclude a stay of proceedings:[99]

> [91] . . . Relevant circumstances include not only issues of public policy (as in this case) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigating in one forum or the other, and the discouragement of forum shopping. In short, within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.

94. Griffin J. found the plaintiff would lose a juridical advantage should Facebook's forum selection clause be enforced: she would lose her ability to rely upon B.C.'s *Privacy Act.*[100] Economic burdens can result in the loss of juridical advantage (burden attending in California outweighing potential nominal damages recovery), and because, as urged by Facebook, the *Privacy Act* is inapplicable to action in California. Furthermore, the *Privacy Act* specifically departs from the common law by enabling plaintiffs to prove claims without the need to prove damage, and makes the B.C. Supreme Court the arbiter of disputes under the Act. If the court

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[99] *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 SCR 907 **[ABA Vol II Tab 19]**
[100] Judgment of BCSC, paras 91 to 93 **[AR Vol I Tab 1]**

assumes the common law is the same in California and B.C., then the plaintiff has lost juridical advantage since the common law requires proof of damage.[101] As explained by one commentator: "While proof of damage is a necessary element of the common law appropriation of personality tort, the appropriation of personality actions under the provincial privacy acts are 'actionable without proof of damage.'"[102]

95. The matter ought to proceed in B.C. where the local B.C. Supreme Court has territorial competence, a public protection statute provides important local protections, the very same statute compels the parties to proceed before the local court, costs to attend in another country to litigate the dispute will exceed any individual claim presented, and a contract of adhesion ambiguously seeks venue outside the province while asserting that the contract drafter will respect local laws. The legislature intended the B.C. Supreme Court hear such cases for the policy reasons set out above. Even leaving aside the other arguments, cost impediments created by Facebook through its forum selection clause would effectively frustrate that objective.

96. The Court of Appeal avoided the public policy discussion entirely by finding the appellant did not prove she could not sue Facebook in California.[103] But the question is not whether the appellant might be able to sue in California – that is, whether California courts might assume territorial competence – but whether she would lose the juridical and substantive advantages provided by B.C's *Privacy Act* and the *Class Proceedings Act*. That should be analyzed through the lens of the local statutes, not foreign statutes.

97. At minimum, there is a significant risk that a California court would refuse to apply B.C's *Privacy Act*. Recall Facebook's own argument: California law applies to the dispute and "defeats the application of B.C.'s *Privacy Act*".[104] As well, B.C.'s procedural *Class Proceedings Act*, including its costs protection, will not apply in California. As explained in *Cash Converters*,

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[101] *Long v. Western Propeller Co*., [1968] M.J. No. 49, 67 D.L.R. (2d) 345 (C.A.) **[ABA Vol II Tab 25]**; *Krouse v. Chrysler Canada Limited et al*. (1974), 40 D.L.R. (3d) 15, 1 O.R. (2d) 225 (C.A.) **[ABA Vol II Tab 24]**; Stuart McCormack, *Intellectual Property Law in Canada*, 2d ed. (Huntington, NY: Juris Publishing, 2010) at 553 **[ABA Vol IV Tab 56]**; Robert G. Howell, "Publicity Rights in the Common Law Provinces of Canada" (1998) Loyola of Los Angeles Entertainment Law Review, 3-1-1998 **[ABA Vol IV Tab 55]**

[102] Stuart McCormack, *Intellectual Property Law in Canada*, 2d ed. (Huntington, NY: Juris Publishing, 2010) at 566, and see also at 553-554 **[ABA Vol IV Tab 56]**

[103] Judgment of BCCA at paras 75 to 78 **[AR Vol I Tab 3]**

[104] Judgment of BCSC at para 303 **[AR Vol I Tab 1]**; Judgment of BCCA below at paras 82 to 84 **[AR Vol I Tab 3]**

doubts that privacy rights may be undermined should be resolved in favour of preserving such rights and the onus should rest with the person seeking to avoid application of those rights.[105]

98. Bauman C.J. wrote that "… [if] there is no available expert evidence about that foreign law, the court will presume it is the same as B.C. law…"[106] This statement is overbroad and imposes an inappropriate evidentiary burden on a B.C. plaintiff simply seeking to apply a B.C. statutory tort in a B.C. court using a B.C. procedural rule. It is Facebook that wishes to move the case outside B.C., not the appellant. Furthermore, the presumption outlined by Bauman C.J. should not apply to statutory provisions altering the common law.[107]

99. The appellant says that Facebook, as the party seeking to rely upon the contractual forum selection clause, had the onus to prove the appellant will still receive her full *Privacy Act* protections in California. The notion that the appellant must adduce evidence of foreign law to sue under a local statute in a local court misinterprets *Pompey*. In *Pompey*, this Court simply provided that the plaintiff demonstrate "good reason it should not be bound by the forum selection clause."[108] Here, the appellant has demonstrated many good reasons found in policy objectives underpinning the *Privacy Act*, as detailed by Griffin J. in her reasons for judgment at paras. 75-76 and 96-105, concluding "… the plaintiff has shown strong cause why the Forum Selection Clause should not cause this Court to decline jurisdiction."[109] Put another way, the appellant is entitled to show good reason by relying on the public policy underlying local law, and need not prove what would occur under foreign law (and of course Facebook says the local B.C. law will not apply in California).

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[105] 2007 ONCA 502, 86 O.R. (3d) 401 at para 29 **[ABA Vol I Tab 8]**
[106] Judgment of BCCA at para 39 **[AR Vol I Tab 3]**
[107] See footnote 102, above. In *Gray v. Kerslake*, [1958] S.C.R. 3, 11 D.L.R. (2d) 255 **[ABA Vol II Tab 16]**, concerning rights under an insurance policy made in New York, Cartwright J. (for himself and Kerwin C.J.) dealt with the argument that New York law should be deemed the same as Ontario law, stating as follows: "[23] It is contended that the Court of Appeal were right in presuming that the law of the New York was the same as that of Ontario, but the presumption relates to the general law and does not extend to the special provisions of particular statutes altering the common law." In *Hellens v. Densmore*, [1957] S.C.R. 768, 10 D.L.R. (2d) 561 **[ABA Vol II Tab 17]**, Cartwright J. wrote: "[34] . . . In the absence of such evidence [as to the law of Alberta] the British Columbia Court should proceed on the basis that in Alberta the general law, as distinguished from special statutory provisions, is the same as that of British Columbia." There is debate on the scope of the assumption. See for example *Fernandez v. "Mercury Bell"*, [1986] 3 F.C. 454, 27 D.L.R. (4th) 641 (C.A.) **[ABA Vol I Tab 13]**
[108] *Pompey* at para 20 [emphasis added] **[ABA Vol III Tab 49]**
[109] *Pompey* at para 106 **[ABA Vol III Tab 49]**

100. The B.C. Supreme Court found "good reasons" to avoid the forum selection clause. Facebook remained silent in response to these good reasons, except to argue against application of the *Privacy Act*, a position that only heightens legitimate concerns that the appellant will not receive the protections intended by the B.C. legislature.[110] Surely in these circumstances the onus is on Facebook to mollify the B.C. Supreme Court: to explain how the appellant's rights and putative class rights will be protected in California. Facebook seeks to impose California as the forum for disputes and as the substantive law, yet offers no assurance regarding the ways in which the B.C. public will be protected there.

D. Extraterritorial Effect: Misplaced Reliance on *Tolofson* and *Unifund*

101. The existence of "strong cause" is sufficient to support this appeal. However, there are other failings with the B.C. Court of Appeal's analysis. The Court of Appeal relied on *Tolofson v. Jensen*[111] and *Unifund Assurance Co. v. ICBC*[112] for the proposition that Griffin J. gave extraterritorial effect to the *Privacy Act* requirement that action under the statute "must be heard and determined" by the B.C. Supreme Court.[113] Neither *Tolofson* nor *Unifund* was cited or relied upon by Facebook in its factum before the B.C. Court of Appeal. The issue was developed by the Court of Appeal on its own. One might expect a sophisticated multi-billion dollar corporation like Facebook to advance all reasonable arguments in its favour and not require court assistance.

102. In any event, contrary to the Court of Appeal's reasons on the issue, Ms. Douez never sought to give extraterritorial effect to the *Privacy Act*. Rather she sought to maintain the statutes *intra*-territorial or local effect.

103. La Forest J.'s reasons for judgment in *Tolofson* describe extraterritorial extension of laws as follows: "It seems to me self evident, for example, that State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country, or for that matter the actions in State B of citizens of State C, and it would lead to unfair and unjust results if it did."[114] (Emphasis added). In *Unifund* this Court found that Ontario could not apply its regulatory law to an insurer in B.C. lacking sufficient connections to Ontario.

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[110] Judgment of BCSC at para 303 **[AR Vol I Tab 1]**
[111] [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289 ("*Tolofson*") **[ABA Vol III Tab 42]**
[112] 2003 SCC 40, [2003] 2 S.C.R. 63 ("*Unifund*") **[ABA Vol III Tab 46]**
[113] Judgment of BCCA at para 63**[AR Vol I Tab 3]**
[114] *Tolofson* at 1052 **[ABA Vol III Tab 42]**

104. In contrast, the *Privacy Act* creates a tort in B.C. and regulates activities in B.C. *intra*-territorially. This is why Facebook accepted the B.C. Supreme Court's territorial competence, and only asked the Court to exercise its discretion to stay the action. Hence, presumptions against extraterritorial application of a statute simply do not arise here: the statute's impact is confined to conduct within the B.C. Court's territorial competence, and Ms. Douez never argued otherwise.[115] The proposed class is limited to B.C. residents.

105. Through the *Privacy Act* the B.C. legislature simply requires persons to appear before the B.C. Supreme Court when they enter the B.C. market and breach B.C. residents' privacy by taking their portraits or names in B.C. for their own financial gain and without consent. This is not a case in which a foreigner with no connection to B.C. is being hailed before the B.C. courts to answer for its extraterritorial conduct (as in *Unifund*).

106. Plainly, this is not an extraterritorial application of law. On the contrary, the law of the remedy-granting legislature operates only within the territory of the province that enacted it.[116] If Facebook believes s. 4 to be unconstitutional it should have applied to state a constitutional question challenging its validity (which it did not do, perhaps not surprisingly as the issue arose first in the B.C. Court of Appeal's reasons for judgment).[117] In truth, there is no constitutional issue.

E. B.C.'s *CJPTA* s. 11 Approach Now Differs from SK and NS Approaches

107. The *CJPTA* controls the courts' discretion to refrain from exercising territorial competence. Pursuant to s. 12 of the *CJPTA*, when another statute, such as the *Privacy Act*, expressly confers jurisdiction upon a court, the *CJPTA* s. 11 analysis defers to the other statute. Griffin J. recognized this and relied on s. 12 in finding that the *Privacy Act* prevails over the forum selection clause.[118] In contrast, the B.C. Court of Appeal's approach circumvents both the

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[115] See Pamela K. Bookman, "Litigation Isolationism" (2015) 67 Stanford Law Review 1081 at 1143: "Finally, what is to be done about the presumption against extraterritoriality? Prescriptive jurisdiction is a different beast from the adjudicative jurisdiction and discretionary doctrines just discussed. For our purposes, the relevant detail is that the presumption applies to prevent the application of federal law to Americans' conduct abroad." **[ABA Vol III Tab 51]**

[116] See paras 57-58, above.

[117] This was required under the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, s. 8 **[ABA Vol IV Tab 63**]. Nor did Facebook apply to state a question in this Court upon the granting of leave to appeal.

[118] Judgment of BCSC at paras 130-133**[AR Vol I Tab 1]**

CJPTA and the *Privacy Act*. As such, B.C. and potentially other *Privacy Act* and *CJPTA* provinces lose key legislative tools designed to protect public rights and secure access to justice.

108. When a court is asked to decline to exercise territorial competence, one would expect the court to refer to and rely upon the precise statute carefully designed to manage such issues: the *CJPTA*. Yet, the B.C. Court of Appeal avoided the *CJPTA* by considering Facebook's forum selection clause without regard to the *CJPTA*. This cannot have been the legislative intent in enacting a statute designed specifically to address issues of the court's jurisdiction.

109. The B.C. Court of Appeal's approach purportedly flowed from this Court's decision in *Pompey*. But *Pompey* does not concern the *CJPTA*. It is a common law case involving a forum selection clause between sophisticated commercial parties under federal jurisdiction, which lacks a *CJPTA* statute.

110. In *Teck*, decided six years after *Pompey*, this Court considered the impact of the *CJPTA* in a case involving the B.C. Supreme Court's decision to refuse to decline its territorial competence over a contractual dispute and in the face of a parallel Washington state lawsuit. In so doing, McLachlin C.J. described s. 11 of the *CJPTA* as "a complete codification of the common law test for *forum non conveniens*" that "admits of no exceptions". [119] She described the *CJPTA* as "a comprehensive regime that applies to all cases where a stay of proceedings is sought on the ground that the action should be pursued in a different jurisdiction (*forum non conveniens*)."[120] Further, it was held that "the CJPTA was intended to codify the *forum non conveniens* test, not to supplement it."[121] This language is unambiguous and highlights the B.C. Court of Appeal's error. Academics have commented that "[i]n the face of this [statement in *Teck*], it seems very difficult to argue that stay of proceedings cases involving a jurisdiction clause should somehow be analyzed using a different framework than the one in s. 11."[122]

111. Despite this Court's admonition in *Teck*, appellate courts in provinces with *CJPTA* statutes now diverge on whether to assess a forum selection clause's impact through the *CJPTA*

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[119] *Teck* at para 22 **[ABA Vol III Tab 41]**
[120] *Teck* at para 21 **[ABA Vol III Tab 41]**
[121] *Teck* at para 23 **[ABA Vol III Tab 41]**
[122] Vaughan Black, Stephen Pitel and Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012) at 208 **[ABA Vol III Tab 50]**; G. Saumier and J. Bagg, "Forum Selection Clauses before Canadian Courts: A Tale of Two (or Three?) Solitudes" (2013) 46 UBC L Rev 439 at 465-468 **[ABA Vol IV Tab 58]**

lens, or separately under common law principles enunciated in *Pompey*. Divergence should be avoided because the *CJPTA* is a uniform statute, being a product of the Uniform Law Conference of Canada currently in force in British Columbia, Nova Scotia and Saskatchewan.[123]

112. The B.C. Court of Appeal's approach relegates the *CJPTA* to an inferior position in the analysis: a potentially useless appendage. In particular, the B.C. Court of Appeal held as follows: "… In B.C., when the defendant relies upon a forum selection clause, the *Pompey* test is a separate, standalone inquiry that is conducted first. The *CJPTA* analysis may be conducted second, if necessary."[124] By divorcing the forum selection clause from the *CJPTA* analysis and the *Privacy Act*, the B.C. Court of Appeal avoided s. 12 of the *CJPTA* (deferring to other statutes) and s. 4 of the *Privacy Act* (granting jurisdiction to the B.C. Supreme Court).

113. The Court of Appeal followed its earlier decision in *Viroforce*.[125] However, not only did the Court of Appeal in *Viroforce* fail to cite *Teck*, but its decision runs counter to this Court's express admonition in *Teck* that the *CJPTA* represents a complete codification of the law of *forum non conveniens*. In *Teck*, this Court held that the "existence of prior parallel proceedings" cannot by itself justify a stay or be treated differently than other factors in s. 11 of the *CJPTA*. To similar effect, a forum selection clause should not be treated differently.[126]

114. The Saskatchewan Court of Appeal applies a different and preferable approach (preferable at least for non-adhesion contracts – a more nuanced approach should apply to adhesion contracts). In particular, in *Microcell*[127] and in *Hudye Farms Inc. v. Canadian Wheat Board*,[128] the Saskatchewan C.A. considered forum selection clauses within the *CJPTA*, S.S. 1997, c. C-41.1, and not as an independent, stand-alone common law test. This point is succinctly outlined in *Hudye Farms* as follows:

> [11] The effect of a valid forum selection clause must be considered in the context of a consideration of the "fair and efficient working of the Canadian

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[123] S.B.C. 2003 c. 28 **[ABA Vol IV Tab 65]**; S.N.S. 2003 (2d Sess.), c. 2 **[ABA Vol IV Tab 66]**; S.S. 1997, c C-41.1 **[ABA Vol IV Tab 70]**.
[124] Judgment of BCCA at para 32, emphasis added **[AR Vol I Tab 3]**. This misinterprets *Pompey*. See Elizabeth Edinger, "The Problem of Parallel Actions" (2010) 60 U.N.B.L.J. 116 at 125 **[ABA Vol III Tab 52]**
[125] 2011 BCCA 260, 336 D.L.R. (4th) **[ABA Vol III Tab 44]**
[126] G. Saumier and J. Bagg, *supra* at 466-467 **[ABA Vol IV Tab 58]**
[127] 2011 SKCA 136, 377 Sask. R. 156 **[ABA Vol II Tab 20]**
[128] 2011 SKCA 137, 377 Sask. R. 146 **[ABA Vol II Tab 20]**

> legal system as a whole" (see s. 10(2)(f)), but the presence of a forum selection clause is not just one factor among many contained in s. 10 (*Microcell*)…

115. Similarly, Nova Scotia courts consider forum selection clauses *within* its *CJPTA*.[129] Professor Edinger endorses a similar approach: one that applies s. 11 of the *CJPTA* to accommodate the *Pompey* strong cause test.[130]

116. Bauman C.J. acknowledged the different approaches, but adopted the wrong path: "[in *Microcell*] Madam Justice Jackson disagreed with this Court's analytical approach. In her view, forum selection clauses should be considered as factors bearing on 'the fair and efficient working of the Canadian legal system as a whole' within the meaning of s. 11(2)(f) of the *CJPTA* . . ."[131]

117. Applying the Saskatchewan and Nova Scotia approaches, the forum selection clause is considered *within* the *CJPTA*. Thus, s. 12 of the *CJPTA* must be considered as part of the analysis. Here, another statute (the *Privacy Act*) vests jurisdiction with the B.C. Supreme Court notwithstanding a private contract purporting to vest jurisdiction with a foreign court. Section 12's incorporation of s. 4 of the *Privacy Act* therefore precludes the stay of proceedings.

118. This outcome is fair. Facebook chose to enter the B.C. marketplace and to take and use names and portraits of approximately 40% of B.C.'s residents in the Ads. It also said it would "strive to respect local laws". Presumably Facebook, a multi-billion dollar international corporation, knew about the "local laws" of B.C. before it chose to engage B.C. residents. It knew, or should have known, that B.C.'s *Privacy Act* required the B.C. Supreme Court to hear and resolve disputes under the *Privacy Act* and that the legislature, through s. 12 of the *CJPTA*, required that any balancing of factors in s. 11 of the *CJPTA* defer to other statutes vesting jurisdiction with a court, such as the *Privacy Act*. Facebook may point to its jurisdiction clause in its contract and claim B.C. resident members agreed to resolve disputes in a distant jurisdiction, but surely the stronger argument is that Facebook willingly agreed that in entering the jurisdiction of B.C., it would be bound by B.C.'s local statutes, including the *CJPTA*.

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[129] See *Curves International, Inc. v. Archibald*, 2011 NSSC 217, 303 N.S.R. (2d) 288 **[ABA Vol I Tab 11].** The onus there shifts to the party seeking to avoid the forum selection clause, but nevertheless the analysis occurs within the *CJPTA*. The appellant says placing the onus on the party seeking to avoid the clause is appropriate in true commercial situation between parties of equal bargaining power. But as detailed earlier, the burden should rest with the defendant in situations such as the present, involving consumer contracts of adhesion.

[130] Edinger, *supra* at 125 to 126 **[ABA Vol III Tab 52]**

[131] Judgment of BCCA below citing *Microcell* at para 29 **[ABA Vol II Tab 27]**

119. Alternatively, the *CJPTA*'s s. 11 analysis should at least be allowed to balance against the forum selection clause. The s. 11 test should not be ignored in its entirety if s. 12 does not govern the question. Indeed, in *Pompey* this Court considered factors that are addressed under the s. 11 inquiry in deciding whether to stay proceedings based on the forum selection clause.[132] The B.C. Court of Appeal disturbed Griffin J.'s careful weighing of relevant factors even though she exercised her discretion invoking correct principles of law, and made reasonable and undisputed findings of fact. On this basis the Court of Appeal should have left her decision intact.[133]

F. Summary

120. Facebook seeks to rely on a contractual forum selection clause in its "terms of use" to stay proceedings in B.C. when the B.C. Supreme Court has undisputed territorial competence and a statute requiring the particular statutory cause of action to be brought before that court.

121. Facebook carried the burden to prove its "terms of use" were valid, clear, enforceable and applicable to the dispute. This question was left unresolved by the B.C. Supreme Court, and assumed to fall in Facebook's favour by the B.C. Court of Appeal. This Court should make the requisite finding.

122. Facebook failed to meet this burden. Its "terms of use" are ambiguous. It sets out a forum selection clause, but also promises to "strive to respect local laws" in the same "terms of use". Leaving aside the fact that its terms are lengthy and use fine print, and that its forum selection clause is buried towards the end of the document, the reasonable reader would conclude that in the event of conflict, Facebook would respect and abide by the local laws: local laws would prevail. A conflict arises here as Facebook seeks to avoid the local laws. The conflict avoids application of the forum selection clause. Lack of clarity, enforceability and applicability to the dispute arises from ambiguity in Facebook's "terms of use" and can be decided by this Court. Alternatively, this issue ought to be remitted to the B.C. Supreme Court for a decision.

123. Facebook also carried the burden to prove its "terms of use" were enforceable and applicable in the face of the *Privacy Act*'s statutory jurisdiction clause. The *Privacy Act*'s

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[132] *Pompey* at paras 19, 39-40 **[ABA Vol III Tab 49]**
[133] *Mubili v. Chona*, 324 Sask. R. 152 (Sask. C.A., chambers) at para 3 **[ABA Vol II Tab 29]**

jurisdiction provision prevails over the contractual jurisdiction clause and this, too, renders the clause inapplicable to the dispute.

124. Even if the forum selection clause is valid, clear, enforceable and applicable, it should not be enforced in this particular case. Two approaches may be adopted to arrive at the same result. The first approach considers the forum selection clause under a case-sensitive form of the *Pompey* "strong cause" test. It accounts for the nature of the contract: a contract of adhesion between numerous B.C. consumers and a sophisticated corporation. The second approach considers the forum selection clause as one factor to balance within the s. 11 *CJPTA* analysis.

125. In this particular case, weighing all the *CJPTA* s. 11 factors militates against a stay. Considering the forum selection clause within the s. 11 analysis under the rubric of the fair and efficient working of the Canadian legal system as a whole requires due regard for the type of contract and its weight in comparison to local public policies. The contract here is a contract of adhesion between Facebook and numerous B.C. residents. Facebook buried the forum clause deep within its "terms of use" and contradicted that clause with a promise to ". . . respect local laws". The claim arises from a local statutory tort: an allegation that Facebook used names and portraits of roughly 40% of the B.C. populace, including children, in Ads without their consent in breach of the *Privacy Act*. Public policy is derived from the *Privacy Act*, pursuant to which the legislature saw it fitting to create a statutory cause of action that does not depend on proof of damage and to require prosecution before the local courts. Public policy in B.C. favours protection of privacy, which is a *quasi*-constitutional right. Attempts to avoid such rights are treated narrowly with the burden on the person seeking to avoid the rights. In this circumstance, the forum selection clause should be accorded no weight.

126. The forum selection clause must also be considered in the context of other access to justice factors. In this case the convenience of witnesses favours B.C., where Facebook allegedly used names and portraits of a vast segment of B.C.'s population without their consent. To paraphrase the Israeli Central District Court in *Ben Hamo*, the burden imposed on every one of B.C.'s roughly 1.8 million class members to litigate abroad is a significant burden which may prevent such litigation in many cases. In contrast, the burden on Facebook to litigate in B.C. would be inconsequential. On the other hand, attempting to force this case into California will effectively terminate the action. The plaintiff will lose juridical advantages under the *Privacy*

Act, *Class Proceedings Act*, and *CJPTA*, with costs of attendance and cost repercussions in California, singly or together, outweighing nominal damages available.

PART IV – COSTS SUBMISSIONS

127. The appellant requests costs.[134]

PART V – ORDER SOUGHT

128. The Applicant respectfully requests that the appeal be granted and the matter be remitted to the B.C. Court of Appeal for a decision on Facebook's appeal of the B.C. Supreme Court's order certifying the action as a class proceeding pursuant to the *Class Proceedings Act*.

129. In the alternative, that this matter be remitted to the B.C. Supreme Court to determine whether Facebook's forum selection clause is valid, clear, enforceable and applicable to the dispute.

130. In the further alternative, if this Court finds that, at minimum, the forum selection clause cannot be invoked against minors, that this matter be remitted to the B.C. Supreme Court to determine whether there is a suitable plaintiff to represent such a class.[135]

ALL OF WHICH IS RESPECTFULLY SUBMITTED
Dated at the City of Vancouver in the Province of British Columbia this ____ day of July, 2016.

_____
Ward K. Branch, Q.C., Michael Sobkin
and Christopher Rhone
Counsel for the Appellant

[134] The no-costs regime established in s. 37 of the *Class Proceedings Act* applies only to proceedings at trial and in the Court of Appeal: *Class Proceedings Act*, s. 37 **[ABA Vol IV Tab 62]**; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175 at para 178 [**ABA Vol III Tab 36**]
[135] *Class Proceedings Act*, ss. 4(2), 5(6) **[ABA Vol IV Tab 62]**. And see footnote 33, above.

PART VI – TABLE OF AUTHORITIES

Secondary Sources

PART VII – STATUTES, REGULATIONS AND RULES

Statute

1. *Age of Majority Act*, R.S.B.C. 1996, c. 7, s. 1(1).
2. California Civil Code § 3344.
3. *Civil Code of Quebec*, CQLR c. C-1991, art. 3149.
4. *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 37.
5. *Constitutional Question Act*, R.S.B.C. 1996, c. 68, s. 8.
6. Council Regulation (EC) No 44/2001.
7. *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, ss. 11, 12.
8. *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2d Sess.), c. 2.
9. *Infants Act*, R.S.B.C. 1996, c. 223, s. 19(1).
10. *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29.
11. *Privacy Act*, R.S.B.C. 1996, c. 373, ss. 3(2), 4.
12. *The Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c C-41.1.