

## Supreme Court Judgments

## Douez v. Facebook, Inc.

Collection: Supreme Court Judgments

Date: 2017-06-23

Neutral citation: 2017 SCC 33

Report: [2017] 1 SCR 751

Case number: 36616

Judges: McLachlin, Beverley; Abella, Rosalie Silberman; Moldaver, Michael J.; Karakatsanis, Andromache; Wagner, Richard; Gascon, Clément; Côté, Suzanne

On appeal from: British Columbia

Notes: SCC Case Information: [36616](#)**SUPREME COURT OF CANADA****CITATION:** Douez v. Facebook, Inc., 2017 SCC 33,  
[2017] 1 S.C.R. 751**APPEAL HEARD:** November 4, 2016  
**JUDGMENT RENDERED:** June 23, 2017  
**DOCKET:** 36616**BETWEEN:****Deborah Louise Douez**  
Appellant

and

**Facebook, Inc.**  
Respondent

- and -

**Canadian Civil Liberties Association, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Information Technology Association of Canada and Interactive Advertising Bureau of Canada**  
Interveners**CORAM:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.**JOINT REASONS FOR JUDGMENT:** Karakatsanis, Wagner and Gascon JJ.  
(paras. 1 to 77)

**REASONS CONCURRING IN THE  
RESULT:**

(paras. 78 to 118)

Abella J.

**JOINT DISSENTING REASONS:**

(paras. 119 to 177)

McLachlin C.J. and Côté J. (Moldaver J. concurring)

---

Douez v. Facebook, Inc., 2017 SCC 33, [2017] 1 S.C.R. 751

**Deborah Louise Douez***Appellant*

v.

**Facebook, Inc.***Respondent*

and

**Canadian Civil Liberties Association,  
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,  
Information Technology Association of Canada and  
Interactive Advertising Bureau of Canada***Interveners***Indexed as: Douez v. Facebook, Inc.****2017 SCC 33**

File No.: 36616.

2016: November 4; 2017: June 23.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Private international law — Courts — Jurisdiction — Choice of forum — Forum selection clauses — Consumer contract of adhesion — Company with head office in California operating online social network — Company’s terms of use containing forum selection clause in favour of California courts — Resident of British Columbia and member of company’s online social network bringing action against company in British Columbia relying on statutory tort pursuant to British Columbia’s Privacy Act — Whether action should be stayed on basis of forum selection clause contained in terms of use — Common law test for forum selection clauses applied in consumer context — Whether analysis of forum selection clauses should be subsumed under forum non conveniens test adopted in s. 11 of the Court Jurisdiction and Proceedings Transfer Act — Privacy Act, R.S.B.C. 1996, c. 373, s. 4 — Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, s. 11.*

*Privacy — Courts — Jurisdiction — British Columbia’s Privacy Act providing that despite anything contained in another Act, actions under Privacy Act must be heard and determined by Supreme Court of that province — Statute silent on contractual provisions — Whether Privacy Act overrides forum selection clauses — Privacy Act, R.S.B.C. 1996, c. 373, s. 4.*

Facebook, an American corporation headquartered in California, operates one of the world’s leading social networks and generates most of its revenues from advertising. D is a resident of British Columbia and has been a member of Facebook since 2007. In 2011, Facebook created a new advertising product called “Sponsored Stories”, which used the name and picture of Facebook members to advertise companies and products to other members. D brought an action in British Columbia against Facebook alleging that it used her name and likeness without consent for the purposes of advertising, in contravention to s. 3(2) of British Columbia’s *Privacy Act*. D also seeks certification of her action as a class proceeding under the *Class Proceedings Act*. The proposed class includes all British Columbia residents who had their name or picture used in Sponsored Stories. The estimated size of the class is 1.8 million people.

Under s. 4 of the *Privacy Act*, actions under the Act must be heard in the British Columbia Supreme

Court. However, as part of the registration process, all potential users of Facebook must agree to its terms of use which include a forum selection and choice of law clause requiring that disputes be resolved in California according to California law.

Facebook brought a preliminary motion to stay the action on the basis of this forum selection clause. The chambers judge declined to enforce the clause and certified the class action. The British Columbia Court of Appeal reversed the stay decision of the chambers judge on the basis that Facebook's forum selection clause was enforceable and that D failed to show strong cause not to enforce it. This rendered the certification issue moot and the court declined to address it.

*Held* (McLachlin C.J., Moldaver and Côté JJ. dissenting): The appeal should be allowed. The forum selection clause is unenforceable. The chambers judge's order dismissing Facebook's application to have the Supreme Court of British Columbia decline jurisdiction is restored.

*Per* Karakatsanis, Wagner and Gascon JJ.: In the absence of legislation to the contrary, the common law test for forum selection clauses established in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450, continues to apply and provides the analytical framework for this case. The *forum non conveniens* test adopted in the *Court Jurisdiction and Proceedings Transfer Act* ("CJPTA") was not intended to replace the common law test for forum selection clauses. The analysis of forum selection clauses thus remains separate, despite the enactment of the *CJPTA*.

Forum selection clauses serve a valuable purpose and are commonly used and regularly enforced. However, forum selection clauses divert public adjudication of matters out of the provinces, and court adjudication in each province is a public good. Because forum selection clauses encroach on the public sphere of adjudication, Canadian courts do not simply enforce them like any other clause. Where no legislation overrides the forum selection clause, the two-step approach set out in *Pompey* applies to determine whether to enforce a forum selection clause and stay an action brought contrary to it. At the first step, the party seeking a stay must establish that the clause is valid, clear and enforceable and that it applies to the cause of action before the court. If this party succeeds, the onus shifts to the plaintiff who must show strong cause why the court should not enforce the forum selection clause and stay the action. At this second step of the test, a court must consider all the circumstances, including the convenience of the parties, fairness between the parties and the interests of

justice. Public policy may also be a relevant factor at this step. The strong cause factors have been interpreted and applied restrictively in the commercial context, but commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. Thus, the *Pompey* strong cause factors should be modified in the consumer context to account for the different considerations relevant to this context. When considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake.

As the Court recognized in *Pompey*, legislative provisions can override forum selection clauses. In the present case, s. 4 of the *Privacy Act* lacks the clear and specific language that legislatures normally use to override forum selection clauses. While the legislature intended s. 4 of the *Privacy Act* to confer jurisdiction to the British Columbia Supreme Court to resolve matters brought under the Act, nothing suggests that it was also intended to override forum selection clauses.

With respect to the first step of the *Pompey* test, the forum selection clause contained in Facebook's terms of use is enforceable. At the second step of the test, however, D has met her burden of establishing that there is strong cause not to enforce the forum selection clause. A number of different factors, when considered cumulatively, support a finding of strong cause. Most importantly, the claim involves a consumer contract of adhesion between an individual consumer and a large corporation and a statutory cause of action implicating the quasi-constitutional privacy rights of British Columbians. It is clear from the evidence that there was gross inequality of bargaining power between the parties. Individual consumers in this context are faced with little choice but to accept Facebook's terms of use. Additionally, Canadian courts have a greater interest in adjudicating cases impinging on constitutional and quasi-constitutional rights because these rights play an essential role in a free and democratic society and embody key Canadian values. This matter requires an interpretation of a statutory privacy tort and only a local court's interpretation of privacy rights under the *Privacy Act* will provide clarity and certainty about the scope of the rights to others in the province. Overall, these public policy concerns weigh heavily in favour of strong cause.

Two other secondary factors also suggest that the forum selection clause should not be enforced.

First, even assuming that a California court could or would apply the *Privacy Act*, the interests of justice support having the action adjudicated by the British Columbia Supreme Court. The lack of evidence concerning whether a California court would hear D's claim is not determinative. The British Columbia Supreme Court, as compared to a California one, is better placed to assess the purpose and intent of the legislation and to decide whether public policy or legislative intent prevents parties from opting out of rights created by the *Privacy Act* through a choice of law clause in favour of a foreign jurisdiction. Second, the expense and inconvenience of requiring British Columbian individuals to litigate in California, compared to the comparative expense and inconvenience to Facebook, further supports a finding of strong cause. The chambers judge found it would be more convenient to have Facebook's books and records made available for inspection in British Columbia than requiring D to travel to California to advance her claim. There is no reason to disturb this finding.

*Per Abella J.:* This is an online consumer contract of adhesion. To become a member of Facebook, a consumer must accept all the terms stipulated in the terms of use, including the forum selection clause. No bargaining, no choice, no adjustments. The automatic nature of the commitments made with online contracts intensifies the scrutiny for clauses that have the effect of impairing a consumer's access to potential remedies.

The operative test in *Pompey* for determining whether to enforce a forum selection clause engages two distinct inquiries. The first is into whether the clause is enforceable under contractual doctrines like public policy, duress, fraud, unconscionability or grossly uneven bargaining positions. If the clause is enforceable, the onus shifts to the consumer to show "strong cause" why the clause should not be enforced because of factors typically considered under the *forum non conveniens* doctrine. Keeping the two *Pompey* inquiries distinct means that before the onus shifts, the focus starts where it should, namely on whether the contract or clause itself is enforceable based on basic contractual principles.

In this case, the forum selection clause is unenforceable under the first step of the *Pompey* test applying contractual principles.

The burdens of forum selection clauses on consumers and their ability to access the court system range from added costs, logistical impediments and delays, to deterrent psychological effects. When online consumer contracts of adhesion contain terms that unduly impede the ability of consumers to vindicate their rights in domestic courts, particularly their quasi-constitutional or constitutional rights, public policy concerns

outweigh those favouring enforceability of a forum selection clause.

Public policy concerns relating to access to domestic courts are especially significant in this case given that it deals with a fundamental right: privacy. Section 4 of British Columbia's *Privacy Act* states that the particular protections in the *Act* "must be heard and determined by the Supreme Court" despite anything contained in another Act. This is statutory recognition that privacy rights under the *Act* are entitled to protection in British Columbia by judges of the British Columbia Supreme Court. It would be contrary to public policy to enforce a forum selection clause in a consumer contract that has the effect of depriving a party of access to a statutorily mandated court.

Tied to the public policy concerns is the "grossly uneven bargaining power" of the parties. Facebook is a multi-national corporation which operates in dozens of countries. D is a private citizen who had no input into the terms of the contract and, in reality, no meaningful choice as to whether to accept them given Facebook's undisputed indispensability to online conversations.

The doctrine of unconscionability also applies in this case to render the forum selection clause unenforceable. Both elements required for the doctrine of unconscionability to apply — inequality of bargaining power and unfairness — are met in this case. The inequality of bargaining power between Facebook and D in an online contract of adhesion gave Facebook the unilateral ability to require that any legal grievances D had could not be vindicated in British Columbia where the contract was made, but only in California where Facebook has its head office. This gives Facebook an unfair and overwhelming procedural — and potentially substantive — benefit.

*Per* McLachlin C.J. and Moldaver and Côté JJ. (dissenting): When parties agree to a jurisdiction for the resolution of disputes, courts will give effect to that agreement, unless the claimant establishes strong cause for not doing so. In this case, D has not shown strong cause for not enforcing the forum selection clause to which she agreed. Therefore, the action must be tried in California, as the contract requires, and a stay of the underlying claim should be entered.

Section 11 of the *CJPTA* does not apply to oust forum selection clauses. Pursuant to *Pompey*, where

the parties have agreed in advance to a choice of forum, there is no need to inquire into which of the two forums is the more convenient; the parties have settled the matter by their contract, unless the contractual clause is invalid or inapplicable or should not be applied because the plaintiff has shown strong cause not to do so. A unified test that would apply forum selection clauses as an element of the *forum non conveniens* test should be rejected. While the *CJPTA* is a complete codification of the common law related to *forum non conveniens*, it does not supplant the common law principles underlying the enforcement of forum selection clauses. If the test in *Pompey* is satisfied and the forum selection clause is inapplicable, the result is a situation where there are two competing possibilities for forum. At this point, the *CJPTA* which codifies the common law provisions for *forum non conveniens* applies. In this case, the test in *Pompey* is not satisfied and therefore s. 11 of the *CJPTA* does not assist D.

With respect to the first step of the *Pompey* test, Facebook has discharged the burden of establishing that the forum selection clause is enforceable and applies in the circumstances: it is established that an enforceable contract may be formed by clicking an appropriately designated online icon; the contract on its face is clear and there is no inconsistency between a commitment to strive to apply local laws and an agreement that disputes will be tried in California; and finally, s. 4 of the *Privacy Act* grants the Supreme Court of British Columbia subject matter jurisdiction over *Privacy Act* claims to the exclusion of other British Columbia courts but nothing in the language of s. 4 suggests that it can render an otherwise valid contractual term unenforceable.

While the court can refuse to enforce otherwise valid contractual provisions that offend public policy, the party seeking to avoid enforcement of the clause must prove the existence of an overriding public policy that outweighs the very strong public interest in the enforcement of contracts. No such overriding public policy is found on the facts of this case. Forum selection clauses, far from being unconscionable or contrary to public policy, are supported by strong policy considerations. They serve an important role of increasing certainty and predictability in transactions that take place across borders. And, the fact that a contract is in standard form does not affect the validity of such a clause. That is not to say that forum selection clauses will always be given effect by the courts. Burdens of distance or geography may render the application of a forum selection clause unfair in the circumstances. However, those considerations are relevant at the second step of *Pompey*, not the first. Here, the forum selection clause is valid and applicable and the first step of *Pompey* test has been met.

As to the second step of the *Pompey* test, requiring the plaintiff to demonstrate strong cause is



essential for upholding certainty, order and predictability in private international law, especially in light of the proliferation of online services provided across borders. In this case, none of the circumstances relied on by D show strong cause why the forum selection clause should not be enforced. She has not shown that the facts in the case and the evidence to be adduced shifts the balance of convenience from the contracted state of California to British Columbia. Further, the British Columbia tort created by the *Privacy Act* does not require special expertise and the courts of California have not been shown to be disadvantaged in interpreting the *Privacy Act* as compared with the Supreme Court of British Columbia. Nothing in D's situation suggests that the class action she wishes to commence could not be conducted in California just as easily as in British Columbia. There is also no suggestion that Facebook does not genuinely wish all litigation with users to take place in California. Finally, D has not shown that application of the forum selection clause would deprive her of a fair trial.

Applying the strong cause test in a nuanced manner or modifying the test to place the burden on the defendant in the context of consumer contracts of adhesion would amount to inappropriately overturning the Court's decision in *Pompey* and substituting new and different principles. Nuancing the strong cause test by considering the factor of the consumer's lack of bargaining power conflates the first step of the test set out in *Pompey* with the second step, in a way that profoundly alters the law endorsed in *Pompey*. It is at the first step that inequality of bargaining power is relevant. Inequality of bargaining power may lead to a clause being declared unconscionable – something not argued by D. In this case, Facebook has demonstrated that the forum selection clause is enforceable and D has failed to establish strong cause why the forum selection clause she agreed to should not be enforced.

## Cases Cited

By Karakatsanis, Wagner and Gascon JJ.

**Applied:** *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450; **referred to:** *Momentous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd.*, 2010 ONCA 722, 103 O.R. (3d) 467, aff'd 2012 SCC 9, [2012] 1 S.C.R. 359; *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321; *Viroforce Systems Inc. v. R & D Capital Inc.*, 2011 BCCA 260, 336 D.L.R. (4th) 570; *Armoyan v. Armoyan*, 2013 NSCA 99, 334 N.S.R. (2d) 204; *Hudye Farms Inc. v. Canadian Wheat Board*, 2011 SKCA 137, 377 Sask. R. 146; *Frey v. BCE Inc.*, 2011 SKCA 136, 377 Sask. R. 156; *The Fehmarn*, [1958] 1 All

E.R. 333; *Preymann v. Ayus Technology Corp.*, 2012 BCCA 30, 32 B.C.L.R. (5th) 391; *The “Eleftheria”*, [1969] 1 Lloyd’s Rep. 237; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90, [2001] 3 S.C.R. 907; *Donohue v. Armco Inc.*, [2001] UKHL 64, [2002] 1 All E.R. 749; *Aldo Group Inc. v. Moneris Solutions Corp.*, 2013 ONCA 725, 118 O.R. (3d) 81; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; *Straus v. Decaire*, 2007 ONCA 854; *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351, 100 O.R. (3d) 241; *Stubbs v. ATS Applied Tech Systems Inc.*, 2010 ONCA 879, 272 O.A.C. 386; *Welex A.G. v. Rosa Maritime Limited (The “Epsilon Rosa”)*, [2003] EWCA Civ 938, [2003] 2 Lloyd’s Rep. 509; *The “Bergen” (No. 2)*, [1997] 2 Lloyd’s Rep. 710; *Quinlan v. Safe International Försäkrings AB*, [2005] FCA 1362; *Incitec Ltd. v. Alkimos Shipping Corp.*, [2004] FCA 698, 206 A.L.R. 558; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *R. v. Salituro*, [1991] 3 S.C.R. 654; *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280; *TCR Holding Corp. v. Ontario*, 2010 ONCA 233, 69 B.L.R. (4th) 175; *Kelly v. Human Rights Commission (P.E.I.)*, 2008 PESCAD 9, 276 Nfld. & P.E.I.R. 336; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Dyment*, [1988] 2 S.C.R. 417; *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162; *Vita Food Products, Inc. v. Unus Shipping Co.*, [1939] A.C. 277; *Avenue Properties Ltd. v. First City Dev. Corp. Ltd.* (1986), 7 B.C.L.R. (2d) 45.

By Abella J.

**Applied:** *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450; **referred to:** *The “Eleftheria”*, [1969] 1 Lloyd’s Rep. 237; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; *Zi Corp. v. Steinberg*, 2006 ABQB 92, 396 A.R. 157; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19; *Ironrod Investments Inc. v. Enquest Energy Services Corp.*, 2011 ONSC 308; *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2001), 20 B.L.R. (3d) 289, aff’d. (2003), 63 O.R. (3d) 431; *Takefman v. Golden Hope Mines Ltd.*, 2015 QCCS 4947; *Nord Resources Corp. v. Nord Pacific Ltd.*, 2003 NBQB 213, 37 B.L.R. (3d) 115; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69.

By McLachlin C.J and Côté J. (dissenting)

*Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450; *Preymann v. Ayus Technology Corp.*, 2012 BCCA 30, 32 B.C.L.R. (5th) 391; *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321; *Viroforce Systems Inc. v. R & D Capital Inc.*, 2011 BCCA 260, 336 D.L.R. (4th) 570; *Frey v. BCE Inc.*, 2011 SKCA 136, 377 Sask. R. 156; *Hudye Farms Inc. v. Canadian Wheat Board*, 2011 SKCA 137, 377 Sask. R. 146; *Rudder v. Microsoft Corp.* (1999), 2 C.P.R. (4th) 474; *Berkson v. Gogo LLC*, 97 F. Supp.3d 359 (2015); *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Donohue v. Armco Inc.*, [2001] UKHL 64, [2002] 1 All E.R. 749; *Atlantic Marine Construction Co. v. U.S. Dist. Court for Western Dist. of Texas*, 134 S.Ct. 568 (2013); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Akai Pty Ltd. v. People's Insurance Co.* (1996), 188 C.L.R. 418; *Advanced Cardiovascular Systems Inc. v. Universal Specialties Ltd.*, [1997] 1 N.Z.L.R. 186; *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *The "Eleftheria"*, [1969] 1 Lloyd's Rep. 237; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609.

## Statutes and Regulations Cited

*Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, s. 3.

*Civil Code of Québec*, art. 3149.

*Class Proceedings Act*, R.S.B.C. 1996, c. 50.

*Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, s. 11.

*Electronic Transactions Act*, S.B.C. 2001, c. 10, s. 15(1).

[\*Marine Liability Act\*, S.C. 2001, c. 6, s. 46\(1\)](#).

*Privacy Act*, R.S.B.C. 1996, c. 373, ss. 1(1), 3(2), 4.

*Regulation (E.U.) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, [2012] O.J. L. 351/1, arts. 18, 19.

*Securities Act*, R.S.A. 2000, c. S-4, s. 180(1).

## Authors Cited

- Benson, Peter. "Radin on Consent and Fairness in Consumer Boilerplate: A Brief Comment" (2013), 54 *Can. Bus. L.J.* 282.
- Braucher, Jean. "Unconscionability in the Age of Sophisticated Mass-Market Framing Strategies and the Modern Administrative State" (2007), 45 *Can. Bus. L.J.* 382.
- Ellinghaus, M. P. "In Defense of Unconscionability" (1969), 78 *Yale L.J.* 757.
- Farrow, Trevor C. W. *Civil Justice, Privatization, and Democracy*. Toronto: University of Toronto Press, 2014.
- Geist, Michael A. "Is There a There There? Toward Greater Certainty for Internet Jurisdiction" (2001), 16 *Berkeley Tech. L.J.* 1345.
- Hall, Geoff R. *Canadian Contractual Interpretation Law*, 3rd ed. Toronto: LexisNexis, 2016.
- Joseph, David. *Jurisdiction and Arbitration Agreements and their Enforcement*, 2nd ed. London: Sweet & Maxwell/Thomson Reuters, 2010.
- McCamus, John D. *The Law of Contracts*, 2nd ed. Toronto: Irwin Law, 2012.
- Mullenix, Linda S. "Another Easy Case, Some More Bad Law: *Carnival Cruise Lines* and Contractual Personal Jurisdiction" (1992), 27 *Tex. Int'l L.J.* 323.
- Pavlović, Marina. "Contracting out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts" (2016), 62 *McGill L.J.* 389.
- Peel, Edwin. "Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws", [1998] *L.M.C.L.Q.* 182.
- Pitel, Stephen G. A., and Nicholas S. Rafferty. *Conflict of Laws*, 2nd ed. Toronto: Irwin Law, 2016.
- Preston, Cheryl B. "'Please Note: You Have Waived Everything': Can Notice Redeem Online Contracts?" (2015), 64 *Am. U. L. Rev.* 535.
- Purcell, Edward A. Jr. "Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court" (1992), 40 *UCLA L. Rev.* 423.
- Resnik, Judith. "Procedure as Contract" (2005), 80 *Notre Dame L. Rev.* 593.
- Saumier, Geneviève. "What's in a Name? Lloyd's, International Comity and Public Policy" (2002), 37 *Can. Bus. L.J.* 388.
- Swan, Angela, and Jakub Adamski. *Canadian Contract Law*, 3rd ed. Markham, Ont.: LexisNexis, 2012.
- Tang, Zheng. "Exclusive Choice of Forum Clauses and Consumer Contracts in E-commerce" (2005), 1 *J. Priv. Int. L.* 237.
- Tang, Zheng Sophia. *Electronic Consumer Contracts in the Conflict of Laws*, 2nd ed. Portland, Or.: Hart, 2015.

Uniform Law Conference of Canada. *Uniform Court Jurisdiction and Proceedings Transfer Act* (online: <http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/739-jurisdiction/civil-jurisdiction/1730-court-jurisdiction-proceedings-transfer-act?showall=1&limitstart=>; archived version: [http://www.scc-csc.ca/cso-dce/2017SCC-CSC33\\_1\\_eng.pdf](http://www.scc-csc.ca/cso-dce/2017SCC-CSC33_1_eng.pdf)).

Waddams, S. M. *The Law of Contracts*, 6th ed. Toronto: Canada Law Book, 2010.

Waddams, Stephen. "Review Essay: The Problem of Standard Form Contracts: A Retreat to Formalism" (2012), 53 *Can. Bus. L.J.* 475.

Walker, Janet. *Castel & Walker: Canadian Conflict of Laws*, 6th ed. Markham, Ont.: LexisNexis, 2005 (loose-leaf updated 2017, release 60).

Walsh, Catherine. "The Uses and Abuses of Party Autonomy in International Contracts" (2010), 60 *U.N.B.L.J.* 12.

Woodward, William J., Jr. "Finding the Contract in Contracts for Law, Forum and Arbitration" (2006), 2 *Hastings Bus. L.J.* 1.

APPEAL from a judgment of the British Columbia Court of Appeal (Bauman C.J.B.C. and Lowry and Goepel JJ.A.), 2015 BCCA 279, 77 B.C.L.R. (5th) 116, 374 B.C.A.C. 56, 642 W.A.C. 56, 73 C.P.C. (7th) 87, 387 D.L.R. (4th) 360, [2016] 1 W.W.R. 287, [2015] B.C.J. No. 1270 (QL), 2015 CarswellBC 1671 (WL Can.), setting aside a decision of Griffin J., 2014 BCSC 953, 313 C.R.R. (2d) 254, 53 C.P.C. (7th) 302, [2014] B.C.J. No. 1051 (QL), 2014 CarswellBC 1487 (WL Can.). Appeal allowed, McLachlin C.J. and Moldaver and Côté JJ. dissenting.

*Ward K. Branch, Q.C., Christopher Rhone and Michael Sobkin*, for the appellant.

*Mark A. Gelowitz and W. David Rankin*, for the respondent.

*Cynthia Kuehl and Meredith E. Jones*, for the intervener the Canadian Civil Liberties Association.

*Paul J. Bates, Marina Pavlovic and Jeremy de Beer*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

*Matthew P. Gottlieb, Paul Michell and Ian C. Matthews*, for the intervener the Information Technology Association of Canada.

*Derek J. Bell and Jason M. Berall*, for the intervener the Interactive Advertising Bureau of Canada.

The following are the reasons delivered by

KARAKATSANIS, WAGNER AND GASCON JJ. —

## I. Overview

[1] Forum selection clauses purport to oust the jurisdiction of otherwise competent courts in favour of a foreign jurisdiction. To balance contractual freedom with the public good in having local courts adjudicate certain claims, courts have developed a test to determine whether such clauses should be enforced. This test has mostly been applied in commercial contexts, where forum selection clauses are generally enforced to hold sophisticated parties to their bargain, absent exceptional circumstances. This appeal requires the Court to apply this test in a consumer context.

[2] Deborah Douez is a resident of British Columbia and a member of the social network Facebook.com. She claims that Facebook, Inc. infringed her privacy rights and those of more than 1.8 million British Columbians, contrary to the *Privacy Act* of that province. Facebook is seeking to have the action stayed on the basis of the forum selection clause contained in its terms of use, which every user must click to accept in order to use its social network.

[3] The chambers judge refused to stay the action, concluding that the *Privacy Act* overrides the clause, and that it provides strong reasons not to enforce it. The Court of Appeal reversed her decision, concluding instead that the clause was enforceable and that Ms. Douez had failed to show strong cause not to enforce it.

[4] Like our colleague Abella J., although for different reasons, we would allow the appeal. In our view, while s. 4 of the *Privacy Act* does not override forum selection clauses, Ms. Douez has established strong reasons not to enforce the clause at issue here. The grossly uneven bargaining power between the parties and the importance of adjudicating quasi-constitutional privacy rights in the province are reasons of public policy that are compelling, and when considered together, are decisive in this case. In addition, the interests of justice, and

the comparative convenience and expense of litigating in California, all support a finding of strong cause in the present case.

## II. Background

[5] The respondent, Facebook, Inc., is an American corporation headquartered in California. It operates Facebook.com, one of the world's leading social networks, and generates most of its revenues from advertising. The appellant, Ms. Douez, is a resident of British Columbia and has been a member of Facebook since 2007.

[6] In 2011, Facebook created a new advertising product called "Sponsored Stories". This product used the name and picture of Facebook members, allegedly without their knowledge, to advertise companies and products to other members on the site and externally.

[7] Ms. Douez brought an action against Facebook when she noticed that her name and profile picture had been used in Sponsored Stories. She alleges that Facebook used her name and likeness without consent for the purposes of advertising, in contravention to s. 3(2) of the *Privacy Act*, R.S.B.C. 1996, c. 373:

(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.

Ms. Douez also seeks certification of her action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The proposed class includes all British Columbia residents who had their name or picture used in Sponsored Stories. The estimated size of the class is 1.8 million people.

[8] Facebook is free to join and use, but all potential users — including Ms. Douez — must agree to its terms of use as part of the registration process. These terms include a forum selection and choice of law clause requiring that disputes be resolved in California according to California law:

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. [A.R., vol. II, p. 138]

[9] Facebook brought a preliminary motion to stay Ms. Doe's action on the basis of this forum selection clause. Alternatively, it argued that the action should be stayed because British Columbia is *forum non conveniens* under s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 ("CJPTA"). In our Court, however, Facebook focused its submissions exclusively on the forum selection clause and did not argue that British Columbia is *forum non conveniens*.

### III. Decisions Below

#### A. *Supreme Court of British Columbia (Griffin J.), 2014 BCSC 953, 313 C.R.R. (2d) 254*

[10] The chambers judge declined to enforce the forum selection clause. Although she found it to be *prima facie* valid, clear and enforceable, she held that s. 4 of the *Privacy Act* overrides forum selection clauses and provides a strong public policy not to enforce them. In her view, the British Columbia Supreme Court has exclusive jurisdiction under s. 4 to hear actions under the Act. As a result, she concluded that the plaintiff would be unable to bring her claim elsewhere if the claim was stayed.

[11] While the chambers judge's findings on s. 4 were sufficient to resolve the motion, she also found that there was strong cause not to enforce the forum selection clause. Enforcing it would, in her view, exclude Facebook from liability because only the British Columbia Supreme Court had jurisdiction over the matter. Ms. Doe did not need to prove California courts would refuse to hear her claim. In addition, she found that the jurisdiction clause and purposes of the *Privacy Act* provide strong public policy reasons supporting a finding of strong cause.

[12] Lastly, the chambers judge concluded on the basis of the factors in s. 11 of the *CJPTA* that the courts of California would not be more appropriate than the courts of British Columbia to hear the action. She



found that it would be more convenient to hear the matter in British Columbia than in California. Thus, the chambers judge refused Facebook's request to stay the proceeding.

B. *Court of Appeal for British Columbia (Bauman C.J. and Lowry and Goepel JJ.A.), 2015 BCCA 279, 77 B.C.L.R. (5th) 116*

[13] The Court of Appeal reversed the decision of the chambers judge and ordered that the action be stayed on the basis of Facebook's forum selection clause. It confirmed that the analysis of forum selection clauses is distinct from the analysis of the appropriate forum under s. 11 of the *CJPTA*.

[14] The Court of Appeal concluded that the chambers judge erred in her interpretation of s. 4 of the *Privacy Act*. In its view, the chambers judge failed to give effect to the principle of territoriality, under which provincial legislation cannot regulate civil rights in another jurisdiction. Section 4 concerns subject-matter competence, not territorial competence, and therefore it only confers jurisdiction to the Supreme Court of British Columbia to the exclusion of other courts in British Columbia. Had the legislature wanted to override forum selection clauses, it would have done so explicitly.

[15] The Court of Appeal held that the forum selection clause was enforceable, and that Ms. Douez had failed to show strong cause. In finding strong cause, the chambers judge's analysis was tainted by her erroneous interpretation of s. 4 of the *Privacy Act*. The fact that a stay would extinguish a claim might provide strong cause, but Ms. Douez failed to provide evidence establishing that this would be the case here. Since the clause should be enforced, the Court of Appeal did not consider s. 11 of the *CJPTA*.

#### IV. Issues

[16] Facebook does not dispute that British Columbia courts have territorial jurisdiction. The main issue is whether Ms. Douez's action should be stayed on the basis of the forum selection clause contained in its terms of use. The parties also disagree on whether the analysis of forum selection clauses should be subsumed under s. 11 of the *CJPTA*, or whether they are distinct concepts.

#### V. Analysis

[17] As we shall explain, the *forum non conveniens* test adopted in the *CJPTA* was not intended to replace the common law test for forum selection clauses. In our view, this case should be resolved under the strong cause analysis established by this Court in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450.

A. *The Interaction Between Forum Selection Clauses and the CJPTA*

[18] At common law, forum selection clauses and the *forum non conveniens* doctrine command different analyses: “Each class of case has its own onus, test and rationale” (*Momentous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd.*, 2010 ONCA 722, 103 O.R. (3d) 467, at para. 37, aff’d 2012 SCC 9, [2012] 1 S.C.R. 359). Our Court has confirmed that “the presence of a forum selection clause” is “sufficiently important to warrant a different test”, and that “a unified approach to *forum non conveniens*, where a choice of jurisdiction clause constitutes but one factor to be considered” may not be preferable (*Pompey*, at para. 21).

[19] Ms. Douez argues that the *CJPTA* provides a complete framework to determine the court’s jurisdiction, and that forum selection clauses should be considered as another factor within the *forum non conveniens* analysis under s. 11.

[20] In our view, the courts below rightly rejected Ms. Douez’s proposed approach. Section 11 of the *CJPTA* “constitutes a complete codification of the common law test for *forum non conveniens* [that] admits of no exceptions” (*Teck Cominco Metals Ltd. v. Lloyd’s Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321, at para. 22 (emphasis added)). It was never intended to codify the test for forum selection clauses. Not only does s. 11 make no mention of contractual stipulations, the comments on the uniform act that served as a basis for the *CJPTA* are also silent on this point (Uniform Law Conference of Canada, *Uniform Court Jurisdiction and Proceedings Transfer Act* (online)). The analysis of forum selection clauses thus remains separate, despite the enactment of the *CJPTA*.

[21] Several Canadian provinces have adopted their own *CJPTA*, with identical or similar provisions. Their appellate courts have consistently held that the analysis of forum selection clauses remains distinct (see e.g. *Viroforce Systems Inc. v. R & D Capital Inc.*, 2011 BCCA 260, 336 D.L.R. (4th) 570, at para. 14; *Armoyan*

v. *Armoyan*, 2013 NSCA 99, 334 N.S.R. (2d) 204, at para. 218). Even the Court of Appeal of Saskatchewan, which held that forum selection clauses should be considered as part of the *CJPTA* analysis, held that “*Pompey* continues to apply notwithstanding [its] enactment” (*Hudye Farms Inc. v. Canadian Wheat Board*, 2011 SKCA 137, 377 Sask. R. 146, at para. 10; see also *Frey v. BCE Inc.*, 2011 SKCA 136, 377 Sask. R. 156, at paras. 112-14).

[22] In short, the *CJPTA* was never intended to replace the common law test for forum selection clauses. In the absence of legislation to the contrary, the common law test continues to apply and provides the analytical framework for this case.

B. *The Forum Selection Clause at Common Law: Pompey*

[23] We turn next to the common law test for forum selection clauses adopted by this Court in *Pompey*, and to how we propose to apply it in a consumer context.

[24] Forum selection clauses serve a valuable purpose. This Court has recognized that they “are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law” (*Pompey*, at para. 20). Forum selection clauses are commonly used and regularly enforced.

[25] That said, forum selection clauses divert public adjudication of matters out of the provinces, and court adjudication in each province is a public good. Courts are not merely “law-making and applying venues”; they are institutions of “public norm generation and legitimation, which guide the formation and understanding of relationships in pluralistic and democratic societies” (T. C. W. Farrow, *Civil Justice, Privatization, and Democracy* (2014), at p. 41). Everyone has a right to bring claims before the courts, and these courts have an obligation to hear and determine these matters.

[26] Thus, forum selection clauses do not just affect the parties to the contract. They implicate the court as well, and with it, the court’s obligation to hear matters that are properly before it. In this way, forum selection clauses are a “unique category of contracts” (M. Pavlović, “Contracting out of Access to Justice: Enforcement of

[27] Of course, parties are generally held to their bargain and are bound by the enforceable terms of their contract. However, because forum selection clauses encroach on the public sphere of adjudication, Canadian courts do not simply enforce them like any other clause. In common law provinces, a forum selection clause cannot bind a court or interfere with a court's jurisdiction. As the English Court of Appeal recognized long ago, "no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them" (*The Fehmarn*, [1958] 1 All E.R. 333, at p. 335).

[28] Instead, where no legislation overrides the clause, courts apply a two-step approach to determine whether to enforce a forum selection clause and stay an action brought contrary to it (*Pompey*, at para. 39). At the first step, the party seeking a stay based on the forum selection clause must establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court" (*Preymann v. Ayus Technology Corp.*, 2012 BCCA 30, 32 B.C.L.R. (5th) 391, at para. 43; see also *Hudye Farms*, at para. 12, and *Pompey*, at para. 39). At this step of the analysis, the court applies the principles of contract law to determine the validity of the forum selection clause. As with any contract claim, the plaintiff may resist the enforceability of the contract by raising defences such as, for example, unconscionability, undue influence, and fraud.

[29] Once the party seeking the stay establishes the validity of the forum selection clause, the onus shifts to the plaintiff. At this second step of the test, the plaintiff must show strong reasons why the court should not enforce the forum selection clause and stay the action. In *Pompey*, this Court adopted the "strong cause" test from the English court's decision in *The "Eleftheria"*, [1969] 1 Lloyd's Rep. 237 (Adm. Div.). In exercising its discretion at this step of the analysis, a court must consider "all the circumstances", including the "convenience of the parties, fairness between the parties and the interests of justice" (*Pompey*, at paras. 19 and 30-31). Public policy may also be a relevant factor at this step (*Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90, [2001] 3 S.C.R. 907, at para. 91, referred to in *Pompey*, at para. 39; *Frey*, at para. 115).

[30] The strong cause factors were meant to provide some flexibility. Importantly, *Pompey* did not set out a closed list of factors governing the court's discretion to decline to enforce a forum selection clause. Both *Pompey* and *The "Eleftheria"* acknowledged that courts should consider "all the circumstances" of the particular case (*Pompey*, at para. 30; *The "Eleftheria"*, at p. 242). And the leading authority in England

continues to recognize that the court in *The “Eleftheria”* did not intend its list of factors to be comprehensive (*Donohue v. Armco Inc.*, [2001] UKHL 64, [2002] 1 All E.R. 749, at para. 24).

[31] That said, the strong cause factors have been interpreted and applied restrictively in the commercial context. In commercial interactions, it will usually be desirable for parties to determine at the outset of a business relationship where disputes will be settled. Sophisticated parties are justifiably “deemed to have informed themselves about the risks of foreign legal systems and are deemed to have accepted those risks in agreeing to a forum selection clause” (*Aldo Group Inc. v. Moneris Solutions Corp.*, 2013 ONCA 725, 118 O.R. (3d) 81, at para. 47). In this setting, our Court recognized that forum selection clauses are generally enforced and to be encouraged “because they provide international commercial relations with the stability and foreseeability required for purposes of the critical components of private international law, namely order and fairness” (*GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 22).

[32] In *Pompey*, for example, our Court enforced a forum selection clause contained in a bill of lading concluded between two sophisticated shipping companies. The parties were of similar bargaining power and sophistication, since they were “corporations with significant experience in international maritime commerce. . . . [that] were aware of industry practices” (para. 29). The Court held that the “forum selection clause could very well have been negotiated” between the parties (*ibid.*). This context manifestly informed the Court’s application of the strong cause test.

[33] But commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. For example, the unequal bargaining power of the parties and the rights that a consumer relinquishes under the contract, without any opportunity to negotiate, may provide compelling reasons for a court to exercise its discretion to deny a stay of proceedings, depending on the other circumstances of the case (see e.g. *Straus v. Decaire*, 2007 ONCA 854, at para. 5 (CanLII)). And as one of the interveners argues, instead of supporting certainty and security, forum selection clauses in consumer contracts may do “the opposite for the millions of ordinary people who would not foresee or expect its implications and cannot be deemed to have undertaken sophisticated analysis of foreign legal systems prior to opening an online account” (Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic Factum, at para. 7).

[34] Canadian courts have recognized that the test may apply differently, depending on the contractual context (see *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351, 100 O.R. (3d) 241, at para. 24; *Stubbs v. ATS Applied Tech Systems Inc.*, 2010 ONCA 879, 272 O.A.C. 386, at para. 58). The English courts have also recognized that not all forum selection clauses are created equally. The underpinning of the transaction is relevant to the exercise of discretion under the strong cause test: “. . . a defendant who cynically flouts a jurisdiction clause which he has freely negotiated is more likely to be enjoined than one who has had the clause imposed upon him . . . .” (*Welex A.G. v. Rosa Maritime Limited (The “Epsilon Rosa”*), [2003] EWCA Civ 938, [2003] 2 Lloyd’s Rep. 509, at para. 48; see also *The “Bergen” (No. 2)*, [1997] 2 Lloyd’s Rep. 710 (Q.B. (Adm. Ct.)), at p. 715; D. Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2nd ed. 2010), at para. 10.13). Similarly, Australian courts have found “that in a consumer situation [courts] should not place as much weight on an exclusive jurisdiction clause in determining a stay application as would be placed on such a clause where there was negotiation between business people” (*Quinlan v. Safe International Försäkrings AB*, [2005] FCA 1362, at para. 46 (AustLII); see also *Incitec Ltd. v. Alkimos Shipping Corp.*, [2004] FCA 698, 206 A.L.R. 558, at para. 50).

[35] As these cases recognize, different concerns animate the consumer context than those that this Court considered in *Pompey*, where a sophisticated commercial transaction was at issue. Because of these concerns, we agree with Ms. Douez and several interveners that the strong cause test must account for the different considerations relevant to this context.

[36] In our view, recognizing the importance of factors beyond those specifically listed in *The “Eleftheria”* is an appropriate incremental response of the common law to a different context (*Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at paras. 33-34 and 40). Such a development is especially important since online consumer contracts are ubiquitous, and the global reach of the Internet allows for instantaneous cross-border consumer transactions. It is necessary to keep private international law “in step with the dynamic and evolving fabric of our society” (*R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670).

[37] After all, the strong cause test must ensure that a court’s plenary jurisdiction only yields to private contracts where appropriate. A superior court’s general jurisdiction includes “all the powers that are necessary to do justice between the parties” (*80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (C.A.),

at p. 282; *10K Hoiang Corp. v. Ontario*, 2010 ONCA 255, 69 B.L.R. (4th) 115, at para. 20; *Kelly v. Human Rights Commission (P.E.I.)*, 2008 PESCAD 9, 276 Nfld. & P.E.I.R. 336, at para. 8).

[38] Therefore, we would modify the *Pompey* strong cause factors in the consumer context. When considering whether it is reasonable and just to enforce an otherwise binding forum selection clause in a consumer contract, courts should take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake. The burden remains on the party wishing to avoid the clause to establish strong cause.

[39] Although the steps are distinct, some considerations may be relevant to both steps of the test. For example, a court may consider gross inequality of bargaining power at the second step of the analysis, even if the circumstances of the bargain do not render the contract unconscionable at the first step. Taking into account the fact that the parties did not negotiate on an even playing field recognizes that the reasons for holding parties to their bargain carry less weight when there is no opportunity to negotiate a forum selection clause. This is not to say that the gross inequality of bargaining power will be sufficient, on its own, to show strong cause. However, it is a relevant circumstance that may be taken into account in the analysis.

[40] The two steps governing the enforcement of forum selection clauses ultimately play conceptually distinct roles. Professor Pavlović explains that at the first step, where the court determines the validity of the forum selection clause, “[c]ontract rules provide a core legal basis for the enforcement of jurisdiction agreements” (p. 402). On the other hand, the strong cause test at the second step “limits contractual autonomy in order to protect the authority (jurisdiction) of otherwise competent courts” (*ibid.*). This second step recognizes that there may be strong reasons to retain jurisdiction over a matter in the province.

### C. *Application*

#### (1) Section 4 of the *Privacy Act*

[41] As this Court recognized in *Pompey*, legislative provisions can override forum selection clauses. In the present case, the chambers judge found that s. 4 of the *Privacy Act* had overtaken the forum selection clause in conferring exclusive jurisdiction to the Supreme Court of British Columbia. We disagree.

[42] Section 4 reads as follows:

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

[43] Section 4 lacks the clear and specific language that legislatures normally use to override forum selection clauses. This Court referred to such overrides on at least two occasions. First, it found an override in [s. 46\(1\)](#) of the [Marine Liability Act, S.C. 2001, c. 6](#), which specifically mentions and sets aside contracts that purport to provide for the adjudication of claims in another forum (*Pompey*, at paras. 37-38). Second, it found that the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, was intended to override arbitration clauses (*Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at paras. 5-7 and 31). Section 3 of that enactment specifically prevents consumers from contractually waiving their rights under the statute.

[44] In contrast, although s. 4 of the *Privacy Act* expressly provides that it applies “[d]espite anything contained in another Act”, it is silent on contractual provisions. If the legislature had intended to override forum selection clauses, it would have done so explicitly. While the legislature intended s. 4 of the *Privacy Act* to confer jurisdiction to the British Columbia Supreme Court to resolve matters brought under the Act, nothing suggests that it was also intended to override forum selection clauses.

## (2) The Pompey Test

[45] As discussed above, the *Pompey* test involves a two-step analysis. At the first step, the court must be satisfied that the contract is otherwise enforceable, having regard to general principles of contract law.

[46] In this regard, Ms. Douez argues that the clause is unenforceable primarily because it was made unclear by Facebook’s statement that it “strive[s] to respect local laws”. We disagree. This general statement, which is also contained in the terms of use, does not prevail over the clear and specific language of the forum selection clause. Indeed, “where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the



subject-matter of the specific term” (*BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, at p. 24; see also G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 19). And as Facebook rightly notes, s. 15(1) of the *Electronic Transactions Act*, S.B.C. 2001, c. 10, permits offer and acceptance to occur in an electronic form through “clicking” online.

[47] Our colleague Abella J. concludes that the clause is not enforceable at this first step based upon other considerations. We prefer to address these considerations at the “strong cause” step of the test.

[48] At the second step of *Pompey* — the strong cause test — Facebook argues that Ms. Douez has failed to meet her burden because she did not provide any evidence that her contract with Facebook is the result of grossly uneven bargaining power or that a California court would be unable to hear her claim. For her part, Ms. Douez emphasizes the distinctions between a commercial contract amongst sophisticated parties and the consumer context. She also stresses the importance of privacy rights and the public policy underpinning the British Columbia legislature’s decision to enact a statutory cause of action to allow for vindication of these rights.

[49] As we note above, in exercising its discretion at this step of the analysis, a court must consider “all the circumstances”, including the “convenience of the parties, fairness between the parties and the interests of justice” (*Pompey*, at paras. 19 and 30-31). As we have said, public policy may also be an important factor at this step (*Holt Cargo*, at para. 91, referred to in *Pompey*, at para. 39; *Frey*, at para. 115).

[50] We conclude that Ms. Douez has met her burden of establishing that there is strong cause not to enforce the forum selection clause. A number of different factors, when considered cumulatively, support the chambers judge’s finding of strong cause. Most importantly, the claim involves a consumer contract of adhesion and a statutory cause of action implicating the quasi-constitutional privacy rights of British Columbians. We begin with these compelling factors, which are decisive in this case when considered together.

(a) *Public Policy*

[51] There are strong public policy considerations which favour a finding of strong cause. As we have

mentioned, this Court has emphasized party autonomy and commercial certainty in the context of contracts involving sophisticated parties. This usually justifies enforcement of forum selection clauses in the commercial context (*Pompey*, at para. 20; *GreCon Dimter*, at para. 22). Facebook argues that there is no reason to depart from this balance in the consumer context. We disagree.

[52] There are generally strong public policy reasons to hold parties to their bargain and it is clear that forum selection clauses are not inherently contrary to public policy. But freedom of contract is not unfettered. A court has discretion under the strong cause test to deny the enforcement of a contract for reasons of public policy in appropriate circumstances. Generally, such limitations fall into two broad categories: those intended to protect a weaker party or those intended to protect “the social, economic, or political policies of the enacting state in the collective interest” (C. Walsh, “The Uses and Abuses of Party Autonomy in International Contracts” (2010), 60 *U.N.B.L.J.* 12, at p. 15). In this case, both of these categories are implicated. It raises both the reality of unequal bargaining power in consumer contracts of adhesion and the local court’s interest in adjudicating claims involving constitutional or quasi-constitutional rights.

[53] First, the forum selection clause is included in a contract of adhesion formed between an individual consumer and a large corporation. As we discussed above, even if a contract is not unconscionable, gross inequality of bargaining power is still a relevant factor at the strong cause step of the analysis in this context.

[54] Despite Facebook’s claim otherwise, it is clear from the evidence that there was gross inequality of bargaining power between the parties. Ms. Douez’s claim involves an online contract of adhesion formed between an individual and a multi-billion dollar corporation. The evidence on the record is that Facebook reported almost \$4.28 billion in revenue in 2012 through advertising on its social media platform. It is in contractual relationships with 1.8 million British Columbian residents, approximately 40 percent of the province’s population. Ms. Douez is one of these individuals.

[55] Relatedly, individual consumers in this context are faced with little choice but to accept Facebook’s terms of use. Facebook asserts that Ms. Douez could have simply rejected Facebook’s terms. But as the academic commentary makes clear, in today’s digital marketplace, transactions between businesses and consumers are generally covered by non-negotiable standard form contracts presented to consumers on a “take-

it-or-leave-it” basis (Pavlović, at p. 392).

[56] In particular, unlike a standard retail transaction, there are few comparable alternatives to Facebook, a social networking platform with extensive reach. British Columbians who wish to participate in the many online communities that interact through Facebook must accept that company’s terms or choose not to participate in its ubiquitous social network. As the intervener the Canadian Civil Liberties Association emphasizes, “access to Facebook and social media platforms, including the online communities they make possible, has become increasingly important for the exercise of free speech, freedom of association and for full participation in democracy” (I.F., at para. 16). Having the choice to remain “offline” may not be a real choice in the Internet era.

[57] Given this context, it is clear that the difference in bargaining power between the parties is large. This distinguishes the situation from *Pompey*, where the Court emphasized that the respondent in that case could have chosen to negotiate the forum selection clause in the bill of lading (para. 29). Nothing suggests in this case that Ms. Douez could have similarly negotiated the terms of use.

[58] Secondly, Canadian courts have a greater interest in adjudicating cases impinging on constitutional and quasi-constitutional rights because these rights play an essential role in a free and democratic society and embody key Canadian values. There is an inherent public good in Canadian courts deciding these types of claims. Through adjudication, courts establish norms and interpret the rights enjoyed by all Canadians.

[59] At issue in this case is Ms. Douez’s statutory privacy right. Privacy legislation has been accorded quasi-constitutional status (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at paras. 24-25). This Court has emphasized the importance of privacy — and its role in protecting one’s physical and moral autonomy — on multiple occasions (see *Lavigne*, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66; *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 427). As the chambers judge noted, the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person’s privacy interests. In this context, it is especially important that such harms do not go without remedy. And since Ms. Douez’s matter requires an interpretation of a statutory privacy tort, only a local court’s interpretation of privacy rights under the *Privacy Act* will provide clarity and certainty about the scope of the rights to others in the province.

[60] Moreover, the British Columbia legislature's creation of a statutory cause of action evidences an intention to create local rights and protections for the privacy rights of British Columbia residents. As the chambers judge noted, local courts are better placed to adjudicate these sorts of claims:

. . . 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. [para. 75]

[61] Similarly, the legislature's creation of a statutory privacy tort that can be established without proof of damages reflects the legislature's intention to encourage access to justice for such claims. As well, British Columbia's *Class Proceedings Act* provides important procedural tools designed to improve access to justice (*Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162, at para. 1).

[62] Yet commentators recognize the practical reality that forum selection clauses often operate to defeat consumer claims (E. A. Purcell, Jr., "Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court" (1992), 40 *UCLA L. Rev.* 423, at pp. 446-49). Given the importance of constitutional and quasi-constitutional rights, it is even more important that reverence to freedom of contract and party autonomy does not mean that such rights routinely go without remedy.

[63] Overall, the public policy concerns weigh heavily in favour of strong cause.

(b) *Secondary Factors*

[64] In addition to the strong public policy reasons favouring strong cause, two other secondary factors also suggest that the forum selection clause should not be enforced. These factors are the interests of justice and the comparative convenience and expense of litigating in the alternate forum.

(i) Interests of Justice

[65] The interests of justice (*Pompey*, at para. 31), support adjudication of Ms. Douez's claim in British Columbia. This factor is concerned not only with whether enforcement of the forum selection clause would unfairly cause the loss of a procedural advantage, but also with which forum is best positioned to hear the case on its merits. Of course, unlike in the *forum non conveniens* analysis, the burden is on the party resisting enforcement of the clause to show good reason why the parties should not be held to their bargain.

[66] The lack of evidence concerning whether a California court would hear Ms. Douez's claim was a significant focus of the hearing before us. In front of the chambers judge, Facebook argued that the substantive law of California would defeat the application of the *Privacy Act*. Before this Court, Facebook emphasizes the lack of any expert evidence on whether this would in fact be the case if the claim proceeded in California. According to Facebook, the fact that Ms. Douez has not provided expert evidence establishing that a California court would not apply the British Columbia *Privacy Act* is decisive. Similarly, the British Columbia Court of Appeal placed significant weight on this lack of expert evidence.

[67] Yet, none of the leading authorities on the strong cause test, *Pompey* included, make proof that the claim would fail in the foreign jurisdiction a mandatory element of strong cause (see e.g. *The "Eleftheria"*, *Momentous* and *Pompey*). A plaintiff may choose to rely on expert evidence to establish that the selected forum would be unable or unwilling to litigate his or her claim. Similarly, the defendant may provide his or her own expert evidence to show that the selected forum would be willing and able to litigate the claim. However, while such evidence may be helpful, its absence is not determinative. Under the *Pompey* analysis, there is no separate requirement for the party trying to avoid the forum selection clause to prove that her claim would necessarily fail in the foreign jurisdiction.

[68] In addition, Ms. Douez's claim is premised on a British Columbia cause of action. Yet, her contract with Facebook includes a choice of law clause in favour of California:

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.

[69] We disagree with Facebook that the choice of law question is irrelevant. Although we do not decide which body of law will apply, and how the choice of law clause might interact with the *Privacy Act*, in

our view, the interests of justice are best served if this question is adjudicated in British Columbia.

[70] Generally, common law courts will give effect to choice of law clauses as long as they are *bona fide*, legal and not contrary to public policy (*Vita Food Products, Inc. v. Unus Shipping Co.*, [1939] A.C. 277 (P.C.), at p. 290). Furthermore, even if a choice of law clause is generally enforceable, local laws may still apply to a dispute if the local forum intends such laws to be mandatory and not avoidable through a choice of law clause (S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2nd ed. 2016), at p. 299).

[71] Usually, courts consider laws of the *local* forum when determining whether the legislature intended there to be mandatory rules that supersede the parties' choice of law (G. Saumier, "What's in a Name? Lloyd's, International Comity and Public Policy" (2002), 37 *Can. Bus. L.J.* 388, at pp. 395-97; J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. (loose-leaf)), at p. 31-2). Whether courts in common law legal systems may similarly consider the intention of *foreign* legislatures, as set out in statutes like the *Privacy Act*, is uncertain (*ibid.*). In *Avenue Properties Ltd. v. First City Dev. Corp. Ltd.* (1986), 7 B.C.L.R. (2d) 45 (C.A.), at pp. 57-58, McLachlin J.A. (as she then was) recognized the likelihood that a foreign court would be unable to consider the public policy evidenced in the local statute as a reason why the local court should refuse a *forum non conveniens* application.

[72] But even assuming that a California court could or would apply the *Privacy Act*, the interests of justice (*Pompey*, at para. 31) support having the action adjudicated by the British Columbia Supreme Court. This court, as compared to a California one, is better placed to assess the purpose and intent of the legislation and to decide whether public policy or legislative intent prevents parties from opting out of rights created by the *Privacy Act* through a choice of law clause in favour of a foreign jurisdiction.

(ii) Comparative Convenience and Expense of Litigating in the Alternate Forum

[73] Another consideration in the strong cause analysis is the comparative expense and convenience of litigating in the alternate forum (*Pompey*, at para. 31; *The "Eleftheria"*, at p. 242). Therefore, related to the concerns about fairness and access to justice discussed above, the expense and inconvenience of requiring British Columbian individuals to litigate in California, compared to the comparative expense and inconvenience to Facebook, further supports a finding of strong cause.

[74] Although Facebook argued its relevant books and records were located in California, the chambers judge found it would be more convenient to have Facebook's books and records made available for inspection in British Columbia than requiring the plaintiff to travel to California to advance her claim. There is no reason to disturb this finding.

[75] While these secondary factors might not have justified a finding of strong cause on their own, they nonetheless support our conclusion that Ms. Douez has established sufficiently strong reasons why the forum selection clause should not be enforced and the action should proceed in British Columbia.

## VI. Conclusion

[76] We would allow the appeal with costs to the appellant. Ms. Douez provided strong reasons to resist the enforcement of the clause: most importantly, the gross inequality of bargaining power between her and Facebook and the quasi-constitutional privacy rights engaged by her claim. The forum selection clause is unenforceable.

[77] As a result, the chambers judge's order dismissing Facebook's application to have the British Columbia Supreme Court decline jurisdiction is restored.

The following are the reasons delivered by

[78] ABELLA J. — Anyone who wants to use Facebook's service must register as a member and accept Facebook's terms of use. The issue in this appeal is the enforceability of the forum selection clause in Facebook's terms of use, whereby all disputes are required to be litigated in Santa Clara County in California.

[79] In *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450, this Court held that a party relying on a forum selection clause must first show that it is enforceable applying a contractual approach. If it is, the onus shifts to the other party to show that there is "strong cause" for the court to decline to apply the forum selection clause based on considerations grounded in *forum non conveniens* principles.

[80] In my view, Facebook’s forum selection clause is not enforceable under the first step of the *Pompey* test.

### Background

[81] When a Facebook user “liked” a post associated with a business, Facebook occasionally displayed the user’s name and portrait in an advertisement on the newsfeeds of the user’s friends. These advertisements were referred to as “Sponsored Stories”. One of those users whose name and portrait were used in a Sponsored Story was Deborah Louise Douez.

[82] Ms. Douez claims that she gave no consent to having her name or portrait used in Sponsored Stories. As a result, she brought proceedings in the Supreme Court of British Columbia alleging that Facebook violated her rights contrary to s. 3(2) of the British Columbia *Privacy Act*, R.S.B.C. 1996, c. 373:

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.

[83] Under s. 4, actions under the *Privacy Act* must be heard in the Supreme Court of British Columbia:

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

[84] Ms. Douez also brought a class action proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The proposed class consisted of approximately 1.8 million British Columbia residents whose names or portraits had been used by Facebook in a Sponsored Story.

[85] Facebook applied for a stay of the proceedings based on the forum selection clause in its terms of use, which states in part:



*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. [Emphasis added.]*

[86] In the Supreme Court of British Columbia, Griffin J. declined to enforce the forum selection clause and certified the class action. She found that s. 4 of the *Privacy Act* grants exclusive jurisdiction to the Supreme Court of British Columbia to hear claims under that *Act*, overriding any forum selection clause. As such, it was unnecessary for Ms. Douez to show “strong cause” why the forum selection clause should not be applied.

[87] The Court of Appeal for British Columbia allowed the appeal and granted Facebook’s request for a stay of proceedings based on the forum selection clause.

### Analysis

[88] *Pompey* involved a bill of lading between sophisticated commercial entities. This is the first time the Court has been asked to consider how *Pompey* applies to a forum selection clause in an online consumer contract of adhesion.

[89] In concluding that the forum selection clause in *Pompey* should be enforced, Bastarache J. set out the following test, based on the 1969 decision in *The “Eleftheria”*, [1969] 1 Lloyd’s Rep. 237 (Adm. Div.):

*Once the court is satisfied that a validly concluded bill of lading otherwise binds the parties, the court must grant the stay unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause. In exercising its discretion, the court should take into account all of the circumstances of the particular case. [Emphasis added; para. 39.]*

[90] He also framed it as follows:

*once it is determined that the bill of lading otherwise binds the parties (for instance that the bill*

. . . since it is determined that the bill of lading otherwise binds the parties (for instance, that the bill of lading as it relates to jurisdiction does not offend public policy, was not the product of fraud or of grossly uneven bargaining positions), [the “strong cause” test] constitutes an inquiry into questions such as the convenience of the parties, fairness between the parties and the interests of justice . . . . [Emphasis added; para. 31.]

[91] The Court found that the forum selection clause in the bill of lading was enforceable at the first step because the parties were experienced commercial entities who were aware of industry practices and were also, notably, in a position to negotiate the forum selection clause. As a result, there was no “grossly uneven bargaining power”:

Bills of lading are typically entered into by *sophisticated parties familiar with the negotiation of maritime shipping transactions* who should, in normal circumstances, be held to their bargain. . . . The parties in this appeal are corporations with significant experience in international maritime commerce. The respondents were aware of industry practices and could have reasonably expected that the bill of lading would contain a forum selection clause. A forum selection clause *could very well have been negotiated* with the appellant . . . . *There is no evidence that this bill of lading is the result of grossly uneven bargaining power that would invalidate the forum selection clause contained therein.* [Emphasis added; para. 29.]

[92] The Court went on to conclude that strong cause had not been shown and that a stay should therefore be granted.

[93] It is clear that the *Pompey* test engages two distinct inquiries. The first is into whether the clause is enforceable under contractual doctrines like public policy, duress, fraud, unconscionability or grossly uneven bargaining positions, tools for examining the enforceability of contracts. If the clause is enforceable, the onus shifts to the consumer to show “strong cause” why the clause should not be enforced because of factors typically considered under the *forum non conveniens* doctrine. Those factors were set out in *The “Eleftheria”* as including:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.

(b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.

(c) With what country either party is connected, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking

procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would

- (i) be deprived of security for that claim;
- (ii) be unable to enforce any judgment obtained;
- (iii) be faced with a time-bar not applicable in England; or
- (iv) for political, racial, religious or other reasons be unlikely to get a fair trial. [p. 242]

[94] Unlike my colleagues in dissent, I think, with respect, that a compelling argument can be made for modifying the strong cause test to include a wider range of factors than the *forum non conveniens* kind of considerations that have been traditionally applied, but I am also of the view that keeping the *Pompey* steps distinct means that before the onus shifts to the consumer, the focus starts where it should, namely on whether the contract or clause itself satisfies basic contractual principles. A contractual approach for determining the enforceability of forum selection clauses in consumer contracts of adhesion finds significant academic support (William J. Woodward, Jr., “Finding the Contract in Contracts for Law, Forum and Arbitration” (2006), 2 *Hastings Bus. L.J.* 1, at p. 46; M. P. Ellinghaus, “In Defense of Unconscionability” (1969), 78 *Yale L.J.* 757; Linda S. Mullenix, “Another Easy Case, Some More Bad Law: *Carnival Cruise Lines* and Contractual Personal Jurisdiction” (1992), 27 *Tex. Int’l L.J.* 323; Stephen Waddams, “Review Essay: The Problem of Standard Form Contracts: A Retreat to Formalism” (2012), 53 *Can. Bus. L.J.* 475; Peter Benson, “Radin on Consent and Fairness in Consumer Boilerplate: A Brief Comment” (2013), 54 *Can. Bus. L.J.* 282).

[95] Starting with a contractual analysis also permits the necessary contextual scope to explore enforceability depending on what the nature of the contract or clause is and what contractual rights are at stake. Only if the clause is found to be enforceable do we move to the second step, where the consumer must demonstrate that there is strong cause why, even though the forum selection clause is enforceable, it should nonetheless be disregarded.

[96] Our first task in this case, as a result, is to determine whether the clause is enforceable using contractual principles. In my respectful view, the clause is not enforceable under the principles set out in the first step of *Pompey*.

[97] In deciding whether a clause is unenforceable for reasons of public policy, the court decides “when the values favouring enforceability are outweighed by values that society holds to be more important” (Stephen Waddams, *The Law of Contracts* (6th ed. 2010), at para. 560). As Prof. McCamus notes, “[a]greements contrary to public policy at common law rest on a judicial determination that the type of agreement in question is sufficiently inconsistent with public policy that it should be treated as unenforceable” (John D. McCamus, *The Law of Contracts* (2nd ed. 2012), at p. 453).

[98] I accept that certainty and predictability generally favour the enforcement at common law of contractual terms, but it is important to put this forum selection clause in its contractual context. We are dealing here with an online *consumer* contract of adhesion. Unlike *Pompey*, there is virtually no opportunity on the part of the consumer to negotiate the terms of the clause. To become a member of Facebook, one must accept all the terms stipulated in the terms of use. No bargaining, no choice, no adjustments.

[99] Online contracts such as the one in this case put traditional contract principles to the test. What does “consent” mean when the agreement is said to be made by pressing a computer key? Can it realistically be said that the consumer turned his or her mind to all the terms and gave meaningful consent? In other words, it seems to me that some legal acknowledgment should be given to the automatic nature of the commitments made with this kind of contract, not for the purpose of invalidating the contract itself, but at the very least to intensify the scrutiny for clauses that have the effect of impairing a consumer’s access to possible remedies.

[100] As Prof. Waddams has pointed out:

. . . there may be scope for application of the concept of public policy in respect of unfair clauses that oust the jurisdiction of the court. It would be open to a court to say that, although arbitration and choice of forum clauses are acceptable if freely agreed by parties of equal bargaining power, *there is reason for the court to scrutinize the reality of the agreement with special care in the context of consumer transactions and standard forms*, since these are clauses that, on their face, offend against one of the traditional heads of public policy. [Emphasis added.]

(Waddams (2012), at p. 483; see also Judith Resnik, “Procedure as Contract” (2005), 80 *Notre Dame L. Rev.* 593; Woodward, at p. 46.)

[101] Much has been written about the burden of forum selection clauses on consumers and their ability

to access the court system. They were described by Prof. Edward Purcell as creating “an egregious disproportionality” (Edward A. Purcell, Jr., “Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court” (1992), 40 *UCLA L. Rev.* 423, at p. 514). They range from added costs, logistical impediments and delays, to deterrent psychological effects. Prof. Purcell refers to these constraints as “burdens of distance” or “burdens of geography”:

The deterrent effects of geography are numerous and weighty. The threshold task of merely retaining counsel in a distant location, which may seem routine to attorneys and judges, is profoundly daunting to ordinary people. The very decision to retain an attorney is so troublesome, in fact, that most claimants are content to accept a settlement without one. The result of that commonplace decision, as numerous studies have repeatedly shown, is that such claimants almost invariably obtain much less from their adversaries than they otherwise would. If claimants learn, perhaps from company representatives they contact, that they must retain an attorney in a distant contractual forum in order to initiate a legal action on their claims, that information alone may dissuade a significant number from proceeding and lead them to accept whatever offer, if any, the company might make.

...

Once litigation begins, the process quickly piles on additional burdens. One is the obvious need to travel and communicate over long distances, which makes the suit more costly as well as more inconvenient in terms of both litigation planning and client-attorney consultation. Another is the compounded costs and risks created by the attorney’s need to communicate with the client’s witnesses and to prepare them for depositions and trial testimony. The party may either have to pay additional travel costs for in-person meetings or risk the creation of potentially discoverable documents that could spur additional and costly motion practice and, if disclosed, weaken the party’s position in negotiations and at trial. A third burden is the likely additional delays involved in prosecuting the case, as distance and inconvenience combine to complicate various pretrial events and to remove from the attorney the spur of a human client who can or does present himself in person at his attorney’s office. A fourth burden is the added cost of participating in a distant trial, including the costs and risks involved in securing the attendance of witnesses at such a location. *All of these burdens will be especially heavy if the plaintiff’s claim arises from events in his home state and many or all of his witnesses reside there.*

...

A final burden is the risk that the cumulative effect of some or all of the preceding complications may combine to so hamper the party’s trial preparations that he will ultimately feel compelled to “cave” on the courthouse steps or end up putting on a materially weaker case than he otherwise would have. If settlement comes after full pretrial discovery and motion practice, costs will consume a larger proportion of any settlement payment. . . . The risks of geography increase the likelihood of such unfavorable outcomes, and that ultimate concern further compounds the pressures that push nonresident claimants toward earlier and less favorable settlements.

The burdens of geography are thus numerous and heavy. They are emotional as well as financial. Some are readily apparent, while others are subtle and surely unmeasurable. When placed on individuals who lack relevant interstate connections and experience or who lack extraordinary personal or financial resources, however, their *de facto* impact as a general matter is severe and certain. They impose sharp discounts on the value of the claims involved and discourage large numbers of plaintiffs from attempting to enforce their legal rights. [Emphasis added; pp. 446-49.]

(See also Catherine Walsh, “The Uses and Abuses of Party Autonomy in International Contracts” (2010), 60 *U.N.B.L.J.* 12, at p. 20.)

[102] As Prof. William Woodward has observed:

. . . unless the case is a large one or the “chosen” forum convenient, a choice-of-forum clause can eliminate a customer’s legal claim entirely. Only in theory can a customer make a cross-country trip to pursue a \$100 warranty claim. [p. 17]

[103] These concerns are what motivated the statutory protections found in art. 3149 of the *Civil Code of Québec*, which render forum selection clauses in consumer or employment contracts unenforceable:

**3149.** 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.

[104] In general, then, when online consumer contracts of adhesion contain terms that unduly impede the ability of consumers to vindicate their rights in domestic courts, particularly their quasi-constitutional or constitutional rights, in my view, public policy concerns outweigh those favouring enforceability of a forum selection clause.

[105] Public policy concerns relating to access to domestic courts are especially significant in this case given that we are dealing with a fundamental right like privacy. In *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 S.C.R. 733, this Court acknowledged the quasi-constitutional status of legislation relating to privacy protection:

The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy. As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as “quasi-constitutional” because of the fundamental role privacy plays in the preservation of a free and democratic society . . . [para. 19]

[106] The *Privacy Act* in British Columbia sought to protect individuals from invasions of privacy by introducing two new torts:

- Using the name or portrait of another person for the purpose of advertising property or services, or promoting their sale or other trading in them, without that person's consent; [s. 3(2)]
- Wilfully violating the privacy of another person. [s. 1(1)]

[107] Section 4 of the *Privacy Act* states that these torts “must be heard and determined by the Supreme Court” despite anything contained in another Act. Section 4 is a statutory recognition that privacy rights under the British Columbia *Privacy Act* are entitled to protection in British Columbia by judges of the British Columbia Supreme Court. I do not, with respect, accept Facebook's argument that s. 4 gives the Supreme Court of British Columbia exclusive jurisdiction only vis-à-vis other courts *within* the province of British Columbia. What s. 4 grants is exclusive jurisdiction to the Supreme Court of British Columbia to the exclusion not only of other courts in British Columbia, but to the exclusion of all other courts, within and outside British Columbia. That is what exclusive jurisdiction means.

[108] Where a legislature grants exclusive jurisdiction to the courts of its own province, it overrides forum selection clauses that may direct the parties to another forum (see *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, at para. 25). It would, in my respectful view, be contrary to public policy to enforce a forum selection clause in a consumer contract that has the effect of depriving a party of access to a statutorily mandated court. To decide otherwise means that a clear legislative intention can be overridden by a forum selection clause. This flies in the face of *Pompey's* acknowledgment that legislation takes precedence over a forum selection clause (*Pompey*, at para. 39).

[109] The approach used by Wittmann A.C.J.Q.B. in *Zi Corp. v. Steinberg* (2006), 396 A.R. 157, is apposite. The Alberta Court of Queen's Bench declined to enforce a forum selection clause mandating proceedings in Florida, because s. 180(1)<sup>[1]</sup> of the Alberta *Securities Act*, R.S.A. 2000, c. S-4, granted jurisdiction to the Court of Queen's Bench for applications under that provision. Wittmann A.C.J.Q.B. concluded that the effect of giving jurisdiction to the Court of Queen's Bench meant that it had exclusive jurisdiction *both within and outside Alberta*. In reaching his conclusion, Wittmann A.C.J.Q.B. relied on years of jurisprudence interpreting similar provisions as granting exclusive jurisdiction to the courts of a particular

province to hear claims for oppression remedies (see also *Gould v. Western Coal Corp.* (2012), 7 B.L.R. (5th) 19 (Ont. S.C.J.), at paras. 319-39; *Ironrod Investments Inc. v. Enquest Energy Services Corp.*, 2011 ONSC 308; *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2001), 20 B.L.R. (3d) 289 (Ont. S.C.J.), at paras. 112-17, aff'd (2003), 63 O.R. (3d) 431 (C.A.); *Takefman v. Golden Hope Mines Ltd.*, 2015 QCCS 4947; *Nord Resources Corp. v. Nord Pacific Ltd.* (2003), 37 B.L.R. (3d) 115 (N.B.Q.B)).

[110] Any uncertainty about the legislature's intention that privacy rights under the British Columbia *Privacy Act* be heard by the Supreme Court in British Columbia is dispelled by the introductory words in s. 4: "Despite anything contained in another Act . . .". That reflects a clear statutory intention that exclusive jurisdiction over the enforcement of the *Privacy Act* be retained by the Supreme Court despite what any other legislation states. It would defy logic to think that the legislature sought to protect the British Columbia Supreme Court's exclusivity from the reach of other statutes, but not from the reach of forum selection clauses in private contracts.

[111] Tied to these public policy concerns is the "grossly uneven bargaining power" of the parties. Facebook is a multi-national corporation which operates in dozens of countries. Ms. Douez, a videographer, is a private citizen. She had no input into the terms of the contract and, in reality, no meaningful choice as to whether to accept them given Facebook's undisputed indispensability to online conversations. As Prof. Cheryl Preston noted: ". . . if one's family, friends, and business associates are on Facebook . . . using a competitor's service is not a reasonable choice" (Cheryl B. Preston, "'Please Note: You Have Waived Everything': Can Notice Redeem Online Contracts?" (2015), 64 *Am. U. L. Rev.* 535, at p. 554).

[112] The doctrine of unconscionability, a close jurisprudential cousin to both public policy and gross bargaining disparity, also applies to render the forum selection clause unenforceable in this case.

[113] This Court confirmed in *Tercon* that unconscionability can be used to invalidate a single clause within an otherwise enforceable contract (*Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69, at para. 122).

[114] As Prof. McCamus notes, the doctrine of unconscionability is a useful tool for addressing the enforceability of some clauses in consumer contracts of adhesion:



. . . the doctrine of the unconscionable term may provide a common law device, long awaited by some, that can ameliorate the harsh impact of unfair terms in boilerplate or “adhesion” contracts, offered particularly in the context of consumer transactions on a take-it-or-leave-it basis. [Footnote omitted; p. 444.]

(See also Jean Braucher, “Unconscionability in the Age of Sophisticated Mass-Market Framing Strategies and the Modern Administrative State” (2007), 45 *Can. Bus. L.J.* 382.)

[115] Two elements are required for the doctrine of unconscionability to apply: inequality of bargaining powers and unfairness. Prof. McCamus describes them as follows:

. . . one must establish both inequality of bargaining power in the sense that one party is incapable of adequately protecting his or her interests *and* undue advantage or benefit secured as a result of that inequality by the stronger party. [Emphasis added; pp. 426-27.]

[116] In my view, both elements are met here. The inequality of bargaining power between Facebook and Ms. Douez in an online contract of adhesion gave Facebook the unilateral ability to require that any legal grievances Ms. Douez had, could not be vindicated in British Columbia where the contract was made, but only in California where Facebook has its head office. This gave Facebook an unfair and overwhelming procedural — and potentially substantive — benefit. This, to me, is a classic case of unconscionability.

[117] For all these reasons, the forum selection clause is unenforceable under the first step of the *Pompey* test.

[118] I would allow the appeal with costs throughout and dismiss Facebook’s application for a stay of proceedings.

The reasons of McLachlin C.J. and Moldaver and Côté JJ. were delivered by

[119] THE CHIEF JUSTICE AND CÔTÉ J. (dissenting) — The respondent, Facebook, Inc., is a successful global corporation based in California. It operates a social media website (www.facebook.com) used by millions of users throughout the world. Facebook’s website allows users to establish their own “facebook”, through which they communicate with “friends”, with whom they share news, information, opinions, photos and videos.

[120] To become a Facebook user, a person must enter into a contract with Facebook. The appellant, Deborah Louise Douez wanted to become a Facebook user. When Ms. Douez chose to sign up as a user of Facebook, she agreed to Facebook's terms of use, which included a forum selection clause. A version of the clause provides:

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. [A.R., vol. II, at p. 138]

[121] Ms. Douez wants to start a class action against Facebook. She says that Facebook used her name and face in an advertising product called "Sponsored Stories", without her consent, contrary to s. 3(2) of the *Privacy Act*, R.S.B.C. 1996, c. 373, which creates a statutory tort of invasion of privacy. Facebook, for its part, says it obtained Ms. Douez's consent through the "terms of use" to which she consented in her contract with Facebook.

[122] The question on this appeal concerns the place where the lawsuit should be heard. Facebook argues that the dispute must be tried before a state or federal court in Santa Clara County, California, as Ms. Douez agreed to in her contract with Facebook. Ms. Douez, on the other hand, argues that the lawsuit should be tried in British Columbia. She does not dispute that she agreed by contract to have all disputes with Facebook tried in California. However, she argues that the clause should not be enforced against her.

[123] The issue assumes great importance in a world where millions of people routinely enter into online contracts with corporations, large and small, located in other countries. Often these contracts contain a forum selection clause, specifying that any disputes must be resolved by the corporation's choice of court. In this way, global corporations, be they American, Canadian or from some other country, seek to ensure that they are not dragged into litigation in foreign countries.

[124] The principles of private international law support the enforcement of forum selection clauses, while recognizing that in exceptional cases courts may decline to enforce them. Forum selection clauses provide

while recognizing that in exceptional cases courts may decline to enforce them. Forum selection clauses provide certainty and predictability in cross-border transactions. When parties agree to a jurisdiction for the resolution of disputes, courts will give effect to that agreement, unless the claimant establishes “strong cause” for not doing so.

[125] We see no need to depart from the settled principles of private international law on forum selection clauses — principles repeatedly confirmed by courts around the world, including the Supreme Court of Canada. The simple question in this case, as we see it, is whether Ms. Douez has shown “strong cause” for not enforcing the forum selection clause to which she agreed. We agree with the Court of Appeal of British Columbia that strong cause has not been shown, and that the action must be tried in California, as the contract requires. A stay of the underlying claim should be entered.

#### I. Forum Selection Clauses and *Forum Non Conveniens*

[126] The test for the enforcement of forum selection clauses in contracts was settled by this Court 14 years ago in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450. The inquiry proceeds in two steps. First, the court must determine whether the forum selection clause is enforceable and applies to the circumstances: *Pompey*, at para. 39; *Preymann v. Ayus Technology Corp.*, 2012 BCCA 30, 32 B.C.L.R. (5th) 391, at para. 43. Second, the court must assess whether there is strong cause in favour of denying a stay, despite the enforceable forum selection clause: *Pompey*, at paras. 19 and 39.

[127] Ms. Douez argues that the courts should not apply the settled *Pompey* test to her case. Instead, she argues, they should consider the forum selection clause within the context of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (“*CJPTA*”). We disagree.

[128] Section 11 of the *CJPTA* outlines the circumstances in which a court may decline jurisdiction where there is a more appropriate forum. It deals with the situation where two different courts have jurisdiction, and provides instructions to settle which of the two courts should take jurisdiction. It provides:

- 11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
- (b) the law to be applied to issues in the proceeding,
- (c) the desirability of avoiding multiplicity of legal proceedings,
- (d) the desirability of avoiding conflicting decisions in different courts,
- (e) the enforcement of an eventual judgment, and
- (f) the fair and efficient working of the Canadian legal system as a whole.

As this Court noted in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321, at para. 22, “[s.] 11 of the *CJPTA* . . . constitutes a complete codification of the common law test for *forum non conveniens*. It admits of no exceptions.”

[129] This code for deciding which of two available jurisdictions should, as a matter of convenience, take jurisdiction, does not apply to oust forum selection clauses. Where the parties have agreed in advance to a choice of forum, there is no need to inquire into which of two forums is the more convenient; the parties have settled the matter by their contract, unless the contractual clause is invalid or inapplicable (the first step of the *Pompey* test) or should not be applied because the plaintiff has shown strong cause not to do so (the second step of the *Pompey* test). In such cases, the duty of the court is to enforce the contractual agreement, unless the plaintiff shows strong cause otherwise.

[130] What Ms. Douez suggests, in effect, is that the two-part *Pompey* test be changed for a unified test that would apply forum selection clauses as an element of the *forum non conveniens* test. This Court rejected this very contention in *Pompey*. Justice Bastarache stated that he was “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” (para. 21). He shared the concerns expressed by author, Edwin Peel that such an approach would not give full weight to forum selection clauses because other factors weigh in the balance — factors that the parties must be deemed already to have considered when they agreed to a forum selection clause: E. Peel, “Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws”, [1998] *L.M.C.L.Q.* 182.

[131] We therefore agree with the British Columbia and Saskatchewan Courts of Appeal that *Pompey* continues to apply when the courts consider forum selection clauses: see *Viroforce Systems Inc. v. R & D Capital Inc.*, 2011 BCCA 260, 336 D.L.R. (4th) 570, at para. 14; *Preymann*, at para. 39; *Frey v. BCE Inc.*, 2011 SKCA 136, 377 Sask. R. 156, at paras. 112-14; *Hudye Farms Inc. v. Canadian Wheat Board*, 2011 SKCA 137, 377 Sask. R. 146, at para. 10. While the *CJPTA* is a complete codification of the common law related to *forum non conveniens*, it does not supplant the common law principles underlying the enforcement of forum selection clauses. Where the parties have agreed to a forum selection clause, the court must apply that clause unless the test in *Pompey* is satisfied. If the test is satisfied and the forum selection clause is inapplicable, the result is a situation where there are two competing possibilities for forum. At this point, the *CJPTA* which codifies the common law provisions for *forum non conveniens* applies.

[132] *Pompey* is considered first. Since we conclude that the test in *Pompey* is not satisfied, s. 11 of the *CJPTA* does not assist Ms. Doeuz.

## II. Step One: Is the Forum Selection Clause Enforceable?

[133] Having rejected Ms. Doeuz's contention that the *Pompey* test should be rolled into the codified provisions for *forum non conveniens*, the next step is to apply the two-part *Pompey* framework.

[134] The first step in the *Pompey* test asks whether the forum selection clause is enforceable and applies in the circumstances. Facebook bears the burden of establishing this. In our opinion, Facebook has discharged this burden. On its face, the answer is affirmative. The language of the clause is clear and appears to cover all disputes, including this one.

[135] Ms. Doeuz suggests three reasons why the forum selection clause is invalid or inapplicable to her situation. None of them withstand scrutiny. First, she argues that the forum selection clause was not brought to her attention. Second, she argues that the terms of use are unclear. Third, she argues that s. 4 of the *Privacy Act* renders the forum selection clause unenforceable. Abella J. adds a fourth; that the forum selection clause offends public policy. In our view, these arguments are not persuasive.

[136] The first argument is that the forum selection clause is unenforceable because Ms. Douez was simply invited to give her consent to the clause by clicking on it, without her attention being drawn to its specific language. In other words, she is not bound because electronic clicking without more does not indicate her agreement to the forum selection clause.

[137] We cannot accede to this submission. In British Columbia, s. 15(1) of the *Electronic Transactions Act*, S.B.C. 2001, c. 10, codifies the common law rule set out in *Rudder v. Microsoft Corp.* (1999), 2 C.P.R. (4th) 474 (Ont. S.C.J.), and establishes that an enforceable contract may be formed by clicking an appropriately designated online icon:

**15** (1) Unless the parties agree otherwise, an offer or the acceptance of an offer, or any other matter that is material to the formation or operation of a contract, may be expressed

. . .

(b) by an activity in electronic form, including touching or clicking on an appropriately designated icon or place on a computer screen or otherwise communicating electronically in a manner that is intended to express the offer, acceptance or other matter.

[138] Ms. Douez relies on *Berkson v. Gogo LLC*, 97 F. Supp.3d 359 (E.D.N.Y. 2015), at para. 22, where a U.S. district court, in the absence of legislation on electronic formation of contract, adopted a four-step procedure to determine whether a contract was formed by accepting terms of use online. In British Columbia, s. 15(1) of the *Electronic Transactions Act* answers the question, providing that clicking on a screen suffices to indicate acceptance.

[139] Ms. Douez's second contention is that the terms of use contradict the forum selection clause, rendering it unclear. She points to the provision that Facebook will "strive to respect local laws", and suggests that this requires Facebook to defer to s. 4 of the British Columbia *Privacy Act*, which grants the Supreme Court of British Columbia subject matter jurisdiction over *Privacy Act* claims, to the exclusion of other tribunals. The tension between the strict terms of the forum selection clause in the contract, and the provision that Facebook will "strive to respect local laws", introduces an ambiguity, rendering the forum selection clause unenforceable, Ms. Douez contends.

[140] This argument cannot succeed. The contract on its face is clear. There is no inconsistency between a commitment to “strive” to apply local laws and an agreement that disputes will be tried in California. A forum selection clause does not disrespect the laws of British Columbia.

[141] This brings us to Ms. Douez’s third argument — that s. 4 of the *Privacy Act* invalidates forum selection clauses for actions under this Act. Section 4 provides that “an action under [the *Privacy Act*] must be heard and determined by the Supreme Court [of British Columbia]”. Ms. Douez argues that this clause amounts to a stipulation that all actions under this Act must be heard in British Columbia, with the result that forum selection clauses providing other jurisdictions are invalid.

[142] We do not agree. Section 4 of the *Privacy Act* grants the Supreme Court of British Columbia subject matter jurisdiction over *Privacy Act* claims to the exclusion of other British Columbia courts. Nothing in the language of s. 4 suggests that it can render an otherwise valid contractual term unenforceable.

[143] We do not dispute that legislation can limit the scope of forum selection clauses or render them altogether unenforceable: see *Pompey*, at para. 38. Nor do we dispute that some jurisdictions have adopted a “protective model” limiting the impact of forum selection clauses in consumer contracts: Z. S. Tang, *Electronic Consumer Contracts in the Conflict of Laws* (2nd ed. 2015), at p. 357. However, when they have done so, they have used clear language. For example, *Regulation (E.U.) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, [2012] O.J. L. 351/1, provides consumers with a positive right to bring proceedings in his or her home state (art. 18), unless the clause was agreed to after a dispute had arisen, provides additional forum options to the consumer, or concerns parties resident in the same state (art. 19). The *Civil Code of Québec* is more absolute: art. 3149 provides that Québec courts have jurisdiction to hear actions based on consumer contracts, and that “the waiver of such jurisdiction by the consumer or worker may not be set up against him”.

[144] The British Columbia legislature has not adopted the “protective model” approach. It has not legislated an absolute or limited right to bring an action in British Columbia, in the face of a forum selection clause stipulating a different jurisdiction. It has focussed not on where the action can be brought, but on the protection of consumer rights in the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (“*BPCPA*”). The choice to focus on rights rather than forum was made after this Court’s decision in *Pompey*.

Section 3 of the *BPCPA* provides that “[a]ny waiver or release by a person of the person’s rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.” If the legislature had intended to render forum selection clauses inoperable for claims made under the *Privacy Act*, it would have said so expressly: see *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 25. Courts are obliged to respect this choice.

[145] Ms. Douez does not argue that the forum selection clause is unconscionable. Such an argument would have to be based on evidence (see *Pompey*, at para. 29); none was adduced in this case. Inequality of bargaining power, even if it were established here, does not, on its own, give the court reason to interfere with the freedom to contract. As noted by Angela Swan and Jakub Adamski in *Canadian Contract Law* (3rd ed. 2012), at §9.114:

The mere fact that, as might happen in very many transactions, the parties are not equally competent in looking after their own interests or equally informed is not a basis for relief. There has to be, as has been suggested, some relation of dependence or likelihood of undue influence, *i.e.*, some element of procedural unconscionability, inequality or unfairness, *and* a bad bargain, *i.e.*, some element of substantive unfairness. [Emphasis in original.]

[146] Finally, we come to the argument that forum selection clauses violate public policy and should therefore be treated as invalid and inapplicable. This contention, too, cannot prevail.

[147] It is unclear to us how a court can invalidate a contractual provision simply because the court finds it is contrary to public policy in the abstract. While the court can refuse to enforce otherwise valid contractual provisions that offend public policy, the party seeking to avoid enforcement of the clause must prove “the existence of an overriding public policy . . . that outweighs the very strong public interest in the enforcement of contracts”: *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 123 (per Binnie J., in dissent, but not on this point). In our view, no such overriding public policy is found on the facts of this case.

[148] Forum selection clauses, far from being unconscionable or contrary to public policy, are supported by strong policy considerations. Forum selection clauses are well-established and routinely enforced around the world: see e.g. *Donohue v. Armco Inc.*, [2001] UKHL 64, [2002] 1 All E.R. 749, at para. 24; *Atlantic Marine*



*Construction Co. v. U.S. Dist. Court for Western Dist. of Texas*, 134 S.Ct. 568 (2013), at pp. 581-82, citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), at pp. 17-18; *Akai Pty Ltd. v. People's Insurance Co.* (1996), 188 C.L.R. 418, at pp. 441-42 (H.C.A.); *Advanced Cardiovascular Systems Inc. v. Universal Specialties Ltd.*, [1997] 1 N.Z.L.R. 186 (C.A.). Forum selection clauses serve an important role of increasing certainty and predictability in transactions that take place across borders. The fact that a contract is in standard form does not affect the validity of such a clause: *Pompey*, at para. 28; *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), at pp. 593-94.

[149] That is not to say that forum selection clauses will always be given effect by the courts. As Abella J. notes, “burdens of distance” and “burdens of geography” may render the application of a forum selection clause unfair in the circumstances. However, those considerations are relevant at the second step of *Pompey*, not the first. As we discuss below, a court in assessing strong cause can consider the relative convenience and expense of local and foreign courts, as well as any prejudice a plaintiff might suffer in being forced to bring their claim in a foreign court: see *The “Eleftheria”*, [1969] 1 Lloyd’s Rep. 237 (Adm. Div.), at p. 242. But these considerations play no role at the first step of the *Pompey* test.

[150] We conclude that the forum selection clause is valid and applicable and that the first step of the *Pompey* test has been met. It remains to determine whether Ms. Douez has shown strong cause why it should not be given effect.

### III. Step Two: Has Ms. Douez Shown Strong Cause?

[151] We have concluded that step one of the *Pompey* test has been met: Facebook has established that the forum selection clause is enforceable and applies to these circumstances. It remains to ascertain whether Ms. Douez has established strong cause why the clause should not be enforced in this case.

[152] The strong cause exception to the enforceability of forum selection clauses confers a discretion on the judge, to be exercised in accordance with settled factors, to decline to enforce the clause. The strong cause test means that forum selection clauses are enforced, upholding predictability and certainty, unless the plaintiff shows that enforcement of the clause would unfairly deny her an opportunity to seek justice.

[153] The party seeking to displace the forum selection clause bears the burden of establishing strong cause. There are good reasons for this. First, enforceability of forum selection clauses is the rule, setting them aside the exception. Generally, parties seeking an exceptional exemption must show grounds for what they seek. Second, it is the party seeking the exception who is in the best position to argue why it should be granted, not for the party seeking to rely on the rule to show why the rule should not be vacated; generally, burdens fall on the party asserting a proposition and in the best position to prove it. Reversing the burden would require a defendant to prove a negative — that “strong cause” does not exist. This would ask a defendant to anticipate and counter all the arguments a plaintiff might raise in support of there being strong cause. Finally, to reverse the burden would undermine the general rule that forum selection clauses apply and introduce uncertainty and expense into commercial transactions that span international borders. It would detract from the “certainty and security in transaction” that is critical to private international law (*Pompey*, at paras. 20 and 25). For many businesses, having to prove in a foreign country why there is not strong cause would render the contract costly and in many cases, practically unenforceable. Businesses, small suppliers as well as giants like Facebook, would be required to amass proof of a negative in a host of foreign countries. Accordingly, the law in Canada and elsewhere has consistently held that it is the plaintiff — the party seeking to set aside the forum selection clause — who bears the burden of showing strong cause for not giving effect to the enforceable forum selection clause by entering a stay of proceedings: *Pompey*, at para. 25; *The “Eleftheria”*, at p. 242.

[154] In *Pompey*, Bastarache J. explained the reasons for embracing the strong cause test and the burden on the plaintiff to prove strong cause (para. 20):

These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law . . . . In the context of international commerce, order and fairness have been achieved at least in part by application of the “strong cause” test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise. In any event, the “strong cause” test provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.

[155] This brings us to what the plaintiff must show to establish strong cause why a forum selection clause should not be enforced. The factors that govern the judge’s exercise of his discretion were set out in *The*

“*Eleftheria*”, at p. 242, and were adopted in *Pompey*, at para. 19, per Bastarache J.:

- (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
- (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
- (3) The burden of proving such strong cause is on the plaintiffs.
- (4) In exercising its discretion the Court should take into account all the circumstances of the particular case.
- (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded:
  - (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.
  - (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects.
  - (c) With what country either party is connected, and how closely.
  - (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.
  - (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would
    - (i) be deprived of security for that claim;
    - (ii) be unable to enforce any judgment obtained;
    - (iii) be faced with a time-bar not applicable in England; or
    - (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

[156] Applying these factors to the case at bar, it is clear that the motions judge should not have found strong cause for not enforcing the forum selection clause to which Ms. Douez agreed. The court must consider all the circumstances of the case. None of the circumstances relied on by Ms. Douez show strong cause why the forum selection clause should not be enforced.

[157] The analysis starts with the proposition that the discretion should be exercised by enforcing the forum selection clause unless the plaintiff shows strong cause for not doing so. Strong cause means what it says — it is not any cause, but strong cause. The default position is that forum selection clauses should be enforced.

[158] There is good reason for this. By offering services across borders, online companies risk uncertainty and unpredictability of the possible jurisdictions in which they may face legal claims. Professor Geist (M. A. Geist, “Is There a There There? Toward Greater Certainty for Internet Jurisdiction” (2001), 16 *Berkeley Tech. L.J.* 1345) describes this risk:

Since websites are instantly accessible worldwide, the prospect that a website owner might be haled into a courtroom in a far-off jurisdiction is much more than a mere academic exercise; it is a very real possibility. [p. 1347]

[159] Other commentators point out that since online companies do not know in advance where their customers are located, it is difficult for them to proactively determine jurisdiction issues in advance: Z. Tang, “Exclusive Choice of Forum Clauses and Consumer Contracts in E-commerce” (2005), 1 *J. Priv. Int. L.* 237. In our view, these risks are best addressed through adherence to the existing system of private international law that has been carefully developed over decades to provide a measure of certainty, order, and predictability. Requiring the plaintiff to demonstrate strong cause is essential for upholding certainty, order, and predictability in private international law, especially in light of the proliferation of online services provided across borders. Holding otherwise would ask the court to ignore valid and enforceable, contractual terms.

[160] It is not only large multi-national corporations like Facebook that benefit from emphasizing the need for order in private international law. The intervener, Information Technology Association of Canada, points out that small and medium-sized businesses benefit from the certainty that flows from enforcing forum selection clauses, and that by reducing litigation risk they can generate savings that can be passed on to consumers. Facebook adds that the certainty which comes with enforcement of forum selection clauses allows foreign companies to offer online access to Canadians. In our view, these benefits accrue to online businesses of all sizes, and in all locations.

[161] We cannot help but note our profound disagreement with the suggestion in the reasons of

Karakatsanis, Wagner and Gascon JJ., that forum selection clauses are inherently contrary to public policy. They state: “. . . forum selection clauses divert public adjudication of matters out of the provinces, and court adjudication in each province is a public good” (para. 25). The overwhelming weight of international jurisprudence shows that, far from being a subterfuge to deny access to justice, forum selection clauses are vital to international order, fairness and comity.

[162] We turn now to the specific factors that *Pompey* directs the court to consider in determining whether the plaintiff has established strong cause for not enforcing the forum selection clause.

[163] First, Ms. Douez has not shown that the facts in the case and the evidence to be adduced shifts the balance of convenience from the contracted state of California to British Columbia. The evidence in the case may be expected to revolve around Facebook’s use of Ms. Douez’s photo and name in its advertisement without her consent. This involves Facebook’s conduct from its headquarters in California. Facebook’s defence is that Ms. Douez consented, not by her actions in British Columbia, but by agreeing to the terms of use. The issue is a legal matter of construing the contract. There is no basis for suggesting this factor shows strong cause to oust the forum selection clause.

[164] Our colleague Abella J. makes reference to the “burdens of distance” and the “burdens of geography” that a plaintiff may carry when faced with a forum selection clause. Similarly, Ms. Douez argued that setting aside the forum selection clause would increase consumers’ access to justice. During oral argument, her counsel called it “a very important principle” (transcript, at p. 33), and in her factum she said that “no rational British Columbia resident would travel to California to litigate nominal damages claims” (A.F., at para. 90). Yet, there is no evidence regarding the “relative convenience and expense of trial” in California as compared to British Columbia. Strong cause cannot be established in absence of a sufficient evidentiary basis.

[165] Nor does the applicable law show strong cause to override the forum selection clause, in our view. It is true that the law giving rise to the tort is a British Columbia statute. However, the British Columbia tort created by the *Privacy Act* does not require special expertise. The courts of California have not been shown to be disadvantaged in interpreting the Act as compared with the Supreme Court of British Columbia. The most the motions judge could say on this factor was that

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.

(Trial reasons, 2014 BCSC 953, 313 C.R.R. (2d) 254, at para. 75)

If possible sensitivity to local context is sufficient to show strong cause, forum selection clauses will never be upheld where a tort occurs in a different country. What this factor contemplates is evidence that the local court will be better placed to interpret the legal provisions at issue than the court stipulated in the forum selection clause. Ms. Douez presented no such evidence.

[166] Ms. Douez did not adduce any evidence of California law or California procedure related to either private international law or the adjudication of privacy claims. She did not provide evidence of California law related to territorial jurisdiction. Bauman C.J.B.C. described the vacuum thus (para. 77):

In my opinion, Ms. Douez failed to provide the Court with any reason to conclude that this proceeding could not be heard in the courts of Santa Clara. There is no evidence in the record as to California private international law. This Court cannot conduct its own research and take judicial notice (see *Duchess di Sora v. Phillipps* (1863), 10 H.L. Cas. 624 (U.K.H.L.) at 640; *Bumper Development Corp. v. Commissioner of Police of the Metropolis*, [1991] 1 W.L.R. 1362 (Eng. C.A.), at 1369).

A court should not be put in the position of having to speculate as to whether a California court would exercise its discretion to assume jurisdiction over a matter, whether that court would apply the laws of British Columbia, whether privacy laws in California are analogous to those in British Columbia, whether the procedural rules in California parallel those in British Columbia, or whether the remedies available in California would be capable of providing Ms. Douez with comparable remedies to what she might obtain in British Columbia. Without evidence, there is respectfully no basis for our colleagues Karakatsanis, Wagner and Gascon JJ. to raise the spectre of harms going “without remedy” (paras. 59 and 62).

[167] The country with which the parties are connected does not establish strong cause. Facebook has its headquarters in California. Ms. Douez, while resident in British Columbia, was content to contract with Facebook at that location. Nothing in her situation suggests that the class action she wishes to commence could

not be conducted in California just as easily as in British Columbia. To show strong cause to oust a foreign selection clause on the basis of residence, the plaintiff must point to more than the mere fact that she lives in the jurisdiction where she seeks to have the action tried. If this sufficed, forum selection clauses would be routinely held inoperative.

[168] The next factor to consider is whether the defendant is merely seeking procedural advantages. If Ms. Douez could show that Facebook does not genuinely desire the trial to take place in California, but wants the trial there simply to gain procedural advantages over her, this might support her case that strong cause lies to oust the forum selection clause. However, she has not shown this. There is no suggestion that Facebook does not genuinely wish all litigation with users to take place in California. Indeed, it is clear it does so, for reasons of substance and convenience. The purpose of the forum selection clause is to avoid costly and uncertain litigation in foreign countries, which in turn would increase its costs and divert its energy.

[169] Finally, Ms. Douez has not shown that application of the forum selection clause would deprive her of a fair trial because she would be deprived of security for the claim; be unable to enforce any judgment obtained; be faced with a time-bar not applicable in British Columbia; or because of political, racial, religious or other reasons. She does not and cannot take issue with the fact that the state of California has a highly developed and fair legal system, nor with the fact that she will get a fair trial there.

[170] It is thus apparent that all the factors endorsed by this Court in *Pompey* point to enforcing the forum selection clause to which Ms. Douez agreed. None of them establish strong cause.

[171] For this reason, Ms. Douez asks this Court to modify the strong cause test endorsed by this Court in *Pompey*. She urges two modifications. First, she suggests that “the strong cause test should be applied in a nuanced manner, accounting for parties’ inherent inequality or consumers’ lack of bargaining power” (A.F., at para. 71). Alternatively, she says that the test “should be modified to place the burden on the defendant in the context of consumer contracts of adhesion” (A.F., at para. 72). We cannot accept either of these proposals. They would amount to inappropriately overturning this Court’s decision in *Pompey* and substituting new and different principles, and would introduce unnecessary and unprincipled uncertainty into the strong cause test.

[172] Ms. Douez’s first submission is that instead of considering the factors set out in *The “Eleftheria”*

and *Pompey* in determining whether strong cause not to enforce the forum selection clause has been established, the court should consider a different factor — the consumer’s lack of bargaining power. Our colleagues Karakatsanis, Wagner and Gascon JJ. accept this argument. With respect, we disagree.

[173] This argument conflates the first step of the test set out in *Pompey* with the second step, in a way that profoundly alters the law endorsed by this Court in *Pompey*. Consideration of “all the circumstances of the particular case” at the second step is not an invitation to blend the first step into the second. As discussed above, the party seeking to rely on the forum selection clause must first demonstrate that it is enforceable. It is at this step that inequality of bargaining power is relevant. Inequality of bargaining power may lead to a clause being declared unconscionable — something not argued in the case at bar. Short of unconscionability, the stronger party relying on a standard form contract faces the *contra proferentem* rule under which any ambiguity is resolved against them: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 51. As we have said, concerns about inequality of bargaining power may inspire legislators to intervene by making forum selection clauses unenforceable — but the British Columbia legislature has chosen not to do so. There is no reason here to second guess this choice by conflating or modifying the *Pompey* analysis. In this case, Facebook has demonstrated that the forum selection clause is enforceable. We note parenthetically that the strength of the contention of unequal bargaining power seems tenuous, when one realizes that Ms. Douez received the Facebook services she wanted, for free and without any compulsion, practical or otherwise. Even if remaining “‘offline’ may not be a real choice in the Internet era”, as suggested by our colleagues Karakatsanis, Wagner and Gascon JJ. (at para. 56), there is no evidence that foregoing Facebook equates with being “offline”. In any case, enforcement of the forum selection clause does not deprive Ms. Douez, or anyone else, of access to Facebook.

[174] Ms. Douez’s alternative suggestion of reversing the burden of proof is inconsistent with the principles underlying the strong cause test: certainty, security, and fairness (*Pompey*, at para. 20). These principles remain as relevant in the 21st century domain of global online social media as they were in the 20th century climate of international commercial shipping. The principles of order and fairness underpin private international law and “ensure security of transactions with justice”: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1097. The twin goals of justice and fairness in private international law are only achievable by enforcing rules that ensure security and predictability: *Club Resorts Ltd. v. Van Breda*, 2012 SCC



17, [2012] 1 S.C.R. 512, at paras. 15 and 16, see also *Johnson v. Jensen*, [1997] 3 S.C.R. 1022, at p. 1038. As already discussed, there are good reasons why this Court, like the courts in the United Kingdom and elsewhere, places the burden of showing strong cause for not enforcing a forum selection clause on the plaintiff seeking to avoid the clause.

[175] Ms. Douez's submissions that we "nuance" *Pompey* or shift the burden of showing strong cause contrary to *Pompey*, are not supported by principle or policy. They would undermine certainty in private international law. And they amount to overruling this Court's decision in *Pompey*. This Court has established stringent criteria for departing from a previous decision of recent vintage: see e.g. *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 129-39; *R. v. Bernard*, [1988] 2 S.C.R. 833, at pp. 850-61; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at paras. 45-46. Those conditions are not met here.

[176] We conclude that Ms. Douez has failed to establish strong cause why the forum selection clause she agreed to should not be enforced.

#### IV. Disposition

[177] The forum selection clause is valid and enforceable, and Ms. Douez has not shown strong cause to not enforce it. We would dismiss her appeal.

*Appeal allowed with costs, McLACHLIN C.J. and MOLDAVER and CÔTÉ JJ. dissenting.*

*Solicitors for the appellant: Branch MacMaster, Vancouver; Michael Sobkin, Ottawa.*

*Solicitors for the respondent: Osler, Hoskin & Harcourt, Toronto.*

*Solicitors for the intervener the Canadian Civil Liberties Association: Lerner, Toronto.*

*Solicitor for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), Ottawa.*

*Solicitors for the intervener the Information Technology Association of Canada: Lax O'Sullivan  
Lisus Gottlieb, Toronto.*

*Solicitors for the intervener the Interactive Advertising Bureau of Canada: Bennett Jones, Toronto.*

---

[1] Section 180(1) of the *Securities Act*, R.S.A. 2000, c. S-4, stated:

**180(1)** On the application of an interested person, the Court of Queen's Bench, where it is satisfied that a person or company has not complied with this Part or the regulations made in respect of this Part, may make an interim or final order

- (a) compensating any interested person who is a party to the application for damages suffered as a result of a contravention of this Part or the regulations made in respect of this Part;
- (b) rescinding a transaction with any interested person, including the issue of a security or a purchase and sale of a security;
- (c) requiring any person or company to dispose of any securities acquired pursuant to or in connection with a bid;
- (d) prohibiting any person or company from exercising any or all of the voting rights attaching to any securities;
- (e) requiring the trial of an issue;
- (f) respecting any matter not referred to in clauses (a) to (e) that the Court considers proper.



