S.C.C. FILE NO. 36616

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

B E T W E E N :

DEBORAH LOUISE DOUEZ

Appellant
(Respondent)

- and -

FACEBOOK, INC.

Respondent
(Appellant)

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC, INFORMATION TECHNOLOGY ASSOCIATION OF CANADA AND INTERACTIVE ADVERTISING BUREAU OF CANADA

Interveners

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PART I - OVERVIEW

A. OVERVIEW

1. The necessary protection of constitutional and *quasi*-constitutional rights and interests, including privacy interests, demand that the common law be revisited from time to time to ensure that the protections have not been rendered illusory. In this regard, technological changes pose particular challenges. On one hand, technological change, including the advent and use of social media, promotes and facilitates full participation in Canadian society; on the other, these changes pose unique threats to individuals' privacy interests. The common law must evolve in response to these modern realities and must do so in a manner that balances the interests of various parties while recognizing the importance of privacy as fundamental to a free and democratic society.

2. Contractual principles which could potentially limit or detract from protections to privacy must therefore be re-evaluated. A test for enforceability of a clause in a commercial bill of lading should not be applied in the same manner to contracts of adhesion that engage constitutional or *quasi*-constitutional rights. In a commercial bill of lading, the predominant public policy interest may be to hold persons to their "bargain" but that is not – nor should it be – the primary concern when privacy interests are engaged. Rather, courts should look to the overriding public policy in favour of protection of those interests.

3. The relevant public policy considerations are not reflected in the application of the "strong cause" test in *Pompey* to contracts of adhesion that engage constitutional or *quasi*-constitutional interests. The test requires modification to reflect the nature of the contract and its impact on the interests of the parties. Absent modification, the test has been interpreted in a manner that places too high an evidentiary burden on the plaintiff who, when litigating these rights, is advancing a larger public purpose. While "strong cause" must still be demonstrated, proof that the impugned provision of the contract of adhesion engages or limits constitutional or *quasi*-constitutional rights should be considered to make out that *prima facie* case. The party who still wants to rely on the clause must demonstrate that the interests will be protected if the clause is given effect. With this modification, there can be assurance that the application of contractual principles that originate in a purely commercial setting do not – implicitly or explicitly – undermine or abrogate constitutional or *quasi*-constitutional rights and interests.

B. THE FACTS

4. The CCLA accepts the facts as summarized by the appellant, with particular regard to the following points.

5. This proposed class proceeding was brought pursuant to s. 3(2) of the British Columbia *Privacy Act*[1] (the "*Act*"). This section creates a tort, actionable without proof of damage, where an individual's name or portrait is used for the purpose of advertising or for promoting the sale of property or services without the individual's consent. The appellant seeks to represent a class of British Columbians whose statutory privacy rights were allegedly violated by the respondent, Facebook, Inc. ("Facebook") by its use of the names and portraits of BC residents for advertising purposes. The court below found, however, that the action must be stayed by virtue of a forum selection clause in Facebook's contract of adhesion.[2]

6. Facebook is a social media platform, used by members for networking and discussion among individuals identified by members as "friends", and for receipt of information from service providers. To become a member of Facebook, an individual must execute Facebook's Statement of Rights and Responsibilities ("Statement of Rights") (previously, "Terms of Use").[3] The terms are non-negotiable; a prospective member must accept the terms and conditions as presented without negotiation or be denied the ability to participate on the platform.

7. Pursuant to a forum selection clause in the Terms of Use executed by the Appellant in June 2007, exclusive jurisdiction for all disputes is said to reside in Santa Clara County in California, and any dispute is to be adjudicated in accordance with the laws of California without regard for conflicts of laws.[4] There was no evidence presented that, if the plaintiff had to litigate in California, California law would define or protect privacy interests in the same or similar manner as in the *Act*, including providing for an action without proof of damages.

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1 *Privacy Act*, RSBC 1996, c 373.

2 *Douez v Facebook, Inc*, 2015 BCCA 279 at para 85.

3 Now known as the "Statement of Rights and Responsibilities", Facebook's terms were known as the "Terms of Use" when the Appellant registered for Facebook in June 2007 (see the Respondent's Factum dated August 26, 2016, para. 18(b) and Affidavit #2 of Sandeep N. Solanki made March 26, 2013, paras 3 to 4, Appellant's Record, Tab 16, p 146).

4 Currently, Facebook's Statement of Rights and Responsibilities dictates disputes will be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County.

8. The application judge found that s. 4 of the *Act* granted exclusive jurisdiction to the BC Superior Court for claims brought pursuant to the statute, thereby overriding any contractual forum selection clause. She further found that the public policy considerations – including the clear legislative intention that domestic courts ensure the adequate protection of privacy interests (as exemplified by s. 4) - constituted "strong cause" to not enforce the clause in any event.[5] In overturning her decision, the court below did not give effect to the public policy considerations or the public interest in privacy at stake on this appeal.

PART II - CCLA'S POSITION ON THE ISSUES

9. The CCLA posits that the "strong cause" test as set out in *ZI Pompey Industrie v ECU-Line NV*[6] for the denial of the enforcement of forum selection clauses in negotiated commercial bills of lading must be modified in cases where a forum selection clause in a contract of adhesion engages constitutional or *quasi*-constitutional rights. For such contracts of adhesion, a *prima facie* "strong cause" will be established if the party seeking relief from the forum selection clause demonstrates that the clause engages or limits constitutional or *quasi*-constitutional rights and interests. The party that still wishes to rely on the clause should then bear the burden of proving that the rights or interests will be protected if the clause is given effect. This modified "strong cause" test best advances the public interest considerations that arise in the context of contracts of adhesion that implicate constitutional and *quasi*-constitutional rights and interests, and ensures that individuals' rights and freedoms, including those guaranteed by the *Charter*, are not abrogated or rendered illusory via private contracts of adhesion.

PART III - ARGUMENT

A. The Public Policy Considerations Underlying *Pompey* Are Not Applicable

10. In *Pompey*, this Court considered whether the appropriate test for the enforcement of a forum selection clause in a negotiated commercial bill of lading was the "strong clause" test, or the tripartite test for interlocutory injunctions developed in *RJR-MacDonald Inc v Canada (AG)*[7]. The Court's confirmation of the "strong cause" test was grounded in the public policy of holding contracting parties to their bargain, an essential element to ensuring certainty and security in

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5 *Douez v Facebook, Inc*, 2014 BCSC 953 at paras 75, 96-105.
6 *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27 (available on CanLII) [*Pompey*].
7 *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311 at 347-349 (available on CanLII).

private international law.[8] Thus, unless a party could show "strong cause" why they should not be held to their bargains, the forum selection clause would apply.

11. Importantly, this Court recognized in *Pompey* that the public policy interest driving the "strong cause" test reflected a history of commercial transactions that included forum selection clauses; this type of transaction involved sophisticated parties who would be aware of that history, and who would enter into these contracts with freedom, ability and expectation of being able to negotiate the terms, including the terms for dispute resolution and forum.[9] None of these factors are reflected in the circumstance of an online contract of adhesion for participation in a social media platform like Facebook.

12. Rather, online contracts of adhesion such as Facebook's Statement of Rights bear no resemblance to the commercial bills of lading discussed in *Pompey*. There is no long history behind these contracts. Rather, social media and indeed all online digital platforms are relatively recent, yet incredibly powerful tools. The contracts are not between sophisticated parties. There can be no expectation that users of social media, who need only be an individual in Canada over the age of 13, understand the import of a forum selection clause, particularly as they relate to statutory torts designed to protect *quasi*-constitutional rights. This suggests that meaningful consent to these provisions is itself questionable. Finally, the contractual freedom to agree on the terms of the contract, including which courts will adjudicate a dispute under the contract, should one arise, does not exist. The desire to hold a party to its bargain diminishes – if not disappears – as a public policy concern given all of these factual circumstances.

13. While courts have recognized that factors "pertaining to justice and reasonableness"[10] may be relevant in determining enforceability under the "strong cause" test and, further, that the factors from *Pompey* are not a closed list, there has been little guidance as to the relevant importance of those factors and the public policy concerns that arise in circumstances outside the context of a commercial bill of lading. Rather, the vast majority of cases apply the commercially influenced standard factors - location of the parties; evidence and witnesses; whether the law of the foreign court differs in any material respects; whether one party seeks a procedural

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8 *Pompey*, *supra* note 6 at para 20.

9 *Pompey*, *ibid* at paras 20, 29.

10 See, for example, *BTR Global Opportunity Trading Ltd v RBC Dexia Investor Services Trust*, 2011 ONCA 518 at para 8.

advantage; and whether the plaintiffs would be prejudiced by having to bring their claim in a foreign court; and the costs of litigation[11] - and do not articulate or consider other public policy issues or interests that may be at stake. The current case presents a significant opportunity for this Court to provide much needed guidance in this area by way of a modified "strong cause" test that is constructed with an awareness of the context in which online contracts of adhesion are established and respectful of the public interest in protecting privacy and other constitutional and *quasi*-constitutional interests.

B. The Context and Effect of the Terms of Use on Privacy Interests

i. Context matters — The Evolution of Social Media

14. Social media and the Internet have vastly changed the means by which people participate in society and in the democratic process. Social media sites, such as Facebook, are not merely for the exchange of online photos and trivial discussion among close relatives or friends. Rather, social media's impact extends to individual matters, such as employment, and global issues including politics. It reflects the manner in which people receive and exchange information about health, civic life, communities and parenting. As noted by one author:

> Social media has emerged in recent years as an essential tool for hundreds of millions of Internet users worldwide. From status updates to photos to voice communication, many rely on social media such as Facebook, Twitter, LinkedIn, and Google Plus, as a key source for online social interaction, newsgathering, creative sharing, and advocacy. Indeed, for a growing number of Internet users, social media and the Internet are virtually synonymous, since most of their "online time" is spent interacting in a social media environment.[12]

15. A telling example of the power of social media for the participation in democracy arose in the context of the Arab Spring, in which organizers of the protest in the Middle East reportedly used Facebook to communicate and provide information as to places and times of protests. The importance of social media in that democratic exercise of rights was so profound

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11 *Pompey*, *supra* note 6 at para 19.

12 Michael Geist, "The Policy Battle over Information and Digital Policy Regulation: A Canadian Perspective" (2016) 17 Theor Inq L 415 at 423-424. See also Lyrissa Barnett Lidsky "Silencing John Doe: Defamation and Discourse in Cyberspace" (2000) 14:4 Duke LJ 855 at 860-861.

the government shut down the Internet service providers.[13] Likewise, domestically, social media platforms, like Facebook, have been used for the organization of political protest, and for the dissemination of information and gathering of support for political action in relation to protests after they have occurred, such as during and after the G20 Summit held in Toronto in 2010.[14]

16. Thus, in the last decade, 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, as evidenced both internationally and domestically. For this reason, restraints on participation that engage or limit other rights or interests, whether explicit or implicit, should be viewed with considerable caution.

17. At the same time, the development of, and individuals' participation in, online platforms and communities has given rise to concerns for the protection of other constitutional and *quasi*-constitutional rights. In articulating the tort of intrusion upon seclusion, the Ontario Court of Appeal noted that "technological change poses a novel threat to a right of privacy that has been protected" by the common law and, later, the *Charter*.[15] As observed by the Court of Appeal in *Jones*, legal scholars have also written of "the pressing need to preserve 'privacy' which is being threatened by science and technology to the point of surrender".[16] The common law must continue to develop to ensure that advances in technology do not undermine rights that are considered "integral to our social and political order".[17]

18. Albeit in a different context, the court's admonition in *Jones* of the need for the common law to evolve to protect privacy interests from the threat of technological advances[18] applies equally when the threat comes from the enforcement of a contract of adhesion. Unlike a negotiated commercial bill of lading where the predominantly economic interests of both parties are paramount, in this setting, one international corporate party holds the exclusive ability to allow the other (an individual) to access social media platforms and communities now

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13 *Sparks v Dubé*, 2011 NBQB 40 at para 18; see also Geist, *supra* note 12.

14 See, for example, https://www.facebook.com/g20inquiry with respect to the G20 summit in Toronto. See, also, *Bérubé c Québec (Ville)*, 2014 QCCQ 8967 at para 13, where protestors against tuition fee increases used social media sites, including Facebook, to share the protest route with others.

15 *Jones v Tsige*, 2012 ONCA 32 at para 68 [*Jones*].

16 Peter Burns, "The Law and Privacy: The Canadian Experience" (1976) 54 Can Bar Rev 1 at 1.

17 *Jones*, *supra* note 15 at para 68.

18 *Jones*, *ibid* at para 67.

considered beneficial to the full participation in democratic society. While Facebook has no obligation to provide the service, for free or otherwise, it chose to create the platform and to bring it to Canadian citizens; it makes great profit advertising to its large Canadian audience (partially through, it is alleged by the appellant, the use of Canadian's names and portraits).[19] Having done so, individuals ought not be faced with the choice between the opportunity of full participation (and the associated benefits) and potentially being denied their subsequent ability to enforce and rely upon statutory protections afforded to their privacy. The common law must be developed in a manner consistent with the recognition of these privacy interests.

ii. Public policy dictates that privacy rights be considered paramount

19. The importance of privacy rights to a free and democratic society is unassailable. This Court has stated that the federal *Privacy Act*[20] has "quasi-constitutional status", and that the values and rights set out in it are closely linked to those set out in the Constitution as being necessary to a free and democratic society.[21] Repeatedly, in cases involving ss. 7 and 8 of the *Charter* and in other privacy contexts, appellate courts across the country, including this Court, have recognized that the *protection* of privacy interests is an important, often determinative, consideration.[22] Public policy, as reflected in the common law and legislation, emphasizes the necessary protection of privacy rights as a public interest.

20. This Court has identified different types of privacy, all equally worthy of protection.[23] Informational privacy, such as that at issue here, includes issues of control; the ability of an individual to control information, including its use and dissemination, as an inherent right to maintain privacy.[24] The protection of informational privacy is particularly important in the global consumer economy where the threat of dissemination of personal information without consent is heightened because of technological change.[25]

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19 Affidavit of Emily Unrau, Appellant's Record, Vol III Tab 16E.
20 *Privacy Act*, RSC 1985, c P-21.
21 *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at paras 24-25.
22 See, for example, *R v Cole*, 2012 SCC 53, where this Court found the warrantless seizure of the accused's work laptop infringed on the accused's privacy rights.
23 *R v Tessling*, 2004 SCC 67 at para 20 [*Tessling*].
24 *Tessling, ibid* at para 25.
25 *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 at para 23 [*United Food*].

21. It is against this backdrop that the consideration of the appropriate test for enforcement of a forum selection clause in a contract of adhesion for a digital platform must be viewed. The importance of the ability to control the use of information, such as but not limited to one's biological information or image, as a corollary to the protection of privacy interests, should not be easily undermined by the content of a non-negotiated forum selection clause. Canadian courts must be vigilant in reviewing such clauses in order to be satisfied that giving effect to the clause will not render protection of privacy illusory as there remain jurisdictions around the world that do not afford privacy the same status and protection as we do in Canada.[26]

22. In doing so, a court should look to the practical impacts on privacy interests that come from enforcement of these clauses. The British Columbia legislature has created a statutory tort to protect residents of British Columbia from infringements of their privacy interests in British Columbia. No proof of damages is required, consistent with the Court of Appeal's observation in *Jones* that torts based on the intrusion of privacy interests often will have nominal damages. [27] The goal of prosecution, thus, is not individual financial reward. Rather, actions of this nature serve a greater purpose of advancing the public interest in the protection of privacy rights. Our common law principles may need to be expanded or modified to protect those privacy rights in light of rapidly changing technology; otherwise, the advantages of ignoring privacy rights will outweigh those of observing them for international corporate parties operating in Canada.[28]

23. Any enforcement of forum selection clauses must thus reflect a consideration of whether the ability to prosecute these actions – as a means to ensure protection of privacy interests – will be practically undermined if the plaintiff must bring their action in a foreign jurisdiction. The court can and should take notice of the rising costs of litigation, and the impact those costs would have on access to justice. Courts should be wary of enforcing clauses where the prosecution in another jurisdiction would, in effect, negate the ability of the plaintiff to prosecute that action at

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26 See Burns, *supra* note 16 at 6, quoting Alan Westin's paper, "Science, Privacy and Freedom: Issues and Proposals for the 1970's" (1966) 66 Colum L Rev 1003, as follows: "Totalitarian systems deny most privacy claims of individuals and non-governmental organizations to assure complete dedication to the ideals and programs of the state, while the totalitarian state's own governmental operations are conducted in secrecy".

27 *Jones, supra* note 15 at para 75.

28 See Burns, *supra* note 16 at 64.

all.[29] Otherwise, courts risk creating a situation where there is no true protection for privacy interests (or arguably any *quasi*-constitutional or constitutional right) and commercial parties in contracts of adhesion can, in effect, abrogate privacy rights (and, by extension, other *quasi*-constitutional or constitutional rights) through forum selection clauses.

C. Public policy supports the development of a modified "strong cause" test

24. In *R. v Gomboc*,[30] this Court commented that caution is appropriate in assessing whether provisions in a contract of adhesion that affect reasonable expectations of privacy ought to be given full force and effect. Albeit stated in a different context, this Court's recognition of the possible need for different treatment for terms of contracts of adhesion that impact privacy interests is of equal, if not greater, importance when considering clauses that, if enforced, could abrogate or undermine those interests.

25. It is recognized that privacy interests are not absolute and must, from time to time, be reconciled with other rights and interests.[31] Those interests must be balanced with other factors, including the desirability of enforcing contractual provisions. Thus, any test adopted by this Court for this context must seek to strike an appropriate balance between competing concerns. That balance is not achieved with the current test in *Pompey* which, at its core, is predominantly concerned with a public policy goal of holding people to their bargains. In the very different circumstances here – where the contract is not the product of negotiation – the predominant public policy consideration must be protection of constitutional and *quasi*-constitutional rights.

26. The need to give this public policy consideration legal effect is required by the decision of the British Columbia legislature to create the statutory tort.[32] The British Columbia legislature can be presumed to have intended to provide a remedy for British Columbians for breach of their

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29 In *Negrich v 2724316 Canada Inc*, 2011 CarswellOnt 16065 (Ont SCJ), the Ontario Small Claims Court would not have enforced a forum selection clause on the basis that doing so would have produced real hardship and unfairness because of the requirement for the plaintiff to travel afar to get justice. It noted that while this did not go as far as to result in "grossly uneven bargaining power" per *Pompey*, the court was concerned about overall fairness in the circumstances of the case.

30 *R v Gomboc*, 2010 SCC 55 at para 33.

31 See, for example, *United Food*, *supra* note 24 at para 37, in which this Court held that the privacy legislation in issue infringed upon the Union's constitutionally protected freedom of expression.

32 *Privacy Act*, RSBC 1996, c 373. See also *E&J Gallo Winery v Morand Bros Beverage et al*, 247 F Supp (2d) 973 (ND Ill 2002). In that case, the Illinois District Court noted that a specific venue clause for lawsuits under or relating to the Act demonstrated "Illinois' strong public policy in favour of having these issues litigated within its borders".

privacy interests, consistent with the need to provide meaningful protection for this *quasi*-constitutional interest. Before an individual can be said to be contractually obligated to seek enforcement of those rights elsewhere, Canadian courts should be satisfied that the other jurisdiction will ensure that those rights can, legally and practically, be enforced.

27. An appropriate balancing of interests, recognizing the public interest in privacy, can be achieved in a modified "strong cause" test. While the party who seeks to be relieved from enforcement must still demonstrate "strong cause", that test will be *prima facie* met if the party can show that (a) the clause forms part of a contract of adhesion; and (b) the interests at stake are constitutional or *quasi*-constitutional rights and interests, such as privacy interests, for which there is a public interest in ensuring protection. If established, the onus would then shift to the party seeking to rely on the clause to demonstrate that enforcement of the clause would not result in undermining or derogating from the protections of those interests. This modified test would ensure that parties are held to their bargains where appropriate and would constitute an appropriate balance of the competing rights and interests.

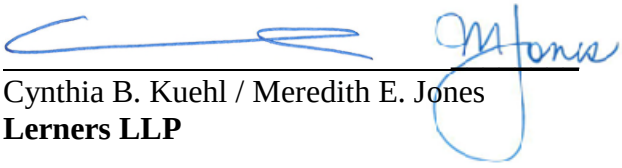
PART IV - SUBMISSIONS REGARDING COSTS

28. The CCLA does not seek costs and asks that no costs be awarded against it.

PART V - ORDER REQUESTED

29. The CCLA requests the Court's permission to make oral submissions of no more than 10 minutes in length at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of October, 2016.



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PART VI
TABLE OF AUTHORITIES

Authority (Jurisprudence)	Paragraph(s) Cited
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Authority (Secondary Sources)	Paragraph(s) Cited
Lyrissa Barnett Lidsky “Silencing John Doe: Defamation and Discourse in Cyberspace” (2000) 14:4 Duke LJ 855.	14
Michael Geist, “The Policy Battle over Information and Digital Policy Regulation: A Canadian Perspective” (2016) 17 Theor Inq L 415.	14
Peter Burns, "The Law and Privacy: The Canadian Experience" (1976) 54 Can Bar Rev 1.	17, 21, 22

PART VII
RELEVANT STATUTES

***Privacy Act*, RSBC 1996, c 373, s 3(2)**

Unauthorized use of name or portrait of another

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.

***Privacy Act*, RSBC 1996, c 373, s 4**

Action to be determined in Supreme Court

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