S.C.C. File number: _____

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

BETWEEN:

DEBORAH LOUISE DOUEZ

APPLICANT
(Respondent)

and

FACEBOOK, INC.

RESPONDENT
(Appellant)

APPLICANT'S MEMORANDUM OF ARGUMENT
(Pursuant to Rule 25 of the Rules of the *Supreme Court of Canada*)

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PART I. OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The issue in this case is whether a corporation's forum selection clause favouring a foreign court, posted on its website and forming part of a contract of adhesion with consumers, defeats a statutory jurisdiction clause vesting exclusive jurisdiction with a domestic court, being the B.C. Supreme Court. The B.C. Supreme Court's territorial competence is undisputed.[1] The question is whether the Court should *refrain* from exercising its territorial competence.

2. The statutory jurisdiction clause, the *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 [B.C.] Supreme Court*" (emphasis added).[2] Materially identical provisions are found in privacy statutes of Newfoundland and Labrador and Saskatchewan.[3]

3. Facebook's forum selection clause purports to compel consumer action in California: "*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. . . .*"

4. The B.C. Supreme Court found the *Privacy Act*'s statutory jurisdiction clause prevails over Facebook's online contractual forum selection clause, and refused a stay of proceedings.

5. The B.C. Court of Appeal disagreed and stayed the Action. In doing so it (a) purported to apply *Z.I. Pompey Industrie v. ECU-Line N.V.*[4] to the very different public policy issues at stake here (a forum selection clause in an online consumer "terms of use" contract seeking to supersede statutory *Privacy Act* protections enacted in the public interest and vesting jurisdiction with the domestic court), and (b) adopted an approach to *forum non conveniens* and forum selection clauses under the *Court Jurisdiction and Proceedings Transfer Act* ("*CJPTA"*) inconsistent with approaches adopted by Saskatchewan and Nova Scotia courts.

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[1] Facebook's Jurisdictional Response filed in B.C. Supreme Court, Vancouver Registry, Oct. 1, 2012 **[Tab D1]**
[2] R.S.B.C. 1996, c. 373, s. 4 **[Applicant's Book of Authorities ("ABA") Tab 32]**
[3] *Privacy Act*, R.S.N.L. 1990, c. P-22, s. 8 **[ABA, Tab 33];** *The Privacy Act*, R.S.S. 1978, c. P-24, s. 5 **[ABA, Tab 35]**
[4] 2003 SCC 27, [2003] 1 S.C.R. 450 ("*Pompey*") **[ABA Tab 25]**

6. As a result of the B.C. Court of Appeal decision, Canadians now face online risks to their quasi-Constitutional privacy rights, depending upon their province of residence.

B. Background to the Current Dispute

7. Facebook operates the social networking website "www.facebook.com". It invites people age 13 years 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).[5]

8. Facebook generates revenue for itself by advertising on behalf of its business customers.[6] The advertisements at issue here are called "Sponsored Stories" (the "Ads"). Facebook used the names and portraits of approximately 1.8 million B.C. website members in the Ads, which combined members' names and portraits with Facebook's business customers' words or logos.[7] To create the Ads, Facebook relied on members' online "social actions", such as clicking "Like" buttons or playing online games.[8] It then placed certain website members in Ads, which it displayed on its website to the members' "Friends".[9]

9. Ms. Douez, alleges Facebook failed to obtain member consent, pay the member, or alert the member depicted in the Ads before displaying the Ads.[10] She alleges Facebook breached her own and class members' statutory privacy rights, contrary to the *Privacy Act*, s. 3(2), which 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 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.

10. Facebook opposed certification and sought a stay of proceedings. It asked the B.C. Supreme Court to decline to exercise its territorial competence. Its stay application depended upon a forum selection clause in its online "terms of use" providing as follows:

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[5] Judgment of BCSC below at para 32 (infants form part of putative class) **[Tab B1]**
[6] Judgment of BCSC below at para 7 **[Tab B1]**
[7] Judgment of BCSC below at para 7 (the Ads) and para 221 (re. 1,800,000 B.C. residents used in Ads) **[Tab B1]**
[8] Judgment of BCCA below at para 4 **[Tab B3]**
[9] Judgment of BCSC below at para 8 **[Tab B1]**
[10] Judgment of BCSC below at para 9 **[Tab B1]**

> 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.

11. Elsewhere in its "terms of use", Facebook promised to "respect local laws", using language at odds with its forum selection and choice of law clause (emphasis added):

> We [Facebook] strive to create a global community with consistent standards for everyone, but we also strive to respect local laws . . .[11]

12. Facebook argued California substantive law applies to the plaintiff's dispute, and "defeats the application of BC's *Privacy Act*".[12] This issue was left open by the chambers judge for determination at the common issues trial, which will not happen absent certification.[13]

13. In response to Facebook's stay application, Ms. Douez relied upon the *Privacy Act*, s. 4, requiring *Privacy Act* actions to be heard and determined by the B.C. Supreme Court:

> 4. Despite anything contained in another Act, an action under this Act must be heard and determined by the [B.C.] Supreme Court.

14. Ms. Douez argued the *Privacy Act*, s. 4, requires this matter to proceed before the B.C. Supreme Court. She outlined important public policy grounds weighing against a stay of proceedings in British Columbia. The B.C. Supreme Court accepted her argument and refused to issue a stay of proceedings. The Court of Appeal overturned that decision.

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. Facebook appealed both orders.

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[11] Judgment of BCSC below at para 52 **[Tab B1]**
[12] Judgment of BCSC below at para 303 **[Tab B1]**
[13] Judgment of Court of Appeal below at paras 81 to 84 **[Tab B3]**; Judgment of Supreme Court below at para 308 **[Tab B1]**

16. On June 19, 2015, the B.C. Court of Appeal issued unanimous reasons for judgment allowing Facebook's appeal. Writing for the Court, Bauman C.J. held that Griffin J. erred in refusing to stay the proceedings. He declined to decide whether she erred in certifying the action as a class proceeding. Certification is not at issue on this proposed appeal.

17. In her reasons for judgment respecting the stay, Griffin J. found that the plaintiff raised a triable issue in arguing the forum selection clause did not apply to *Privacy Act* claims given Facebook's online terms, read in their entirety. For example, as noted above, Facebook stated in its terms of use that "*we also strive to respect local laws*". If Facebook adhered to local law it would not purport to avoid the *Privacy Act*'s exclusive jurisdiction clause and the remedies enacted in the public interest. However, Griffin J. did not need to decide this particular issue as she found the plaintiff showed strong cause to avoid the forum selection clause.[14]

18. In finding strong cause, Griffin J. explained that the *Privacy Act* s. 4 confers exclusive jurisdiction on the B.C. Supreme Court to the exclusion of other courts, not simply to the exclusion of other B.C. courts or tribunals.[15] She provided public policy grounds to support this point, including (a) public interest in protecting privacy of B.C. residents; (b) minimizing costs of bringing claims by avoiding distant locales; (c) increasing 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 and background relevant to privacy interests of British Columbians, compared to courts in foreign jurisdictions.[16]

19. Additionally, Griffin J. found strong cause to avoid the forum selection clause. This strong cause included the statutory grant of exclusive jurisdiction to the B.C. Supreme Court:

> [93] . . . a statute-based claim in the court's own jurisdiction, which confers exclusive jurisdiction on that court, can on its own be a basis for overriding a forum selection clause, but also can support two other 'strong causes' for not enforcing a forum selection clause, namely, juridical advantage and public policy. This is because where a claim is established by the legislature it reflects the fact that such claims are an important aspect of public policy in the jurisdiction.

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[14] Judgment of BCSC below at paras 51 to 78 **[Tab B1]**
[15] Judgment of BCSC below at paras 56 to 67 and citations to *Nord Resources Corp v. Nord Pacific Ltd*, 2003 NBQB 201 and *Gould v. Western Coal Corp*, 2012 ONSC 5184 **[Tab B1]**
[16] Judgment of BCSC below at para 75 **[Tab B1]**

. . .

> [105] . . . 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.

20. As the *Privacy Act* stipulates that only the B.C. Supreme Court may enforce the statute, a California court would probably not do so. As such, the plaintiff faces a significant risk of losing statutory protections enacted in the public interest under the *Privacy Act*.[17] Contrary to its promise to "respect local laws", Facebook certainly intends to argue against application of the *Privacy Act* in any California action.[18]

21. Finally, Griffin J. considered the *forum non conveniens* factors outlined in the *CJPTA* s. 11. She found the factors favour proceeding in B.C.[19] Additionally, she noted that pursuant to s. 12 of the *CJPTA*, the express conferral of jurisdiction upon another court by an Act of B.C. or Canada prevails over the s. 11 *CJPTA* analysis. Thus, the *CJPTA*'s statutory *forum non conveniens* analysis is subordinate to the express grant of jurisdiction in the *Privacy Act*.[20]

22. The Court of Appeal, *per* Bauman C.J., disagreed with Griffin J.'s analysis. Bauman C.J. asked "[21] . . . When 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? . . ."[21]

23. Bauman C.J. adopted the former flawed approach. He acknowledged the contrary analytical framework adopted by the Saskatchewan Court of Appeal[22] and he noted the "apparent difficulty" with the B.C. approach given this Court's decision in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*,[23] wherein 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".[24]

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[17] Judgment of BCSC below at paras 94 to 95 **[Tab B1]**
[18] Judgment of BCSC below at para 52 ("strive to respect local laws" and para. 303 (avoid *Privacy Act*) **[Tab B1]**
[19] Judgment of BCSC below at paras 96 to 129 **[Tab B1]**
[20] Judgment of BCSC below at paras 130 to 133 **[Tab B1]**
[21] Judgment of BCCA below at para 21 **[Tab B3]**
[22] Judgment of BCCA below at para 29 **[Tab B3]**
[23] 2009 SCC 11, [2009] 1 S.C.R. 321 at para 22 ("*Teck*") **[ABA Tab 21]**
[24] Judgment of BCCA below at para 25 **[Tab B3]**

24. Nevertheless, Bauman C.J. found himself bound by B.C. appellate authorities: *Viroforce Systems Inc. v. R&D Capital Inc*.[25] and *Preymann v. Ayus Technology Corp*.[26] He acknowledged *Viroforce* did not 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*.[27] Problematically, *Momentous.ca* fails to mention the *CJPTA* as it is an Ontario decision and Ontario lacks a *CJPTA*.

25. Bauman C.J. next considered whether sufficient strong cause avoided the forum selection clause. Given a lack of contrary evidence, he assumed California courts had territorial competence over the proceeding.

26. Bauman C.J. found the forum selection clause clear.[28] In so doing he failed to comment upon the internal inconsistency within Facebook's own terms of use noted by Griffin J.: a forum selection and choice of law clause favouring California law, while on the other hand commitments to respect local laws (which must include the *Privacy Act*).[29]

27. He then considered whether the *Privacy Act*'s exclusive jurisdiction clause overrides the contractual forum selection clause. As he considered the forum selection clause before considering the CJPTA, he did not consider the impact of s. 12 of the *CJPTA*, which provides that the *forum non conveniens* analysis (s. 11 of the *CJPTA*) is inapplicable if another statute vests jurisdiction with a court. He found s. 4 of the *Privacy Act* could not trump Facebook's forum selection clause due to "the principle of territoriality".[30] He explained that "The principle of territoriality is that B.C. law applies only in B.C. . . ."[31] Thus, he reasoned, s. 4 of the *Privacy Act* cannot deprive California courts of territorial competence. He found that s. 4 is a "[67] . . . rule about subject matter competence . . ." and disagreed with Griffin J.'s finding that s. 4 of the

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[25] 2011 BCCA 260 ("*Viroforce*") **[ABA Tab 22]**
[26] 2012 BCCA 30, 32 B.C.L.R. (5th) 391 ("*Preyman*") **[ABA Tab 18]**; Judgment of BCCA below at para 31 **[Tab B3]**
[27] 2010 ONCA 722, 103 O.R. (3d) 467 ("*Momentous.ca*") **[ABA Tab 16]**
[28] Judgment of BCCA below at paras 42 to 43 **[Tab B3]**
[29] Judgment of BCSC below 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 **[Tab B3]**
[30] Judgment of BCCA below at para 47 **[Tab B3]**
[31] Judgment of BCCA below at para 48 **[Tab B3]**

Privacy Act precludes the B.C. Supreme Court from declining jurisdiction. He found s. 4 only applies *intra-state* to distinguish between the B.C. Supreme Court and other B.C. tribunals.[32]

28. Bauman C.J. then disagreed with Griffin J.'s finding that strong cause precluded a stay of proceedings. He found 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 . . ."[33] Given his finding that s. 4 of the *Privacy Act* did not avoid the territorial competence of the California courts, he found that ". . . Ms. Douez is left with no arguments capable of convincing this Court to decline to enforce the forum selection clause."[34] Bauman C.J. found it unnecessary to consider the *CJPTA* 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."[35]

PART II. STATEMENT OF ISSUES

29. This case raises issues of national and public importance and questions of law arising therefrom, as set out below.

a. Guidance is required respecting the extent to which this Court's decision in *Pompey* applies to forum selection clauses in online contracts of adhesion attempting to avoid the exclusive grant of jurisdiction to domestic courts in quasi-Constitutional public protection statutes. To what extent do such protective statutes enacted in the public interest constitute "strong cause" to avoid forum selection clauses?

b. Guidance is required respecting forum selection clauses within the *CJPTA* framework. Is the forum selection clause considered as part of the statutory *forum non conveniens* analysis within the *CJPTA*? Or, must the plaintiff first demonstrate strong cause not to enforce the forum selection clause before receiving the benefits of the *CJPTA*? Courts in British Columbia diverge from other Canadian courts on this point.

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[32] Judgment of BCCA below at paras 45 to 65 **[Tab B3]**
[33] Judgment of BCCA below at para 77 **[Tab B3]**
[34] Judgment of BCCA below at para 79 **[Tab B3]**
[35] Judgment of BCCA below at para 81 **[Tab D3]**

PART III. STATEMENT OF ARGUMENT

A. This Proposed Appeal Raises Issues of National and Public Importance

30. Privacy is of such importance to Canadians it is accorded quasi-constitutional protection. For example, in *A.B. v. Bragg Communications Inc*., this Court quoted the following passage from *Toronto Star Newspaper Ltd. v. R*., 2012 ONCJ 27 (Ont. S.C.J.):

> 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" (para. 17). . . .[36]

31. The internet has the potential to undermine Canadians' privacy rights.[37] Justice Griffin recognized this issue, expressing her concerns as follows:

> [360] 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.
>
> [361] 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.

32. Privacy concerns are heightened where, as here, consumers' personal information is used for the financial gain of others. As Tamir Israel explains, ". . . *Today, personal data is exposed to a greater number of parties and is increasingly valuable to such entities for a range of secondary business reasons wholly unrelated to the primary interaction undertaken by the end user. The primary driver for this shift is the growing inherent economic value of personal information, which has led to its commoditization. . . .*"[38]

33. Furthermore, within the world of the internet, companies often utilize clauses aimed at avoiding Canadian privacy laws. Indeed, such contractual clauses are common and raise

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[36] 2012 SCC 46, [2012] 2 S.C.R. 567 at para 12 **[ABA Tab 1]**. See also *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502, 86 O.R. (3d) 401, at para 29 **[ABA Tab 3]**; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441 at para 26 **[ABA Tab 10]**; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para 65 **[ABA Tab 5]**. Additionally, see Tamir Israel's Affidavit at paras 9 and 10 **[Tab D2]**

[37] Tamir Israel Affidavit at paras 11 to 14 **[Tab D2]**

[38] Tamir Israel Affidavit at para 14 **[Tab D2]**

particular concerns when they override Canadian privacy protections.[39] Given the importance of privacy rights in Canada, it is necessary to interpret Canadian laws in a manner consonant with privacy protection. In particular, care must be taken when considering forum selection and choice of law clauses posted on Internet sites.

34. Many of the relevant privacy laws were enacted before the internet era. These include the *Privacy Acts* of British Columbia, Saskatchewan, Manitoba and Newfoundland and Labrador. Yet these statues do offer tools to ensure relevant protections even in the internet era. For example, consider the enhanced protections found in the *Privacy Acts* of B.C., Saskatchewan, and Newfoundland and Labrador, which vest exclusive jurisdiction with the superior courts to hear and decide actions under the statutes.[40]

35. As elaborated below, vesting exclusive jurisdiction with a superior court ought to represent "strong cause" to avoid a contractual forum selection clause, particularly where, as here, there is a significant risk that quasi-constitutional rights (privacy rights) will be lost.

36. Canadian residents should be able to rely upon statutes enacted in the public interest in order to protect their fundamental rights when their courts have territorial competence. With the B.C. Court of Appeal decision in this case, their ability to do so is greatly hampered.

B. The "Strong Cause Test" and Consumers

37. *Pompey* concerned a bill of lading between sophisticated commercial parties. In contrast, the present case concerns a contract of adhesion between a sophisticated internet company and consumers and in relation to a public interest statute intended to protect consumers (*Privacy Act*).

38. This Court has not had an opportunity to consider whether the *Pompey* test ought to apply in the arena of consumer contracts and in the face of statutory protections enacted in the public interest. Is *Pompey* properly confined to cases involving bills of lading or commercial contracts, or can it be extended more broadly? At a minimum, should the test, if applicable, be interpreted

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[39] Tamir Israel Affidavit at para 14, ". . . forum selection clauses are commonly employed [on Internet sites] . . ." And, at para 17: "Forum selection clauses can have serious implications for Canadian privacy, as they effectively contract individuals out of Canadian legal standards. . . ." **[Tab D2]**

[40] *Privacy Act,* R.S.B.C. 1996, c. 373, s. 4; **[ABA Tab 32]**; *The Privacy Act*, R.S.S. 1978, c. P-24, s. 5 **[ABA Tab 35]**; and *Privacy Act*, R.S.N.L. 1990, c. P-22, s. 8 **[ABA Tab 33]**

and applied in a manner that considers and accounts for protective public interest statutes, such as the *Privacy Act*? These sorts of issues remain unsettled.[41]

39. For its part, the B.C. Court of Appeal extended *Pompey* to the arena of a consumer contract and in the face of statutory protections. In doing so, the Court of Appeal failed to appreciate the public policy differences between commercial and consumer contracts, and in particular failed to consider public policy objectives underpinning the *Privacy Act*.

40. Public policy factors ought to be considered as part of the "strong cause" test in deciding whether to enforce a forum selection clause capable of defeating protections in statutes enacted in the public interest. In failing to account for public policy objectives, the B.C. Court of Appeal departed from the approach taken by other Canadian courts. This will have significant ramifications for Canadians, particularly in the internet era with ubiquitous forum selection and choice of law clauses capable of avoiding protections granted by local laws and courts.

41. In *Pompey*, this Court itself recognized that legislatures may override forum selection clauses, and where that occurs the legislation prevails and the strong cause test is unnecessary. There, certain legislation was enacted after the lower court's 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 in Canada.[42] This was despite the legislation being permissive, providing that a claimant "may" bring the claim in Canada.

42. Nevertheless, the B.C. Court of Appeal held that parties may freely contract out of protections afforded by the *Privacy Act* – in particular, that by private agreement they may avoid the jurisdiction of the B.C. Supreme Court despite the *Privacy Act*'s s. 4 requirement that *Privacy Act* disputes "*must be heard and determined by the Supreme Court*." In brief reasons on this point, the Court of Appeal found that the *Privacy Act* does not specifically prohibit contracts avoiding its application, thus allowing such contracts.[43] Additionally, the Court of Appeal

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[41] S. Pitel and N. Rafferty, *Conflict of Laws* (Toronto: Irwin Law, 2010) at 128 to 129 **[ABA Tab 28]**
[42] *Pompey* at para 37 **[ABA Tab 25]**
[43] Judgment of BCCA below at paras 70 to 71 [**Tab B3]**

essentially ruled circularly that such contracts pulling cases outside s. 4 do not avoid s. 4 because s. 4 cannot be interpreted to apply outside B.C.'s borders.[44]

43. However, statutes vesting jurisdiction with a particular court have been held to apply inter-state, not merely intra-state.[45] The plaintiff says this principle should apply *a fortiori* where, as here, the "tort" is a creature of a public interest statute (*Privacy Act*) creating protective rights and the remedies of a constitutional or quasi-constitutional nature.[46]

44. In certain cases parties may contract out of statutory protections. However, the Court of Appeal's broad brush approach to this issue runs counter to the law in other provinces, which require courts to balance competing public policy concerns before upholding a forum selection clause designed to avoid the court's jurisdiction.

45. Privacy rights are of such importance that this Court has held that exceptions from such rights are interpreted narrowly, with doubt resolved in favour of preserving the right and with the burden of persuasion resting on the person seeking exceptions from the right. The law is summarized by Feldman J.A. speaking for the Ontario Court of Appeal in *Cash Converters Canada Inc. v. Oshawa (City)*, as follows (emphasis added):

> [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

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[44] Judgment of BCCA below at paras 45 to 64 **[Tab B3]**

[45] See *Zi Corp v. Steinberg*, 2006 ABQB 92, 62 Alta L.R. (4th) 123 [ABA Tab 24]; *Voyage Co. Industries v. Craster*, 1998 CanLII 1776 (BCSC) **[ABA Tab 23]**; *Incorporated Broadcasters Ltd v. Canwest Global Communications Corp.*, [2001] O.J. No. 4882 (QL), 2001 CanLII 28395 (SC) **[ABA Tab 12]**; *Nord Resources Corp v. Nord Pacific Ltd*, 2003 NBQB 201, 263 N.B.R. (2d) 205 **[ABA Tab 17]**; *Ironrod Investments Inc. v. Enquest Energy Services Corp.*, 2011 ONSC 308 **[ABA Tab 13]**; *Gould v. Western Coal Corp.*, 2012 ONSC 5184 **[ABA Tab 7]**. See also the American case, *Taylor v. LSI Logic Corp.*, 715 A.2d 837 (U.S. Del. Super. 1998) **[ABA Tab 20]**

[46] See *Schwartz v. Ingenious Ideas Inc.*, 2009 NSSC 255, 281 N.S.R. (2d) 233 at paras 20 to 22, to similar effect re. copyright claims **[ABA Tab 19]**

> 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 (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."[47]

46. Facebook allegedly accessed and used the plaintiff's personal information (her name and image) for its own commercial gain (the Ads) and sought to avoid the *Privacy Act* and its protections. The Court of Appeal placed no burden upon Facebook to justify exceptions from *Privacy Act* protections. This raises serious public policy concerns.

47. For her part, Griffin J. recognized public policy underpinning privacy rights in Canada and the obvious need to protect privacy. She explained this issue as follows (emphasis added):

> [102] Clearly the BC legislature thought it a matter of important public policy 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: ss. 7, 8 of the *Canadian Charter of Rights and Freedoms* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (see *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145; *R. v. Wong*, [1990] 3 S.C.R. 36; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841).
>
> [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. [48]

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[47] 2007 ONCA 502, 86 O.R. (3d) 401 ("*Cash Converters*") **[ABA Tab 3]**
[48] Judgment of BCSC below at paras 102-105 **[Tab B1]**

48. The Court of Appeal avoided the public policy discussion entirely by simply finding the plaintiff did not prove she could not sue Facebook in California.[49] This formed the substance of Bauman C.J.'s detailed discussion of extra-territorial application of domestic law. [50] But the question is not whether the plaintiff might be able to sue in California – that is, whether California courts might have territorial competence – but whether she would lose the jurisdictional juridical and substantive advantages provided by the *Privacy Act* if she did so.

49. At minimum, there is a significant risk that a California court would refuse to apply the *Privacy Act*. Recall Facebook's argument: California law applies to the dispute and "defeats the application of BC's *Privacy Act*" (emphasis added), an issue left alive by the courts below.[51] Facebook's position, and the Court of Appeal's judgment, thus jeopardizes public policy favouring statutory privacy rights. As explained in *Cash Converters*, doubts that privacy rights may be undermined must be resolved in favour of preserving such rights and the onus rests with the person seeking to avoid application of those rights (see para. 45 above).

50. Contrasting with the B.C. Court of Appeal's approach, the Ontario Court of Appeal stresses the need to weigh public policy factors before upholding contracts that may avoid statutory protections. For example, in *Jean Estate v. Wires Jolley*,[52] in the context of an agreement to arbitrate fee disputes between solicitor and client, the majority, *per* Weiler J.A., held that private agreements are unenforceable if they avoid statutory protections granted by Ontario's *Solicitors Act*. Like the *Privacy Act*, the *Solicitors Act* does not expressly prohibit contracting out. Yet public policy precludes doing so if the same avoids statutory protections.

51. As Weiler J.A. explained: "[8] . . . 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." And further, she explained that "[82] The 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).

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[49] Judgment of BCCA below at paras 75 to 78 **[Tab B3]**
[50] Judgment of BCCA below at paras 45 to 64 **[Tab B3]**
[51] Judgment of BCSC below at para 303 **[Tab B1]**; Judgment of BCCA below at paras 82 to 84 **[Tab B3]**
[52] 2009 ONCA 339, 96 O.R. (3d) 171 ("*Jean Estate*") **[ABA Tab 14]**

52. As an example, at para. 82 Weiler J.A. quoted from *Andrew Feldstein & Associates v. Keramidopulos*, [2007] O.J. No. 3683 (Ont. S.C.J.), 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."

53. To appropriately assess enforceability of the agreement to arbitrate, Weiler J.A. properly balanced Canadian public policy favouring arbitration against public policy ensuring public protection. Should arbitration undermine substantive statutory rights, the agreement to arbitrate would be unenforceable. She emphasized, at para. 77, 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."

54. On the facts, Weiler J.A. found that substantive statutory rights would not be affected by arbitration. But this was because in that case the Court retained jurisdiction to ensure arbitration proceedings did not avoid any statutory remedy. As Weiler J.A. explained (emphasis added):

> [84] . . . two qualifications to the arbitrability of contingency fee disputes examined above lead me to the conclusion that public policy prevents the parties from contracting out of the statutory protections contained in the *Solicitors Act* and that any arbitration must be conducted in accordance with them. While the parties are free to select a different decision maker than the one contemplated in the *Solicitors Act*, any decision maker appointed to hear the dispute [must] make his decision in accordance with the substantive statutory rights contained in the *Solicitors Act*. There are two reasons for my conclusion. First, the jurisprudence that I have reviewed regarding the enforcement of arbitration clauses has not considered or sanctioned the removal of any substantive statutory right affecting the merits of the underlying dispute. Second, the jurisprudence in relation to the S*olicitors Act* holds that it would be contrary to the public interest to allow solicitors and their clients to contract out of any statutory remedy in relation to the assessment of solicitors' accounts.

55. The *Privacy Act*, like the *Solicitors Act*, incorporates important remedies to protect the public. In fact, the common law of British Columbia does not yet recognize a tort of breach of privacy.[53] The legislature, through the *Privacy Act*, created its own tort and remedy.

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[53] *Ari v. ICBC*, 2013 BCSC 1308, 54 B.C.L.R. (5th) 197 ("*Ari*") at para 63 **[ABA Tab 2]**

56. But Facebook's approach and the B.C. Court of Appeal's decision raise significant concerns that the plaintiff's privacy rights under the *Privacy Act* will not be properly protected if the stay is granted. Facebook says the *Privacy Act* is inapplicable and seeks to avoid it.[54] This alone raises necessary doubts that a California court would apply the *Privacy Act* to protect the plaintiff.

57. That the *Privacy Act* vests exclusive jurisdiction with the B.C. Supreme Court further validates these doubts. A California court may have territorial competence to hear a general privacy tort claim (if such tort even exists – it certainly does not yet exist in British Columbia),[55] but there is a significant risk that California courts will accede to Facebook's argument and refuse to grant *Privacy Act* protection to the plaintiff.

58. Bauman C.J. wrote that "[39] . . . [if] there is no available expert evidence about that foreign law, the court will presume it is the same as B.C. law. . . " But this statement is overbroad and imposes an improper evidentiary burden on a B.C. plaintiff seeking to apply a B.C. statutory tort enacted in the public interest in a B.C. court. As the concern is to protect quasi-Constitutional privacy rights, the burden rests with Facebook as the party seeking to resist the rights.[56] In any event, the principle outlined by Bauman C.J. should not apply to specific statutory provisions altering the common law.[57] If the court assumes the common law is the same in California and B.C., then the plaintiff has lost juridical advantage since B.C. lacks a common law tort of breach of privacy. The tort relied upon is a pure creature of statute (the *Privacy Act*), which alters general law denying the existence of such tort. As the B.C. Supreme Court observed in *Ari*, "<u>There is no common law tort of invasion or breach of privacy in British Columbia</u> . . ."[58]

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[54] Judgment of BCSC below at para 303 **[Tab B1]**
[55] *Ari* at para 53 **[ABA Tab 2]**
[56] *Cash Converters* at para 29 **[ABA Tab 3]**
[57] In *Gray v. Kerslake*, [1958] S.C.R. 3 **[ABA Tab 8]**, 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 (emphasis added): "[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 <u>does not extend to the special provisions of particular statutes altering the common law</u>." In *Hellens v. Densmore*, [1957] S.C.R. 768, 10 D.L.R. (2d) 561 **[ABA Tab 9]**, 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, <u>as distinguished from special statutory provisions</u>, is the same as that of British Columbia." (emphasis added). There is debate on the scope of the assumption, an issue that is itself worthy of consideration by this Court. See for example *Fernandez v. "Mercury Bell"*, [1986] 3 F.C. 454, 27 D.L.R. (4th) 641 (CA) **[ABA Tab 6]**.
[58] *Ari* at para 63 **[ABA Tab 2]**

59. Given this assumption, it was incumbent upon Facebook to prove the plaintiff would receive her full *Privacy Act* protections in California: that is, that California laws offer the plaintiff the same protections as B.C.'s *Privacy Act*. But Facebook took the opposite tack, saying the plaintiff cannot rely upon the *Privacy Act*. The court should thus assume B.C. common law applies in California, which denies remedy for breach of privacy rights, or that the plaintiff will otherwise be deprived of her rights under the *Privacy Act*.

60. The risk of losing the statutory protection is heightened where the dispute occurs outside the domestic jurisdiction because the domestic courts have no control over the process. Unlike *Jean Estate*, where the court retained jurisdiction over the arbitration, the B.C. courts lack any ability to control the process as proceedings would occur outside British Columbia.[59]

C. BC *forum non conveniens* approach now differs from SK and NS approaches

61. A further layer of protection assists in preserving the privacy rights of B.C. and Saskatchewan residents. These provinces exempt *Privacy Act* protections from jurisdictional disputes. This is accomplished because the *CJPTA* subordinates itself to the *Privacy Act* and other statutes expressly vesting jurisdiction in courts.

62. The *CJPTA* properly controls 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 forum non conveniens* analysis defers to that express statutory grant.

63. The B.C. Court of Appeal's approach circumvents the *CJPTA* and the *Privacy Act*. The result: residents of B.C. and potentially other *Privacy Act* and *CJPTA* provinces lose key legislative tools designed to protect their rights and ensure access to justice.

64. When the Court is asked to exercise its discretion to decline to exercise its territorial competence, one would expect the Court to refer to and rely upon the *CJPTA*. Yet the B.C. Court of Appeal avoided the *CJPTA* by considering the forum selection clause outside the scope of the *CJPTA*. On finding the forum selection clause required a stay, the Court of Appeal then found it unnecessary to consider the *CJPTA* at all.

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[59] Judgment of BCSC below at para 85 **[Tab B1]**

65. The B.C. Court of Appeal's approach purported to flow from this Court's decision in *Pompey*, a common law case involving a forum selection clause in a bill of lading between sophisticated commercial parties and involving federal jurisdiction, which lacks a *CJPTA* statute. In those circumstances, Bastarache J. stated that "I am not convinced that a unified approach to *forum non conveniens,* where a choice of jurisdiction clause constitutes but one factor to be considered, is preferable."[60] He suggested that at least in cases involving bills of lading, "a separate approach" should be followed, which would honour the clause in all but "exceptional circumstances".

66. Six years later in *Teck* 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".[61] Academics have commented that "In 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."[62]

67. Before considering the B.C. Court of Appeal's approach, it is first necessary to note that the legislature chose within the *CJPTA* to make it clear that the *CJPTA* would respect jurisdiction clauses in other Acts, including the *Privacy Act*. In this regard, see s. 12:

> 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 to a court, that other Act prevails.[63]

68. The *CJPTA*'s *forum non conveniens* analysis is thus controlled by the legislative conferral of jurisdiction on the superior courts through the *Privacy Act*.[64]

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[60] *Pompey* at para 21 **[ABA Tab 25]**
[61] *Teck* at para 22 **[ABA Tab 21]**
[62] V. Black, S. Pitel and M. Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012) at p. 208 **[ABA Tab 26]**
[63] *CJPTA*, S.B.C. 2003, c. 28, s. 12 [ABA Tab 30]. See also s. 11 of Saskatchewan's *CJPTA*, S.S. 1997, c. C-41.1 **[ABA Tab 34]**

69. Despite *Teck*, appellate courts in provinces with *CJPTA* statutes now diverge on whether to assess the forum section clause's impact through the lens of the *CJPTA*, or pursuant to common law principles enunciated by this Court in *Pompey*. Divergence should be avoided because the *CJPTA* is a uniform statute, being a product of the Uniform Law Conference of Canada. It is in force in British Columbia, Nova Scotia and Saskatchewan.[65] It was enacted in Yukon, PEI, and Newfoundland and Labrador, and a variant in New Brunswick, albeit not yet in force in those jurisdictions.

70. Unlike other courts, the B.C. Court of Appeal applied a disjunctive analysis to the interaction of the *CJPTA*, Facebook's forum selection clause, and the *Privacy Act*. As the Court of Appeal held: ". . . 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."[66]

71. 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* and s. 4 of the *Privacy Act* (exclusive jurisdiction to B.C. Supreme Court). It thus stayed the Action.

72. But the Saskatchewan Court of Appeal applies a different approach. In Saskatchewan, forum selection clauses are considered as part of the *CJPTA* analysis. In *Microcell Communications Inc. v. Frey* and *Hudye Farms Inc. v. Canadian Wheat Board*, the Saskatchewan Court of Appeal considered contractual forum selection clauses as part of the analysis under the *CJPTA*, S.S. 1997, c. C-41.1, and not as a separate, stand-alone common law analysis.[67] This point is succinctly outlined in *Hudye Farms* as follows (emphasis added):

> [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 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*)). The burden is initially on the plaintiff/respondent to demonstrate strong cause not to

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[64] B.C's *Privacy Act*, s. 4 **[ABA Tab 32]**; Saskatchewan's *Privacy Act*, s. 5 **[ABA Tab 35]**
[65] S.B.C. 2003 c. 28 **[ABA Tab 30]**; S.N.S. 2003 (2d Sess.), c. 2 **[ABA Tab 31]**; S.S. 1997, c C-41.1 **[ABA Tab 34]**
[66] Judgment of BCCA below at para 32 **[Tab B3]**. This seems to misinterpret *Pompey*. See Elizabeth Edinger, "The Problem of Parallel Actions" (2010) 60 U.N.B.L.J. 116 at p.125 **[ABA Tab 27]**
[67] 2011 SKCA 136, 377 Sask. R. 156 ("*Microcell*") **[ABA Tab 15]**; 2011 SKCA 137, 377 Sask. R. 146 ("*Hudye Farms*") **[ABA Tab 11]**

> enforce the forum selection clause. As part of the common law of Canada, great weight is given to the parties' contractual choice of the appropriate forum.

73. Similarly, Nova Scotia courts consider forum selection clauses *within* the *CJPTA*. The onus shifts to the party seeking to avoid the forum selection clause, but nevertheless the analysis occurs within the *CJPTA*.[68] Professor Edinger of UBC endorses a similar approach: an approach that relies on an interpretation and application of s. 11 of the *CJPTA* which accommodates the *Pompey* strong cause test.[69]

74. Bauman C.J. acknowledged the different approaches but failed to discuss differing results. As Bauman C.J. noted "[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* . . ."[70]

75. Applying the approach developed in Saskatchewan and Nova Scotia, the forum selection clause is considered *within* the *CJPTA*. Thus, s. 12 of the *CJPTA* must be considered. In this case the statute (*Privacy Act*) vests jurisdiction with the B.C. Supreme Court notwithstanding a private contract purporting to vest jurisdiction with a foreign court. Section 12 therefore precludes a stay of proceedings. This outcome acknowledges the primacy of the *Privacy Act*, enacted in the public interest and affording quasi-constitutional protections to the public.

76. As this case demonstrates, the conflicting approaches yield different outcomes. The Saskatchewan and Nova Scotia approaches consider the impact of the forum selection clause within the *CJPTA*. The *CJPTA* expressly subordinates itself to the *Privacy Act*. The *Privacy Act* expressly confers exclusive jurisdiction upon the B.C. Supreme Court. The statutory grant of jurisdiction prevails over the private contract.

77. Alternatively, the *CJPTA*'s s. 11 *forum non conveniens* analysis should balance the forum selection clause and the statutory jurisdiction clause and account for public policy in the analysis. This approach would apply *Pompey* appropriately for the context of this sort of case – a context

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[68] See *Curves International, Inc. v. Archibald*, 2011 NSSC 217, 303 N.S.R. (2d) 288 **[ABA Tab 4]**
[69] E. Edinger, "*The Problem of Parallel Actions*" (2010) 60 UNBLJ 116 at pp.125 to 126 **[ABA Tab 27]**
[70] Citing *Microcell* at para 29 **[ABA Tab 15]**

that includes a statute enacted in the public interest, affording quasi-constitutional protections to the public, and vesting exclusive jurisdiction with the domestic court to protect those rights. In these circumstances, the onus should rest upon the party resisting the consumer's statutory privacy rights and the domestic court's exclusive statutory jurisdiction. That party (in this case Facebook), ought to satisfy the court that the plaintiff will not lose her statutory protections in the other jurisdiction.

PART IV. COSTS SUBMISSIONS

78. The *Class Proceedings Act* provides for no costs in the ordinary course at this stage of the proceedings.[71]

PART V. ORDER SOUGHT

79. The Applicant respectfully requests that leave to appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Vancouver in the Province of British Columbia this ____ day of September, 2015.

_____
Christopher A. Rhone
Counsel for the Applicant

[71] *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 37 **[ABA Tab 29]**

PART VI. TABLE OF AUTHORITIES

Authority	Cited at Paras
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Secondary Sources

PART VII. STATUTES, REGULATIONS AND RULES
(Reproduced in the Applicant's Book of Authorities)

Tab	Statute
29.	*Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 37
30.	*Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, ss. 11 and 12
31.	*Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2d Sess.), c. 2
32.	*Privacy Act*, R.S.B.C. 1996, c. 373, ss. 3(2) and 4
33.	*Privacy Act*, R.S.N.L. 1990, c. P-22, s. 8
34.	*The Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c C-41.1
35.	*The Privacy Act*, R.S.S. 1978, c. P-24, s. 5