

Douez v. Facebook

*Do you accept the terms and conditions?
Do you, really?*



Do you know what you're agreeing to?

facebook

Please accept our updated Terms to continue using Facebook

We've updated our Terms to better explain our service and what we ask of everyone using Facebook.

We've made it easier for you to control your data, privacy and security settings in one place, which you can do at any time in Settings. We've also updated our Data Policy and Cookie Policy to reflect the new features that we've been working on, and to explain more about how we create a personalised experience for you.

Updates include:

- new features such as Marketplace, camera effects and accessibility tools
- more details about how our systems process things that you share, such as text, photos and videos
- how we share information, systems and technology across the Facebook Company Products, including WhatsApp, Instagram and Oculus
- adding Instagram, a service provided by Facebook Ireland, to

By clicking I Accept, you accept the updated Terms. If you don't want to accept the Terms, see your options.

I Accept

“I acknowledge that I have read and agree to the above terms and conditions.”



Meet Deborah Douez



British Columbia resident

Member of Facebook since 2007

Claimed that Facebook infringed her privacy rights and those of over 1.8 million British Columbians

Relied on the British Columbia's *Privacy Act, R.S.B.C. 1996*

What did Facebook do?

In 2011, Facebook created a new advertising product called **'Sponsored Stories'**.

It used the name and picture of Facebook members without their knowledge to advertise companies and products on Facebook and externally.

Companies paid Facebook to have sponsored stories appear frequently.

What did Facebook do?

All Recently viewed **Sponsored stories**



Steve Schlafman likes Naked Apartments.



Naked Apartments
Like



Mike Feinstein, Robert Scoble and Brad Turner like LogMeIn.



LogMeIn
Like



Jeffrey Lange, Rich Liu and Nikolay Kolev like Newegg.com.



Newegg.com
Like



Pano Anthos, Henry W. Lu and Chris DeWolfe like Unity.



Unity
Like

For instance if a user clicked on a contest to win a trip sponsored by a company, Facebook took that as permission to make the user a spokesperson for that brand.

If a user liked a page or a comment, RSVP'd to an event, voted on a page's question, checked in to a place, used an app, played a game or shared a website before Facebook changed its policy in 2014, the policy said it could create a sponsored story with their name or photo.

<https://vancouver.sun.com/news/local-news/b-c-supreme-court-approves-51m-settlement-for-facebook-users#:~:text=A%20B.C.%20Supreme%20Court%20judge%20has%20approved%20a,permission%20in%20the%20web%20giant%E2%80%99s%20%E2%80%9C-sponsored%20stories%E2%80%9D%20ads>

The details of Douez' position

Douez brought an action against Facebook under s.3 (2) of the *Privacy Act*.

(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.

Douez also sought certification for a class action under the *Class Proceedings Act* (1996) to include all BC residents who also experienced this alleged breach of privacy (estimated class size: 1.8 million people).

Unsurprisingly, Facebook didn't take to that too kindly...

How unkindly, you may ask?

American corporation | Headquartered in California | Generates most of its revenue from advertising

The terms of use that members must agree to upon registration include the following:

- a) A forum selection clause
- b) A choice of law clause

These terms require that disputes be resolved *in* California **according to** California law.

So, Facebook sought to stay Douez' action on two grounds:

- 1) The forum selection clause
- 2) Based on the *forum non conveniens* test (s. 11 of the BC *Court Jurisdiction and Proceedings Transfer Act*, "CJPTA")*

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]

*this argument was not made before the SCC - at this stage, Facebook exclusively argued that the forum selection clause should be enforced and, consequently, that Douez' action should be stayed.

So many moving parts!

Let's clarify a couple things...

Number One: The *forum non conveniens* test from the *CJPTA* is not applicable

- The *CJPTA* is a provincial legislation for BC courts to determine territorial competence and how to transfer a proceeding in a situation that is ***forum non conveniens*** (“a better/more convenient forum exists elsewhere”)
- **Territorial competence** (s. 1): “aspects of a court’s jurisdiction that depend on a connection between
 - (a) the territory or legal system of the state in which the court is established, and
 - (b) a party to a proceeding in the court or the facts on which the proceeding is based
- Section 11 of the Act sets out the test for determining territorial competence

Discretion as to the exercise of territorial competence

- 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.

So many moving parts!

Let's clarify a couple things...

Number One: The *forum non conveniens* test from the *CJPTA* is not applicable

The analysis for forum selection clauses is distinct.

A choice of jurisdiction clause is but one factor to consider in the analysis of a forum selection clause (Doez para 18).

This view has been upheld in other Canadian provinces: other Canadian provinces have their own version of the *CJPTA*, and courts in these provinces have held that the analysis of forum selection clauses remains distinct (Doez para 21).

So, in the absence of legislation to the contrary, the test for forum selection clauses applies (Doez para 22).

So many moving parts!

Let's clarify a couple things...

Number Two: If there is no legislation that already overrides forum selection clauses, there is a two-step test at common law for determining whether they should be enforced in a given situation (*Z.I. Pompey Industrie v. ECU-Line N.V.* (2003) - “Pompey”)

STEP 1

The party seeking the stay in proceedings must show that the forum selection clause is “**valid, clear and enforceable**” based on general principles of contract law.

The plaintiff may resist the enforceability of the clause by proving unconscionability, undue influence, fraud, etc.

Shift of the
burden of proof!



STEP 2

The plaintiff must establish **strong cause** for the court not to enforce the forum selection clause.

“Strong cause” test from *The Eleftheria* (1969): a court must consider “all the circumstances”, including

- Convenience of the parties
- Fairness between the parties
- Interests of justice
- Public policy

Note: this list is not exhaustive - the court must really consider “all the circumstances” on a case-by-case basis to determine whether there is strong cause in that situation (*Douez* para 30).

So many moving parts!

Let's clarify a couple things...

Number Three: In this case, the SCC expands on the “strong cause” test to adjust it to a consumer context



Commercial context: “sophisticated parties” deemed to have informed themselves about the risks of foreign legal systems and to have accepted those risks

- In commercial contracts, strong cause factors have been interpreted restrictively
- Forum selection clauses provide international commercial relations with stability, order, fairness and foreseeability



Consumer context: in this case, the SCC highlights the potential inequality of bargaining power of the parties and the rights that a consumer relinquishes in a consumer contract, especially if there was no opportunity (as in a contract of adhesion)

- Forum selection clauses in consumer contexts **reduces** certainty and security for “millions of ordinary people who would not foresee or expect the (clause’s) implications and cannot be deemed to have undertaken sophisticated analysis of foreign legal systems...” (Douez para 33)
- “The strong cause test must account for the different considerations relevant to this context”, especially as online consumer contracts are “ubiquitous” today due to the Internet’s global and pervasive reach (Douez para 35-36)

In a consumer context, courts should consider all the circumstances of the case, including **public policy** considerations relating to **gross inequality of bargaining power** and the **nature of the rights at stake** (Douez para 38). Courts may consider gross inequality in the strong cause test even if it does not render the contract unconscionable at the first step (Douez para 39).

Putting it in practice

“STEP 0”

Is there legislation that clearly overrides forum selection clauses?

➔ **Nope.**

Douez argued that s.4 of the *Privacy Act* does, but the SCC found that it lacks the clear & specific language that legislatures usually use when they intend to override forum selection clauses.

STEP 1

Did Facebook show that the forum selection clause is “**valid, clear and enforceable**”?

➔ **Yes!**

Douez’ defence: in its terms of use, Facebook also states that it “strive(s) to respect local laws”, which she argued made the forum selection clause **unclear**.

The SCC’s findings:

- This *general* statement does not override the *specific* language used in the forum selection clause
- Per Facebook’s arguments, section 15(1) of the *Electronic Transactions Act* 2001 permits offer and acceptance to occur in an electronic form through ‘clicking’ online

NOTE: the majority does not consider inequality of bargaining power (among other things) at this step, unlike *Abella J.* in her concurring opinion

Putting it in practice

STEP 2 Did Douez establish **strong cause** not to enforce the forum selection clause in this consumer context? ➔ **Yes!**

PUBLIC POLICY CONSIDERATIONS

Forum selection clauses are not inherently contrary to public policy, but there are two general categories of limitations placed on contractual freedom based on public policy:

1. Limitations intended to protect a weaker party
2. Limitations intended to protect the social, economic or political policies of the enacting state in the collective interest

In this case, both categories are implicated

- Protecting a weaker party: unequal bargaining power in a consumer contract of adhesion
- Protecting the collective interest: local courts' interest in adjudicating claims involving constitutional or quasi-constitutional rights

SECONDARY FACTORS

1. **Interests of justice** (i.e., whether enforcement would unfairly cause the loss of a procedural advantage + determining which forum is best positioned to hear the case)
 - a. Proof that the claim would necessarily fail in a foreign jurisdiction is not mandatory
 - b. Choice of law clause may be overridden if legislation exists that makes its application mandatory
 - c. Even if a California court applied the BC *Privacy Act*, the action should be adjudicated by the BC Supreme Court as it is better placed to assess the purpose and intent of the legislation
2. **Comparative convenience and expense of litigating in the alternate forum** (i.e., the expense and inconvenience of requiring BC residents to litigate in California, compared to the expense and inconvenience to Facebook to litigate in BC)

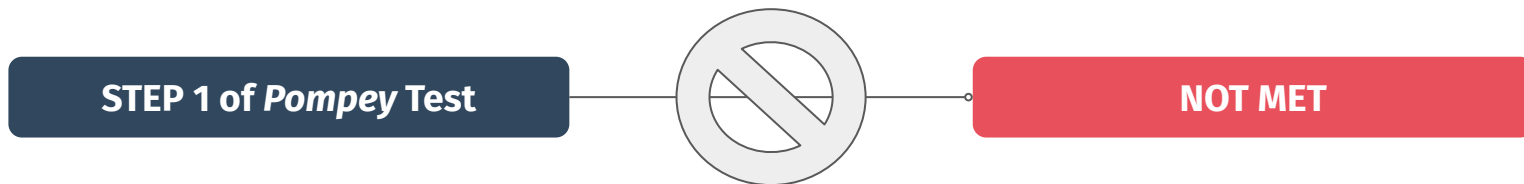
So, what's the majority's take?

The clause is **UNENFORCEABLE**.

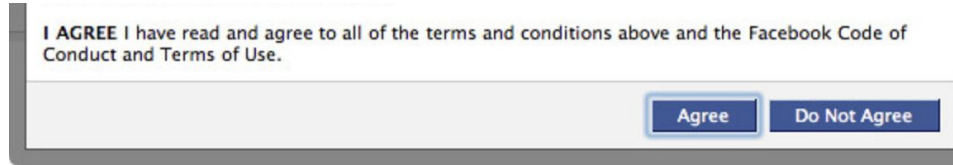
Concurring Opinion

The concurring opinion is that the forum selection clause is not “**valid, clear and enforceable**” based on general principles of contract law.

When considering the *Pompey Test*, Justice Abella concludes that the Facebook forum selection clause **is not enforceable** under the first step of the Pompey test, based on contractual principles. These contractual principles include **public policy**, **gross bargaining disparity**, and **unconscionability**.



The Role of Public Policy



I AGREE I have read and agree to all of the terms and conditions above and the Facebook Code of Conduct and Terms of Use.

Agree Do Not Agree

- In consumer contracts of adhesion, like Facebook's, **users have no opportunity to negotiate terms**. You simply sign up.
- “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?” (*Douez, para 99*)
- Justice Abella writes that these clauses should be given legal acknowledgement, not necessarily to invalidate the contract, but to “**intensify the scrutiny**” of clauses that heavily restrict a consumer's access to remedies.

Emotional and Financial Cost

Forum selection clauses **place significant burdens on consumers**, limiting their ability to access legal remedies. Prof. Edward Purcell describes these burdens as creating an “egregious disproportionality” for consumers, often referred to as "**burdens of distance**" or "**burdens of geography**." These include:

1. Costs and Logistical Challenges: Consumers face **daunting** costs to retain legal counsel in a distant forum. The need to travel, hire local attorneys, and manage long-distance communication **adds substantial financial strain**.
2. Deterrent Psychological Effects: The mere knowledge of needing to litigate in a distant forum can discourage consumers from pursuing their claims, often leading them to settle for much less than they are entitled to.
3. Compounded Litigation Costs: Travel for depositions, witness preparation, and trial attendance adds further costs, while creating discoverable documents introduces risks that may **weaken the consumer's legal position**.
4. Delays in Legal Process: Distance complicates pretrial events, prolonging the litigation process and increasing legal fees.
5. Weakened Legal Position: The **cumulative effect of these burdens** can result in plaintiffs presenting weaker cases or **feeling pressured to settle unfavorably**, particularly when the costs of pretrial motions and discovery are high.
6. Impact on Small Claims: For small claims, like a \$100 warranty dispute, the geographical burden effectively nullifies the consumer's ability to pursue their case, as the cost of litigation far outweighs the potential recovery, as Prof. William Woodward highlights.

These burdens, both emotional and financial, disproportionately affect consumers without significant resources, discouraging them from enforcing their legal rights (*Douez* para 100-102)

Examples from other Provinces

Québec:

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.**

art. 3149 of the *Civil Code of Québec* renders forum selection clauses in consumer or employment contracts unenforceable.

Alberta:

Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, [2013] SCR, the Supreme Court acknowledged legislation related to privacy protection to have “**quasi-constitutional status**”.

This is because privacy plays a “fundamental role” in the preservation of a free and democratic society.

BC Privacy Act vs. Forum Selection Clauses

The **British Columbia Privacy Act** introduces two torts to protect individuals from privacy invasions:

1. Using someone's name or portrait for advertising without consent (s. 3(2)).
2. Willfully violating someone's privacy (s. 1(1)).

Section 4 of the Act grants **exclusive jurisdiction** to the Supreme Court of British Columbia to handle such cases. Abella puts forth that this exclusivity applies excludes all other courts, both within and outside British Columbia.

Legislative decisions, like granting exclusive jurisdiction, override forum selection clauses in contracts, especially consumer contracts, that might direct parties to other jurisdictions.

Enforcing such clauses would contradict public policy and undermine legislative intent. To justify this point, Justice Abella draws on *Zi Corp. v. Steinberg* (2006), **The Alberta Court of Queen's Bench declined to enforce a forum selection clause mandating proceedings in Florida**, because s. 180(1)1 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.

Bargaining Power

Related to public policy was the “grossly uneven bargaining power” of the parties, which the Majority also considered in their opinion. **Facebook is a multi-national corporation and Ms. Douez, a videographer, is a private citizen.**

Unconscionability

Justice Abella considered this forum selection clause to be a “**classic**” case of **unconscionability**.

In *Tercon*, **the Supreme Court of Canada confirmed that unconscionability can invalidate a single clause in an otherwise enforceable contract.** As cited by Abella, McCamus notes that the doctrine of the unconscionable term can mitigate the harsh effects of unfair terms in consumer adhesion contracts.

Two elements are required for the doctrine of unconscionability to apply: inequality of bargaining powers and unfairness.

Both elements are met, according to Abella. The inequality of bargaining power between Facebook and Ms. Douez in the online contract of adhesion allowed Facebook to require that any legal grievances be addressed only in California, not in British Columbia where the contract was formed.

This gave Facebook an unfair procedural and potentially substantive advantage.



So, what's the concurring opinion?

The clause is **UNENFORCEABLE**.

The first prong of the *Pompey* test is not met because of contractual principles.

Dissent

The dissent argues that the forum selection clause is enforceable. **Like in the majority, no legislation overrides the forum selection clauses.**

“STEP 0”

Is there legislation that clearly overrides forum selection clauses?

→ **Nope.**

The CJPTA does not apply to override forum selection clauses.

Section 11 of the *CJPTA* outlines the circumstances in which a court may decline jurisdiction where a more appropriate forum exists.

In asking for s. 11 of the *CJPTA* to apply, Ms. Douez suggests 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. The dissent rejects this and insists that the two steps of the test be kept distinct.

In short, the *Pompey* test continues to apply for forum selection clauses. It must be considered first. Since the *Pompey* test is not satisfied, the s. 11 of the *CJPTA* cannot help Ms. Douez.

Rebuttal Against Ms. Douez's Arguments

STEP 1

Did Facebook show that the forum selection clause is “valid, clear and enforceable”? ➔ **Yes!**

Argument #1:

Ms. Douez argues that the forum selection clause is unenforceable because her consent was given by simply clicking, without specific attention drawn to the clause.

Response:

British Columbia's Electronic Transactions Act (s. 15(1)) codifies that clicking an appropriately designated icon is sufficient to form a binding contract, as established in *Rudder v. Microsoft Corp.*

Argument #2:

Douez claims the forum selection clause is unclear due to Facebook's promise to "strive to respect local laws." She argues this should defer to s. 4 of the BC Privacy Act, granting jurisdiction to the Supreme Court of British Columbia.

Response:

This argument fails. The contract is clear; there is no conflict between respecting local laws and agreeing to resolve disputes in California.

Rebuttal Against Ms. Douez's Arguments

Argument #3:

Douez argues s. 4 of the BC *Privacy Act* invalidates forum selection clauses, as it requires that actions under the Act be heard exclusively in the BC Supreme Court. She claims that this renders the forum selection clause (requiring disputes to be heard in California) invalid.

Dissent's Response:

- Disagrees - Section 4 grants subject matter jurisdiction to the BC Supreme Court, but only to the exclusion of other BC courts, not courts in other jurisdictions.
- While other jurisdictions, like the EU or Québec, use clear language to limit or invalidate forum selection clauses in consumer contracts, BC has not adopted such a "**protective model.**"
- The BC legislature focuses on consumer rights, not where disputes are heard. Had the legislature intended to render forum selection clauses unenforceable, they would have done so explicitly.
- No evidence of procedural or substantive unconscionability was presented to invalidate the clause. Merely unequal bargaining power does not invalidate the freedom to contract without proof of unfairness.

Rebuttal Against Justice Abella's Argument

Argument #4 (from concurring opinion):

Forum selection clauses violate public policy and should therefore be treated as invalid and inapplicable.

Response:

- **Courts cannot invalidate a contract provision solely because it conflicts with abstract public policy.**
- The party opposing enforcement must show an overriding public policy that outweighs the strong interest in contract enforcement – not present in this case.
- Forum selection clauses are **widely accepted and enforced globally**, promoting certainty in cross-border transactions.
- Standard form contracts do not affect the validity of such clauses.
- Fairness factors (e.g., geography) apply later in the analysis, during the second step of the *Pompey* test regarding "strong cause".
- In this case, the forum selection clause is valid, and the next step is determining whether strong cause exists to prevent enforcement.

In this case, the forum selection clause is valid, and the next step is determining whether strong cause exists to prevent enforcement.

STEP 2

Did Douez establish **strong cause** not to enforce the forum selection clause in this consumer context?

➔ **No!**

General Rule: Forum selection clauses are generally enforced to ensure predictability and certainty in legal agreements.

Burden of Proof: The plaintiff (Ms. Douez) bears the responsibility of showing "strong cause" why the clause should not be enforced. Emphasis on strong cause, not just any cause.

Reasoning:

- Enforcing forum selection clauses is the norm, with exceptions being rare.
- The plaintiff is best positioned to argue why an exception should be made.
- Shifting the burden to the defendant (Facebook) would undermine the clause's purpose and increase litigation costs.

Factors for Strong Cause

Factors to Consider: Derived from the case of *The "Eleftheria"* and adopted in *Pompey*:

- **Location of Evidence:** Where the evidence is situated and the convenience of trial location.
- **Applicable Law:** Whether the law of the foreign court applies and how it differs from local law.
- **Connection to the Country:** How closely each party is connected to the jurisdiction.
- **Procedural Advantages:** Whether the defendant is seeking procedural advantages in the foreign court.
- **Fairness of the Trial:** Whether the plaintiff would face any prejudice in the foreign court, such as being deprived of security or fair trial due to political, racial, or other reasons.

Application of Strong Cause Factors

- **Evidence and Convenience:** The evidence primarily relates to Facebook's actions in California, not British Columbia. No strong cause was shown to shift the trial's location.
- **Applicable Law:** The case involves British Columbia's Privacy Act, but no special expertise is required to interpret it, and California courts can fairly apply the law.
- **Connections:** Facebook is headquartered in California, and Ms. Douez willingly contracted with them. This connection supports enforcing the clause.
- **Procedural Advantages:** No evidence suggests Facebook is seeking an unfair procedural advantage by having the case heard in California.
- **Fair Trial:** Ms. Douez did not show that she would be deprived of a fair trial in California.

Rejection of Proposed Modifications to the Test

Douez's argument for nuanced Application:

Argued for a nuanced application of the strong cause test, considering consumer's lack of bargaining power. She also sought to modify the *Pompey* test to shifting the burden of proof to the defendant in consumer contracts.

Court's Response:

These proposals were rejected as they would undermine the certainty and predictability of the law established in *Pompey*. The dissent emphasized that existing principles of private international law should not be altered, even in the context of global online services. Maintaining the *Pompey* test benefits small online business as well as multinationals like Facebook.

So, what's the dissent's take?

The forum selection clause is **ENFORCEABLE**.
Ms. Douez failed to show strong cause.

Takeaways

1. **The “illusion of choice” in the Internet age**
2. **Palpable commitment to protect the weaker party in consumer contexts is refreshing**

Does Facebook have a responsibility to reduce or edit its terms of use to make it more digestible for consumers?

Or do we, as consumers, have a responsibility to understand and accept the terms established by the platforms with which we ‘choose’ to engage?

Douez's class action won!

Local News

B.C. Supreme Court approves \$51M settlement for Facebook users

Payments for estimated 4.3 million class members expected to average \$35. Online opt-in forms are expected in two to three months, say Vancouver lawyers

Susan Lazaruk

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The approximate users are eligible to receive a maximum of \$200 each, according to one of the lawyers, but most will get much less.

“It depends on the number of people who sign up” for payment, said Christopher Rhone of the firm Branch McMaster after the court approval. Take-up usually isn't great for class-action lawsuits, he said.

Announcement of settlement:
November 2023

Class: anyone in B.C., Saskatchewan, Manitoba or Newfoundland & Labrador who registered with Facebook or had a profile photo posted between Jan. 1, 2011 and May 30, 2014 (4.3 million class members)

Legislations: Privacy Acts of the four provinces

Settlement amount: \$51 million

Extra: Judicial History

Supreme Court of British Columbia
(2014)

The clause is **enforceable**.

Found that:

- S.4 of the Privacy Act does not override forum selection clauses explicitly and pertains to subject-matter competence, not territorial competence
- The analysis for forum selection clauses is distinct from the *forum non conveniens* test under s.11 of the CJPTA
- Douez failed to show a strong cause

Supreme Court of Canada
(2017)

The clause is **unenforceable**.

The clause is valid, clear and enforceable but ...

- S.4 of the *Privacy Act* overrides forum selection clauses
- There are strong public policy reasons not to enforce the clause (it would exclude Facebook from liability + the *Privacy Act* provides strong public policy reasons)
- S.11 of the *CJPTA* lends credence to the belief that California courts would not be more appropriate than BC courts to hear the action

Court of Appeal of British Columbia
(2015)

See previous slides

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