No. VLC-S-S-122316
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEBORAH LOUISE DOUEZ

PLAINTIFF

AND:

FACEBOOK, INC.

DEFENDANT

Brought pursuant to the *Class Proceedings act*, RSBC 1996, c-34

PLAINTIFF'S ARGUMENT

Re. Facebook's Jurisdictional Challenge

I. INTRODUCTION AND OVERVIEW

A. The Nature of the Claim

1. The defendant Facebook Inc. ("Facebook") operates the ubiquitous social network website facebook.com. Facebook invites persons 13 years of age and older to become "members" of facebook.com by providing personal information and images which are used to establish the member's own pages on the website. Since its beginnings a decade ago as a social network for college students, facebook.com has grown into the World's largest such entity by far, with over one billion "members" worldwide.

2. Facebook raises revenue from third parties who pay to have their advertising displayed to members on facebook.com. Advertising notices can be displayed to facebook.com's members generally, or they can be more selectively displayed based on the data collected by Facebook of members' personal information and/or their navigation history on the internet.

3. Facebook's general data collection and advertising sales practices are not at issue in the present action.

4. In recent years, Facebook developed a new and further advertising model it called "Sponsored Stories". In this program, computer software designed by Facebook would automatically harvest the personal information of a targeted member, including that member's name and image as well as certain aspects of the history

of his or her internet use, and use this information to construct advertising in the form of an entirely fictitious personal endorsement of a product by that targeted member. The fictitious endorsement would then be presented to other members within the targeted member's network of connections on facebook.com.

5. The plaintiff claims that the "Sponsored Stories" program was unlawful inasmuch as it harvested and used the personal information of British Columbians. Her action is based on the statutory tort of misappropriation of personality in section 3(2) of British Columbia's *Privacy Act*, which provides:

> 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 otherwise 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.

6. The plaintiff and class members were, at the material times, British Columbia residents and members of facebook.com whose personal information was harvested by Facebook for use in its "Sponsored Stories" program. They claim that they did not consent to the use of their name or portrait for the purposes of advertising or promoting the sale of, or otherwise trading in, property and services, by Facebook or its advertisers.

7. Because Facebook invites membership from British Columbians 13 and over, the class can be expected to include a significant number of members who were minors (legally, "infants") at the time their information was harvested for "Sponsored Stories". At present, only Facebook knows or could meaningfully estimate what proportion of the class are infants, or were infants at the relevant times.

B. Procedural History

8. The present action was commenced on March 29, 2012 by the filing of a Notice of a Civil Claim on behalf of the plaintiff and members of the class. On July 5, 2012, the plaintiff filed her Notice of Application for certification of this action as a class proceeding.

9. On October 1, 2012, Facebook filed its application seeking to have this Court decline jurisdiction and to have the Jurisdiction Application heard before the plaintiff's Certification Application.

C. Facebook's Argument

10. Facebook makes a number of submissions in support of its *forum non convenience* application. However, its primary argument is that its standard-form

online Terms contain a Forum Selection Clause that binds members to adjudicate disputes in the courts of California.

11. The Forum Selection 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... You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for the purpose of litigating such claims.[1]

D. The Plaintiff's Argument

12. The plaintiff's argument consists of the following submissions, none of which depends upon controversial facts:

- The question of the territorial jurisdiction of this Court, and the decision of whether to decline that jurisdiction in favour of an alternative forum, is to be determined according to the law of British Columbia.
- The law of British Columbia, and indeed the consistent rule across Canada, is that, where a statute confers exclusive jurisdiction on the superior court of a province, jurisdiction cannot be displaced, including by a forum selection clause in a contract.
- The *Privacy Act* confers exclusive jurisdiction over actions under it to the Supreme Court of British Columbia.
- Even if the *Privacy Act* did not confer exclusive jurisdiction on the B.C. Courts, the basic principles of *forum non conveniens*, now enshrined in the *CJPTA*, lead to the conclusion that this Court should exercise its discretion to retain jurisdiction over this matter despite the presence of the clause. In particular, the plaintiff says doing so will:
    - Be more efficient and cost-effective for the parties and witnesses;
    - Avoid multiplicity of proceedings and possibly inconsistent decisions;
    - Facilitate the application of B.C. law to the present claims, which is consistent with the proper interpretation of the Terms of the Facebook contract and with important public policy considerations; and

[1] Solanki Affidavit, Exhibit "D", p 68

- Be consistent with fairness and the reasonable expectation of the parties.

- Finally, the U.S. proceeding invoked by the defendant as an alternative forum is neither adequate nor appropriate.

II. ARGUMENT

A. Jurisdiction is Determined Pursuant to the Law of British Columbia

13. It is settled law that the question of whether a Court has or should decline jurisdiction is to be decided on the basis of the law of the forum, even in the face of choice of law clauses such as that in Facebook's Terms of Use.[2] Facebook does not argue otherwise, and bases its own jurisdiction submissions on British Columbia law.

14. Facebook likewise does not contest this Court's *prima facie* subject matter jurisdiction over the claim and personal jurisdiction over Facebook in accordance with sections 3 and 10 of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 (the "*CJPTA*").

15. Once territorial competence is established, the Court may decline jurisdiction on the basis of those considerations under section 11 of *CJPTA*. That provision provides as follows:

> 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 proceedings and for their witnesses, in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to the 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

[2] *GreCon Dimter inc v JR Normand inc*, 2005 SCC 46

> (f) the fair and efficient working of the Canadian legal system as a whole.

16. The Supreme Court of Canada held in *Lloyd's Underwriters v Cominco Ltd*, 2009 SCC 11 at paragraph 21:

> [21] . . . . The *CJPTA* creates a comprehensive regime that applies to all cases where a stay of proceedings is sought on the ground that the action should be pursued in a different jurisdiction (*forum non conveniens*). It requires that in every case, including cases where a foreign judge has asserted jurisdiction in parallel proceedings, all the relevant factors listed in s. 11 be considered in order to determine if a stay of proceedings is warranted. . . . .
>
> [22] . . . Section 11 of the *CJPTA* thus constitutes a complete codification of the common law test for *forum non conveniens*. It admits of no exceptions.

17. The list in section 11 of "circumstances relevant" to determining whether "a court of another state is a more appropriate forum in which to hear the proceeding" is meant to codify the factors identified in the common law, but the list is not exhaustive.

18. Facebook argues that some courts appear to have analyzed forum selection clauses as a basis for declining jurisdiction additional to the listed factors,[3] and even goes so far as to suggest that it is a consideration that supersedes the *CJPTA* itself.[4] Other courts have considered such clauses under the *CJPTA*'s subsection (f), as an aspect of "the fair and efficient working of the Canadian legal system".[5]

19. Nothing turns on the formal analytical routing of the question. A discrete jurisprudence sets out considerations to be applied when weighing the application of forum selection clauses. The same jurisprudence is employed regardless of the stage of the consideration.

20. Two principles govern in considering application of forum selection clauses: first, the Court has *no* discretion to enforce a forum selection clause in the face of legislation conferring exclusive jurisdiction on a particular province's courts; and second, if the legislature has not conferred exclusive jurisdiction, the Court has discretion to either enforce or disregard the parties' choice of forum.

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[3] *Viroforce Systems Inc v R&D Capital Inc*, 2011 BCCA 260

[4] Facebook Brief of Argument, para 21

[5] *Frey v Bell Mobility Inc*, 2011 SKCA 136

B. The *Privacy Act* Defeats the Forum Selection Clause

21. As will be described later, the usual analysis involved when deciding whether to enforce a forum selection clause is to ask whether there is "strong cause" to refrain from enforcement. However, both at common law and under the *CJPTA*'s section 12, a forum selection clause can never overcome a statutory provision granting exclusive jurisdiction to the British Columbia Courts.

22. Some Courts have said the "strong cause" test only applies "in the absence of applicable legislation".[6] Other Courts, as we shall see, have held that a legislative grant of exclusive jurisdiction in itself constitutes "strong cause" to disregard a forum selection clause. Whatever the analysis, it is clear that where a statute confers exclusive jurisdiction upon a provincial superior court over a particular matter, that legislation governs. Thus, in *GreCon Dimter*, *supra*, the Supreme Court of Canada held at paragraph 25:

> [25] . . . certain limits are imposed on the expression of the autonomy of the parties [to oust a court's jurisdiction]. First, art. 3151 C.C.Q., enacted by the legislature as a mandatory provision, confers exclusive jurisdiction on a Quebec authority over actions founded on civil liability for damage suffered as a result of exposure to or the use of raw materials originating in Quebec.[7] <u>In such cases, a choice of forum clause cannot oust the jurisdiction of the Quebec authority</u>. [emphasis and footnote added]

23. This principle is enshrined in section 12 of the *CJPTA*, which says that other enactments prevail where they conflict or are inconsistent with the relevant part of the *CJPTA*.[8]

24. The plaintiff says that the *Privacy Act* contains a mandatory direction with respect to jurisdiction and forum in its section 4:

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

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6 *ZI Pompey Industrie v ECU-Line NV,* 2003 SCC 27 at para 39

7 CC Q Article 3151 provides that "A Québec authority has exclusive jurisdiction to hear in first instance all actions founded on liability under article 3129."

8 Section 12 of the *CJPTA* provides as follows: "If there is a conflict or inconsistency between this Part and another Act of British Columbia or of Canada that expressly (a) confers jurisdiction or territorial competence on a court, or (b) denies jurisdiction or territorial competence to a court, <u>that other Act prevails</u>." [emphasis added]

25. The *Interpretation Act*, section 29, provides that in any enactment "'Supreme Court' means the Supreme Court of British Columbia."

26. Facebook concedes in its argument, paragraph 34, that:

> Section 4 of the *Privacy Act* provides exclusive jurisdiction in the Supreme Court of British Columbia to try actions under the Privacy Act[.]

27. Facebook's answer to this difficulty is to say that section 4 of the *Privacy Act* should be interpreted solely as concerned with *which level* of British Columbia court should entertain *Privacy Act* proceedings. It asserts, at paragraph 37 of its written argument, that section 4 is simply a *venue* provision, and cannot be interpreted to speak as well to the selection of *forum* in a territorial sense:

> The purpose of section 4 appears to be ensuring the claims are resolved by a competent judicial tribunal. Section 4 is not directed at the situs of claims under the *Privacy Act* as between competing foreign [sic] jurisdictions. [emphasis in original]

28. In support of this idea, Facebook describes, at paragraphs 34 and 35 of its Argument, a number of cases where more-or-less analogous provisions were used to determine which level of court has jurisdiction over particular statutory claims. But Facebook offers no authority for its central proposition, which is that the exclusive jurisdiction clauses such as that in section 4 should be restricted to that function.

29. And in fact, Courts have consistently rejected the distinction Facebook proposes here.

30. The case most precisely on point is the decision of Associate Chief Justice Wittmann in *Zi Corp v Steinberg*, 2006 ABQB 92. There, the plaintiff had brought a number of claims in contract and for breach of Alberta statute law. The statute in question conferred exclusive jurisdiction on the "Court of Queen's Bench", which, according to that province's *Interpretation Act,* meant the Alberta Court of Queen's Bench. The defendant, as here, sought to enforce a forum selection clause to have the matter heard in another jurisdiction.

31. The Court described the issue in terms strikingly similar to that at bar:

> [64] Because section 180 designates the "Court of Queen's Bench" as the court to which an application under the section is to be brought, Zi submits that this Court is the only court with jurisdiction to grant the relief claimed under that section. Zi, thus, argues that a stay of proceedings in favour of Florida would deny Zi its substantive rights against the Lancer Entities. It states further that Alberta

> legislation regulating securities for the benefit of the public, should constitute "strong cause" why the Court should not stay this action in favour of the Florida Federal Court.

32. Wittmann A.C.J. reviewed the jurisprudence to that point. He referred to the decision of this Court in *Voyage Co Industries v Craster*, 1998 CanLII 1776 (BCSC), where this Court considered the applicable choice of law. One aspect of its analysis involved asking which forum's courts had jurisdiction in relation to the statutory oppression remedy. The plaintiff pointed out that the Yukon *Business Corporations Act* provided that: "a Complainant may apply to the Supreme Court for an order". So, although in a somewhat different context, the Court in *Voyage* was compelled to consider whether the words "may apply to the Supreme Court for an order" spoke to territorial jurisdiction. The Court, at paragraph 12, clearly believed that it did, and stated:

> ... I cannot conclude that this Court should apply the corporate law of another jurisdiction in an action which could potentially affect that plaintiff's status as a corporation, <u>particularly where the governing statute specifically states that the court of the domicile shall hear this type of application</u>. [emphasis added]

33. The Associate Chief Justice in *Zi Corp* also referred to *Incorporated Broadcasters Ltd v Canwest Global Communications Corp*, 2001 CanLII 28395 (ONSC). In that case, Killeen J. stayed an action commenced in Ontario on the basis that Manitoba had jurisdiction. Killeen J. held at paragraphs 116-117:

> Section 234 (1) [of *The Corporations Act* of Manitoba] provides that "[a] complainant may apply to a court for an order under this section." Section 1(1) defines "court" as "the Court of Queen's Bench" and no other.
>
> Thus, it seems inescapable but to conclude that only the Manitoba Court of Queen's Bench has jurisdiction to grant a remedy for oppression brought in respect of a Manitoba corporation such as Broadcasting.

34. This decision was upheld on appeal 2003 CanLII 52135 (ONCA), albeit without affirming the trial decision on this point. Leave to appeal to the SCC was refused [2003] SCCA No 186.

35. The Court in *Zi Corp* also referred to the decisions of the New Brunswick Court of Queen's Bench in *Nord Resources Corp v Nord Pacific Ltd*, 2003 NBQB 201 and the Delaware Supreme Court in *Taylor v LSI Logic Corp*, 715 A2d 837 (US Del

Super 1998), describing these precedents as follows:

> [71] In *Nord Resources* . . . a minority shareholder sought oppression remedies against a New Brunswick corporation. The applicant corporation sought to have the action stayed until a derivative action in New Mexico dealing with the corporation and the same issues was determined. The New Brunswick *Business Corporations Act* defined "Court" to mean the Court of Queen's Bench of New Brunswick and gave it the power to grant various oppression remedies including an order to liquidate or dissolve the corporation. The respondent shareholder argued that this gave the New Brunswick Court of Queen's Bench exclusive jurisdiction such that *forum conveniens* considerations were inapplicable. The applicant corporation, like the Applicants here, argued that the reference to the New Brunswick Court of Queen's Bench was only to identify which New Brunswick court had jurisdiction, not to exclude courts from other provinces or states from assuming jurisdiction.
>
> [72] The Court in *Nord Resources* relied on *Voyage Co., Incorporated Broadcasters and Taylor v. LSI Logic Corp*., 715 A.2d 837 (U.S. Del. Super. 1998) to find that the New Brunswick Court of Queen's Bench had exclusive jurisdiction to adjudicate upon the application for oppression remedies and that *forum conveniens* considerations did not apply.
>
> [73] In *Taylor*, the plaintiff brought an action in the Delaware Court of Chancery under the oppression section of the *Canada Business Corporations Act* to enjoin the defendant from acquiring the minority shareholder interest in a Canadian corporation. The Court of Chancery dismissed the plaintiff's action on the basis of comity, but found that it did have concurrent jurisdiction to adjudicate the claim.
>
> [74] On appeal to the Supreme Court of Delaware the plaintiff's action was dismissed on the grounds that the Delaware courts lacked subject matter jurisdiction. The Court specifically reviewed section 2 of the *CBCA* which defined "court" as various Canadian courts and held at p.6:
>
> > We also find that Taylor's contention that Section 2 of the Canadian Act is merely a procedural venue provision to be unsupported by the clear text of the Canadian Act.

[emphasis added]

36. Thus in *Zi Corp,* Associate Chief Justice Wittmann held:

> [77] In relation to the first consideration, section 180 of the *Act* designates the "Court of Queen's Bench" as the court to which application should be made for relief under that section. Section 28(k) of the *Interpretation Act*, R.S.A. 2000, c. I-8 states that: "[the] 'Court of Queen's Bench' means the Court of Queen's Bench of Alberta".
>
> [78] The wording of the section, together with the authorities cited above, lead to the conclusion that the intent of the legislature was to provide this Court with exclusive jurisdiction in relation to the relief available under section 180 of the *Act*.

37. As a consequence, the Court in *Zi Corp* found that the forum selection clause would apply to the plaintiff's claims in contract (which were not subject to the statutory jurisdiction provision), but with respect to claims premised on the statute, the choice of forum clause must yield to the statutory jurisdiction conferred upon the Alberta court.

38. Since the 2006 decision in *Zi Corp*, there has been another comprehensive consideration of the territorial effect of exclusive jurisdiction clauses such as that in the *Privacy Act.* In the very recent decision *Gould v Western Coal Corp*, 2012 ONSC 5184, Strathy J. was considering an argument that was the precise obverse of *Zi Corp*. The Ontario Court was faced with a claim that was premised, *inter alia*, on an oppression remedy under the B.C. *Business Practices Act*. The plaintiff argued that it should be allowed to pursue the claim in Ontario, notwithstanding the language of the B.C. Act. Strathy J. summarized the issue as follows:

> [320] The plaintiff's oppression claim is based upon s. 227 of the British Columbia *Business Corporations Act*. Section 227(1) provides that a shareholder or "any other person whom the court considers to be an appropriate person" may make an application under the section. Subsection (2) provides:
>
> > (2) A shareholder may apply <u>to the court</u> for an order under this section on the ground
> >
> > (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
> >
> > (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of

> shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.
>
> [Emphasis added.]
>
> [321] Section 1 of the *Business Corporations Act* defines "court", for the purposes of s. 227, as "the Supreme Court", which is in turn defined in the British Columbia *Interpretation Act*, RSBC 1996, c. 238, as "the Supreme Court of British Columbia".
>
> [322] The defendants contend that the s. 227 claim is purely statutory, that the statute confers exclusive jurisdiction on the Supreme Court of British Columbia, and that the Ontario Superior Court of Justice has no subject-matter jurisdiction over the claim.

39. The Plaintiffs in *Gould* claimed that the Ontario court could take jurisdiction over the claim on the basis that the statute did not confer *exclusive* jurisdiction on the B.C. Court. Strathy J. reviewed all the relevant jurisprudence, including the *Zi Corp.* decision and the cases to which it referred, and also considered a 2011 decision of the Ontario Superior Court of Justice. Strathy J. wrote:

> [328] There is substantial recent authority of this court and of other Canadian and American courts directly on point and against the plaintiff's submission. In *Ironrod Investments Inc. v. Enquest Energy Services Corp.*, 2011 ONSC 308, [2011] O.J. No. 544 (Ont. S.C.J. [Commercial List]), C.L. Campbell J. was concerned with a claim for negligent misrepresentation and oppression against two Alberta corporations. The individual plaintiff had acquired convertible debentures in a corporation that was a predecessor of one of the defendants and pleaded that, as a result of misrepresentations by the president of the predecessor company, he had been induced to convert his debentures to shares. The plaintiffs argued that the oppression claims could be brought in Ontario by invoking the jurisdiction of the Ontario Superior Court under the oppression remedies of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B. 16, which were similar, if not identical, to the Alberta statute.
>
> [329] Justice Campbell found, at para. 14, that only an Alberta court had jurisdiction to grant a remedy for oppression brought in respect of an Alberta corporation. He concluded, at para. 16:
>
> > In this case, not only is Alberta the place of incorporation but the *Alberta Business Corporations Act* give the Courts or [sic] that Province complete jurisdiction of the regulation and governance over that corporation. Section 1(m) defines

> "Court" for the purpose of the statute, including the oppression remedy, to mean "the Court of Queen's Bench of Alberta."
>
> [330] While there were other grounds on which the action was stayed, the conclusion of Campbell J. on subject matter jurisdiction stands on its own — the court simply had no jurisdiction over the oppression claim.

40. Strathy J. went on to conclude:

> [339] The oppression remedy applicable to this dispute is a creation of a British Columbia statute. The statute confers the remedy and describes the manner in which it is to be enforced. I have no jurisdiction to grant the remedy because the statute expressly grants jurisdiction to the British Columbia Superior Court. It is irrelevant that the defendants may be otherwise subject to this court's jurisdiction, or may have attorned to the jurisdiction. I have no jurisdiction over the subject matter. The oppression claim should therefore be struck.

41. So it appears that every case that has addressed the question of whether jurisdiction provisions, such as that in section 4 of the *Privacy Act*, confer territorial as well as procedural jurisdiction on Canadian courts has found, without any difficulty, that they do: *Zi Corp*, *Voyage Co*, *Incorporated Broadcasters, Nord Resources, Taylor*, *Ironrod*, and *Gould*.

42. Were any further support for the plaintiff's position required, it can be found in the recent Supreme Court of Canada decision of *Seidel v TELUS Communications Inc*, 2011 SCC 15. In that case the Supreme Court held that a statutory conferral of jurisdiction upon the B.C. Supreme Court precluded a stay of proceedings in the face of an exclusive arbitration clause.

43. The cause of action in *Seidel* arose pursuant to the *Business Practices and Consumer Protection Act*, SBC 2004, c 2 ("*BPCPA*"), which provides that a person "may bring an action in Supreme Court" for breach of that Act. Telus's contract, on the other hand, provided that "[a]ny claim, dispute or controversy" shall be referred to "private and confidential mediation" and thereafter, if unresolved, to "private, confidential and binding arbitration". . . .

44. Binnie J., writing for the Court in *Seidel*, preferred to give effect to the legislative intent over the autonomy of the parties to contract out of the court process in favour of arbitration.

45. Facebook seeks to distinguish *Seidel* on the grounds that it was not an issue of territorial jurisdiction, but only which type of proceeding the plaintiff was bound to pursue. This is true, but could it really be the case that if the arbitration clause

contained a territorial component, that is, if the parties had agreed to arbitration in, for instance, California, the decision would have been any different?

46. Certainly, as Facebook emphasizes, there are good policy reasons why the legislature should prefer litigation over private, confidential arbitration. The plaintiff says many of the same considerations, such as ensuring a measure of notoriety (and thus, perhaps, deterrence) apply to choices of forum (assuming that a class action in British Columbia will be more locally notorious than one in California). The plaintiff could also point to jurisprudence indicating that arbitration clauses are exact analogues to forum selection clauses.[9] But these arguments are somewhat beside the point, which is that, as Binnie J. wrote in *Seidel* at paragraph 3:

> The Court's job is to give effect to the intent of the legislature as manifested in the provisions of its statutes.

47. The intent of the Legislature is manifest in the words of the *Privacy Act*: that proceedings alleging breach of the *Privacy Act* are to be brought before the Supreme Court of British Columbia.

48. The *Privacy Act* represents the conscious decision of the British Columbia Legislature to establish a tort to protect the privacy and personality interests of its citizens under certain terms and conditions. It establishes a private law cause of action, but clearly does so for public purposes: its end is to prevent the misappropriation of British Columbians' personality. As in *Seidel*, an action in the Supreme Court will generate a measure of notoriety and public denunciation, which serves the deterrent and compensatory aims of the statute.

49. Facebook's last argument in response to the plaintiff's invocation of the *Privacy Act*'s exclusive jurisdiction provision (section 4) is to say that the *Privacy Act* predates the Internet and class action legislation. This is a spurious objection. If section 4 conferred territorial jurisdiction before the advent of the Internet or the *Class Proceeding Act*, it would violate every principle of statutory interpretation to

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[9] In *Sarabia* the B.C. Court of Appeal confirmed that forum selection clauses are direct analogues to arbitration clauses:

> [32] . . . there is no reason in principle to treat choice of jurisdiction clauses differently from arbitration agreements; both contain an election to submit disputes to a particular forum for resolution. It has in fact been said by the United States Supreme Court that "[a]n agreement to arbitrate before a specialized tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of [the] suit but also the procedure to be used in resolving the dispute: *Scherk v. Alberto-Culver Company*, 417 U.S. 506, 41 L.Ed. 270 at 280 (1974); see also *Vimar Seguros Y Reaseguros, S.A. v. Sky Reefer*, [1995] A.M.C. 1817 at 1832 (U.S.S.C.). Moreover, in *Owners of Cargo Ex "Athenee" v. "Athenee"* (1922), 11 L.L.L.Rep. 6 at 6 (C.A.), Atkin L.J. held that a forum selection clause should be treated "as equivalent to an arbitration clause".

argue that it no longer confers such jurisdiction. The legislature has had many opportunities since 1968 to amend the *Privacy Act* to avoid its application to cases of the sort advanced in this action. If the *Privacy Act* has remained substantially unchanged since 1968, it is appropriate to infer a legislative intent to accept it and commend its ongoing utility in the age of both the Internet and the *Class Proceedings Act*. A statute is always speaking: the passage of time is no reason to disregard clear and unambiguous statutory language.

C. The Effect of the Choice of Law Clause

50. Having established that the B.C. Court has exclusive jurisdiction over *Privacy Act* claims notwithstanding the Choice of Forum Clause, there is a secondary question as to whether the Choice of Law Clause in the Terms comes to bear at this initial stage of the analysis. That provision states:

> 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.

51. Facebook does not explicitly argue that section 4 of the *Privacy Act* does not apply because of the Choice of Law Clause. However, it does say elsewhere in its written argument that the Clause operates to make the *Privacy Act* inapplicable to Facebook's alleged wrongdoing ("The *Privacy Act* should not be applied to this proceeding"[10]). So it is necessary to consider here whether the Choice of Law Clause ousts the operation of the *Privacy Act* as a whole.

52. The first simple answer is that given earlier: with respect to jurisdiction, it is B.C. law that applies in the analysis. This B.C. law includes the *Privacy Act*.

53. The second simple answer to the objection is that the statutory forum clause in section 4 of the *Privacy Act* is triggered by a procedural event: the bringing of an action under that *Act*, and not by the Court's determination of choice of law. Section 4 provides:

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

54. Whether validly brought or not, there is no room to dispute that the plaintiff's and class member's actions is "an action under" the *Privacy Act*

55. In any event, the Choice of Law Clause cannot be interpreted to displace the *lex loci* with respect to the statutory tort. Despite the location of Facebook's head office in California, the "place of the tort" committed against the British Columbia class members is British Columbia, because it is here where the damage has been

[10] Facebook Brief of Argument, para 45

suffered. Absent the choice of law clause, the substantive law of British Columbia governs the commission of torts when harm is suffered in this province.[11]

56. Notwithstanding Facebook's protest to the contrary, the fact that a perpetrator of a tort is a "foreign entity" does not exclude it from liability for harm in the province, and it is irrelevant whether the statute that imposes liability is silent on its application to such "entities".[12]

57. Further, the Choice of Law Clause is simply insufficiently broad or explicit so as to deprive the plaintiff and class members of their rights conferred by British Columbia's statute law.

58. Facebook's overall argument is premised on the idea that its members freely and knowingly exchanged their rights to the protection of British Columbia law for the opportunity to participate in its "global community". So it is worth considering whether the Choice of Law Clause really was contemplated by the Parties to deprive facebook.com's members of those rights.

59. The reasonable expectation of two parties agreeing to such a provision in a contract would be that its application is confined to disputes related to the contract, or at most to disputes related to the plaintiff's and class members' use of facebook.com. Tort claims that "are not disputes which arise out of the loan agreements themselves" are not subject to contractual choice of law provisions: *Brisbin v Lunev*, 2010 ONSC 1840 at paragraphs 23 and 51, aff'd 2011 ONCA 15.

60. In fact, in its own written argument, Facebook characterizes the breadth of the Choice of Law Clause as follows:

> Facebook's Terms contain a Choice of Law Clause, which designates California law as the law of the contract… [Facebook] has set out in advance what laws are applicable to disputes involving its service or its Terms[.] [para 45, emphasis added]

61. The present claim is not a dispute concerning "the law of the contract", nor is the claim a dispute "involving [Facebook's] service or its Terms". The claim is not concerned with what the plaintiff or class members did on facebook.com, nor things done or omitted by Facebook in its delivery of its service to the plaintiff or class members. The essential element of the *Privacy Act* tort is not the gathering or obtaining of information; the essence of the tort is the *use* of that information "for the purpose of advertising or promoting the sale of, or otherwise trading in, property or services." That the information was gained through a member's use of facebook.com is quite irrelevant, except to this extent: Facebook might invoke the

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[11] *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon*, [1994] 3 SCR 1022

[12] See for instance *British Columbia v Imperial Tobacco Canada Ltd*, 2006 BCCA 398

contractual arrangement as providing it with a defence of "consent". If that is the case, then Facebook will be free to argue that it should be California law that governs those aspects of the analysis, either because of ordinary choice of law principles, or because of its Choice of Law Clause, or some combination of the two. But that is a matter for another day.

62. There is one other point that goes to the "reasonable expectations of the parties" as they relate to the Choice of Law Clause. The Terms drafted by Facebook provide, at clause 16, that:

> We [Facebook] strive to create a global community with consistent standards for everyone, <u>but we also strive to respect local laws</u>... ."[13] [emphasis added]

63. When the agreement is viewed in light of clause 16, it appears that one "reasonable expectation" of the parties, even were they equal in legal sophistication and relative bargaining power, would be that local laws would be respected and that rights established under local laws would be enforceable against Facebook. Thus, if the effect of enforcement of the Choice of Law Clause (in combination with the Forum Selection Clause) would be to defeat the application of the *Privacy Act* or to deprive British Columbians of its remedies, then invoking that clause is in conflict with Facebook's contractual commitment to strive to respect local laws.

64. Other courts have refused to enforce a forum selection clause where doing so would deprive the plaintiff of a statutory cause of action. In *Jitterswing, Inc v Francorp, Inc*, 311 SW3d 82 (MoApp ED, 2010), the Missouri Court of Appeals held:

> Further, even if the forum selection clause were to encompass tort claims, outbound forum selection clauses will not be enforced in Missouri if they are unfair or unreasonable. *Burke v. Goodman*, 114 S.W.3d 276, 279–80 (Mo.App. E.D.2003). We find that enforcing the forum selection clause in the contract between Jitterswing and Francorp would create an unfair result. Jitterswing's claim for practice of law without a license occurred in Missouri and arises under Section 484.020. If required to bring its claim in Illinois, Jitterswing would be without recourse, as <u>this is a tort claim created by a Missouri statute, and the courts of Illinois would be without jurisdiction</u>. [emphasis added]

65. In light of the principle of *contra proferentum*, the only way to reconcile the conflict between the forum and choice of law clauses on the one hand, and clause 16's promise to respect local laws on the other, is to interpret and apply the Terms as

[13] Solanki Affidavit, Exhibit "D", p 68

follows: Facebook has promised that it will not invoke the Forum Selection or Choice of Law clauses if doing so would defeat rights enjoyed by British Columbians under their local laws.

66. In the present case, the *Privacy Act* is not the only provincial legislation that Facebook might wish to avoid. It is expected that, in its Response to the Notice of Civil Claim, Facebook will rely on the Terms to counter the substance of the claim: that is to say, they will argue that class members agreed as a term or condition of using Facebook that the company could deal with their information as it did with its "Sponsored Stories" enterprise. In such an eventuality, application of section 7 of the *Personal Information Protection Act* (*PIPA*) becomes relevant. That section provides that*:*

> 7 (2) An organization must not, as a condition of supplying a product or service, require an individual to consent to the collection, use or disclosure of personal information beyond what is necessary to provide the product or service.

67. The effect of giving force to Facebook's choice of law provision, therefore, would be to defeat also the application of *PIPA*, an important consumer protection law in British Columbia. This will further exacerbate public policy concerns.

68. The choice of law in this tort action must be British Columbia, notwithstanding the Choice of Law Clause in the Terms. This will serve both the reasonable expectations of the parties and the public policy of British Columbia expressed through both the *Privacy Act* and *PIPA*.

D. The Remaining *Forum Non Conveniens* Analysis

(1) The Test and the Factors

69. The plaintiff says that if the argument based on section 4 of the *Privacy Act* is accepted, then this Court has exclusive jurisdiction over the plaintiff and class members' claims, and no other Court has subject matter jurisdiction (and therefore this Court has no discretion to decline jurisdiction). The Forum Selection Clause is simply irrelevant.

70. If the Court rejects the exclusive jurisdiction argument, and if Facebook discharges its burden to prove the Forum Selection Clause, on its face, applies,[14] then the question becomes whether the Court should exercise its discretion to enforce or disregard the Forum Selection Clause.

71. The plaintiff acknowledges that Courts do accord great weight to valid forum selection clauses. In *Viroforce Systems Inc v R&D Capital Inc*, 2011 BCCA 260 at

[14] *ZI Pompey Industrie v ECU-Line NV,* 2003 SCC 27 at paras 24 and 39

paragraph 14, the Court of Appeal explained that: “the existence of a forum selection clause can, by itself, be sufficient reason for a court to decline jurisdiction…” Facebook is also correct that, where a forum selection clause is legally valid, the manifest wishes of the parties will be given effect unless the plaintiff can show “strong cause” why it should not.

72. Nevertheless, courts may refuse to give effect to contractual provisions restricting choice of forum or law. As Huddart J.A. explained in *Sarabia v "Oceanic Mindoro" (The)*, (1996) 26 BCLR (3d) 143 (CA):

> [36] A court is not bound to give effect to an exclusive jurisdiction clause. A stay is always discretionary. As the Alberta Court of Appeal said in *Volkswagen Canada Inc. v. Auto Haus Frohlich Ltd*., 1985 ABCA 223, [1986] 1 W.W.R. 380 at 381:
>
> > One can no more oust jurisdiction by consent than confer jurisdiction by consent. Indeed, the appellant, Volkswagen, by making this application invokes the jurisdiction of this court . . . to enforce [the exclusive jurisdiction clause] of this contract and require the plaintiffs to litigate in Ontario.

73. Similarly, in *"Fehmarn" (The)* (1957), [1958] 1 All ER 333 (Eng CA) at p 335, Lord Denning explained as follows:

> A stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the courts of the country will pay much regard and to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them. [emphasis added]

74. Section 11(2) of the *CJPTA* requires this Court to consider a number of factors in determining whether to decline jurisdiction in favour of another forum’s courts. To reiterate, they are:

(a) the comparative convenience and expense for the parties to the proceedings and for their witnesses, in litigating in the court or in any alternative forum,

(b) the law to be applied to the 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.

75. Each of these considerations is addressed in turn below.

(1) The comparative convenience and expense for the parties and for their witnesses

76. Facebook has introduced evidence that its business records and a handful of witnesses are located in California. These considerations are of little relevance in the present case.

77. The nature of the "Sponsored Stories" program is not in dispute. The process of its development is irrelevant (or if it is relevant, Facebook has not indicated why), and also does not appear to be in dispute. The facts are basically uncontroversial (Facebook has not yet filed a Response to the Notice of Civil Claim, but nothing in its material filed in this action suggests any facts specific to California that are seriously contested).

78. In any event, business records in the modern era can be transmitted electronically between Santa Clara County and Vancouver as easily as they can be sent between adjoining offices in the United States. Examinations for discovery and even review of documents can be conducted in the United States if it is more efficient to do so. Witnesses can be flown from California to Vancouver in a few hours. Satellite technology permits real-time video links to conduct oral discovery if necessary.

79. Multinational businesses routinely litigate all over the globe. Facebook is one of the wealthiest corporations on the planet. It beggars the imagination to suggest that the expense of litigating the plaintiff's and class members' claims in Vancouver would represent anything but the most minor inconvenience.

80. On the other hand, the thousands of members of the class are, *ipso facto*, resident in British Columbia. Any sampling, review, or assessment of their individual circumstances or damages, which is far more likely to be contested than the history of the development of "Sponsored Stories", will be more conveniently done here.

81. There is, in short, no advantage comparative convenience, or cost savings, to litigating the matter in California.

(2) The law to be applied to the issues in the proceeding

82. The *forum non conveniens* question is intertwined with this Court's view regarding choice of law. It seems fairly plain that U.S. courts will be poorly placed to apply

Canadian law, and indeed Facebook seems to accept this principle inasmuch as it argues that if US law applies, BC's courts would be ill-equipped to interpret it.[15]

83. The Plaintiff has described earlier why the proper choice of law in the present action is British Columbia's. If this Court decides that British Columbia residents are entitled to the protections of the *Privacy Act*, then, it is overwhelmingly advantageous to hear the matter here.

(3) Avoiding multiplicity of legal proceedings and conflicting decisions

84. The Court also has an interest in avoiding a multiplicity of proceedings.

85. In the present case, the proposed class will *ipso facto* consist of both adults and children.[16] In other words, there are persons who Facebook says are bound by Facebook's terms, including the forum selection clause, and those who are, by operation of the *Infants Act*, clearly not.[17] It makes no sense to split the class in this way, and indeed it deprives the class of the economy of scale that it should be able to exploit: see *Frey v Bell Mobility Inc*, 2011 SKCA 136 at paras 116-117.

86. Thus in an Ontario class action where some plaintiffs' contracts were governed by forum selection clauses and some were not, "strong cause" was found to disregard the forum selection clause and hear the entire matter in Ontario. In *Magill v Expedia Canada Corp*, 2010 ONSC 5247, the court decided:

> [53] … [I]f the exclusive jurisdiction clause is enforced only for Expedia, Inc., there is the undesirable prospect of proceedings in both Ontario and also Washington involving the same circumstances and more or less the same claims. This is undesirable because of the uneconomic use of court resources and the possibility of inconsistent results. These observations suggest that there is strong cause not to enforce the exclusive jurisdiction clause.

(4) The enforcement of an eventual judgment

87. Facebook says, without any evidence of US law, that the injunctive relief granted by this Court might not be enforced in California against it. This argument is entirely speculative, and rather disrespectful of the Courts of both jurisdictions. And

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[15] Facebook Brief of Argument, para 45

[16] Facebook expressly contemplates use of its website by minors. In its Terms, Facebook stipulates that "*You will not use Facebook if you are under 13*" [Solanki Affidavit, Exhibit "D", p 66].

[17] The *Infants Act*, RSBC 1996, c 223, s 19, provides that, except in limited circumstances, "a contract made by a person who was an infant at the time the contract was made is unenforceable against him or her".

in any event it only speaks to equitable relief: Facebook has not suggested that any monetary judgment will be unenforceable, and if it is announcing that it will disregard an injunction ordered by this Court (a remarkable submission, in the circumstances), then this Court may craft a remedy to provide compensation or other redress in lieu of Facebook's co-operation.

(5) The fair and efficient working of the Canadian legal system as a whole

88. Facebook says it is not fair that it should be subject to litigation in British Columbia "simply because residents of British Columbia sought to become members of Facebook".

89. This is not, of course, the reason that Facebook is subject to proceedings here. It is subject to proceedings because, after the members had joined in British Columbia, Facebook harvested their personal identifying information and images, recycled it into fictitious endorsement advertisements, and unlawfully sold the advertisements to third parties in order to profit from them. Facebook now seeks to hide behind some fine-print clauses in a contract of adhesion to escape liability for doing so.

90. In *Frey* the Saskatchewan Court of Appeal explained that considerations of fairness, as an aspect of public policy, can operate to overcome a forum selection clause:

> [115] In addition to establishing that a forum selection clause can, by itself, be sufficient reason for a court to decline jurisdiction, the British Columbia Court of Appeal in *Viroforce Systems Inc.* referred to the recent comments of the Ontario Court of Appeal in *Expedition Helicopters Inc. v. Honeywell Inc*., 2010 ONCA 351, 319 D.L.R. (4th) 316 (Ont. C.A.), leave to appeal refused [2010] 3 S.C.R. v, where Juriansz J.A. described the effect of a forum selection clause in a commercial contract:
>
> > [24] A forum selection clause in a commercial contract should be given effect. The factors that may justify departure from that general principle are few. The few factors that might be considered include [that] <u>enforcing the clause in the particular case would frustrate some clear public policy</u>.

91. There are several aspects to the present dispute which are relevant to the question of fairness:

    a. As noted, if the clauses are given effect, the plaintiff and class members will be deprived of a statutory cause of action conferred by the BC Legislature to protect residents against abusive and tortious behaviour.

This deprivation renders the Choice of Forum and Choice of Law clauses in Facebook's Terms extremely onerous if they are applied so broadly as to preclude the present action.

b. Facebook clearly failed to take steps to bring the particularly onerous clauses to the attention of its customers. In fact, a review of the 2007, 2009 and 2011 Terms appended to Facebook's Affidavit reveals that the clauses were actually de-emphasized, appearing behind a link at the corner of the webpage, nearing the end of a 4,500 word document, in small font text adjacent to other clauses printed in all capital letters.[18]

c. There is an obvious imbalance of power between Facebook, a sophisticated multi-billion dollar corporation with its own in-house counsel to both draft and litigate its Term's clauses, and a private citizen who joins Facebook presumably without the benefit of legal advice, including children as young as age 13.

92. In *Roy v North American Leisure Group Inc* (2002), 9 CPC (6th) 270, Métivier J. of the Ontario Superior Court of Justice wrote as follows:

> [28] The reasonable expectation of the defendant company, which provides cruise ships for parties contracting by way of a related company situated in other countries, should have been that they might be sued in the passengers' home jurisdiction, particularly if they have made no attempt to bring an onerous condition to the attention of the other contracting party.
>
> [29] The cases relied on by Airtours involve disputes in the context of international commercial transactions between transnational corporations fully informed about their contractual commitment. This is far from the case here where individual litigants are dealing with a large corporate structure. Notwithstanding the more equal bargaining power seen in the jurisprudence, the courts there consistently retained discretion to resist a claim for staying an action where this is in the interests of justice.
>
> [30] It is now well settled that a party cannot rely on unusual and onerous printed terms not drawn to a customer's attention.
>
> [31] I conclude that on grounds of public policy, the plaintiffs ought not to be restricted by the exclusive jurisdiction, choice of law in the contract. [emphasis added]

[18] Solanki Affidavit, Exhibit "B", p 55-56; Exhibit "C", p 64-65; Exhibit "D", p 68

93. The Ontario Court of Appeal has also considered the relative sophistication of the parties to be relevant in weighing a forum selection clause. In *Red Seal Tours Inc v Occidental Hotels Management BV*, 2007 ONCA 620 at paragraph 13, Sharpe J.A. noted the relevance of parties' sophistication as a public policy ground to enforce or refrain from enforcing such clauses. He wrote:

> It is well-established that the law strongly favours the enforcement of choice of forum clauses and that special deference is owed to forum selection clauses found in international agreements involving sophisticated parties. [emphasis added]

94. To similar effect, in *Cincurak v Lamoureux*, 2002 ABQB 777, the defendants resisted jurisdiction on the basis of an agreement to subject claims to the law of British Columbia and the jurisdiction of the courts of B.C. The Alberta Court noted that a stay in Alberta would effectively defeat the plaintiffs' claim entirely as the B.C. limitation period had expired. Such a result would constitute a "massive prejudice" to the plaintiffs, and therefore the stay was refused." See also *Alliance Pipeline v CE Franklin Ltd*, 2005 ABQB 102 at paras 47-48.

95. Facebook proposes that the State or Federal Courts of Santa Clara County are the appropriate forum for the plaintiff's and class members' claims. It points to a class action that is extant there, and says:[19]

> There is no evidence to suggest that the courts in the contractually agreed forum… would decline jurisdiction or otherwise be unable to address the allegations in the Douez claim. In fact, the U.S. Proceeding… asserts issues similar to those raised in the Douez Claim…
>
> …The well established class action regimes in the U.S. afford Douez and the Proposed Douez Class similar substantive rights and protections as those they may have in British Columbia.

96. With respect, this argument is incorrect both in its analysis and conclusions. It is not the plaintiff but Facebook who bears the onus of proof with respect to the availability of a clearly more appropriate alternative forum. Therefore Facebook bears the burden of proving California law permits the plaintiff and class members a remedy there. Facebook has offered no evidence on this point. Facebook does make several references in which it purports to summarize the law of California (for instance when it argues that California courts might not enforce an injunction issued in BC),[20] but it has provided no evidence to prove California law as a fact.

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[19] Facebook Brief of Argument, para 27

[20] Facebook Brief of Argument, para 51

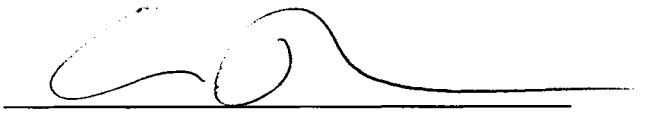
97. In any event, there is substantial reason for concern that the plaintiffs would not, in fact, enjoy a remedy in California. As Facebook concedes, the U.S. Proceeding is explicitly limited to residents of the United States.[21] The U.S. Proceeding is premised on California's Code s. 3344, which, as the U.S. Ninth Circuit has confirmed, provides protections for misappropriation of personality only to plaintiffs who have suffered harm in California (or, through the application of long arm statutes, elsewhere in the United States).[22]

98. Facebook is adamant that hearing this matter in the United States, under US law, would preclude the adjudication of the *Privacy Act* tort. Facebook says plainly that "The *Privacy Act* should not be applied to this proceeding."[23]

99. Adjudicating the matter in the U.S. courts, therefore, combined with Facebook's insistence that the law to be applied would be California law, would be tantamount to permitting Facebook to escape liability for all harm it has caused in British Columbia. This seems to be exactly what Facebook foresees, but it cannot be what was in the contemplation of facebook.com's members when they entered into their relationship with Facebook, and it cannot serve the public purposes expressed through the *Privacy Act*'s tort regime.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: November 30, 2012



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[21] Facebook Brief of Argument, para 17

[22] *Love v Sanctuary Records Group, Ltd*, 611 F3d 601 (9th Cir 2010)

[23] Facebook Brief of Argument, para 45