COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Douez v. Facebook, Inc.,*
2015 BCCA 279

Date: 20150619
Docket: CA41917, CA41918

Between:

Deborah Louise Douez

Respondent
(Plaintiff)

And

Facebook, Inc.

Appellant
(Defendant)

SEALED FILE

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated May 30, 2014 (*Douez v. Facebook, Inc.*, 2014 BCSC 953, Vancouver Docket No. S122316)

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Place and Date of Hearing: Vancouver, British Columbia
March 2, 2015

Place and Date of Judgment: Vancouver, British Columbia
June 19, 2015

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Goepel

Summary:

The plaintiff commenced an action in the B.C. Supreme Court. Relying on a contractual forum selection clause in favour of the courts of Santa Clara, California, the defendant submitted that B.C. is forum non conveniens and applied for a stay of proceedings. The plaintiff applied to certify the action as a class proceeding. The chambers judge declined to stay the proceeding and certified it as a class proceeding. The defendant appeals. Held: Appeal allowed. The forum selection clause should be enforced and the proceeding stayed. The plaintiff is at liberty to bring the action in Santa Clara. The certification issues are moot.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I. Introduction

[1] Facebook appeals from orders declaring that British Columbia is not *forum non conveniens* (CA41917) and certifying the underlying action as a class proceeding (CA41918). For the following reasons, I would allow the appeal in CA41917 and enter a stay of proceedings. This would render CA41918 moot and I decline to address it.

II. Facts

[2] Facebook is a Delaware company with its head office in California. It operates a popular online social network at facebook.com.

[3] It is and always has been free to join and use facebook.com. However, in order to become a member one must first agree to Facebook's Terms of Use.

[4] Facebook earns the vast majority of its revenue from selling advertising on facebook.com. These appeals involve a type of advertising called "Sponsored Stories". Facebook.com has a popular feature called the "like" button. When a member presses the "like" button on a post, his or her friends may receive a notification to that effect in their "newsfeeds", essentially their personal homepages. This is a convenient way for members to share content with their friends. Sponsored Stories were paid advertisements that looked much like ordinary "like" notifications. When a member pressed the "like" button on a post associated with a business,

political party, charity or other entity that had purchased Sponsored Stories, an advertisement featuring the member's name and portrait was sometimes displayed on the newsfeeds of that member's friends. The member was not notified before or after the advertisement was displayed.

[5] Ms. Douez is a resident of B.C. and member of facebook.com. She alleges that her name and portrait were featured in Sponsored Stories without her consent. She commenced an action against Facebook in the B.C. Supreme Court, relying on a statutory tort created by the *Privacy Act*, R.S.B.C. 1996, c. 373, s. 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.

[6] Ms. Douez then applied to have her action certified as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The proposed class was all B.C. residents whose name or photograph was featured in Sponsored Stories.

[7] Facebook, for its part, applied with a request that the Court decline to exercise its territorial competence on the ground that B.C. is *forum non conveniens*. This phrasing was somewhat idiosyncratic. Ordinarily one would apply for a stay of proceedings. Nothing turns on this, however, and I proceed on the understanding that Facebook's application was for a stay of proceedings.

III. Decision Under Appeal

[8] The chambers judge published combined reasons for the two applications. As noted, I will address only the application for a stay of proceedings.

[9] The judge began by noting that Facebook relied principally on its Terms of Use, to which all users must agree in order to create an account on facebook.com. The Terms of Use included a unilateral forum selection clause in favour of the courts of Santa Clara County, California:

> You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County.

[10] Ms. Douez relied upon s. 4 of the *Privacy Act*:

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

Ms. Douez submitted that the effect of this provision was that her action could not be tried in Santa Clara County, or indeed anywhere but the B.C. Supreme Court.

[11] The judge cited *Z.I. Pompey Industrie v. ECU-Line N.V.,* 2003 SCC 27, for the test as to whether a court should decline to exercise its territorial competence because of a forum selection clause. The party relying on the forum selection clause must show it is valid, clear and enforceable, and that it applies to the cause of action. If this is established, the burden then switches to other party to show "strong cause" for the court to decline to enforce the forum selection clause.

[12] The judge accepted that Facebook had shown, at least *prima facie*, that the clause was valid, clear and enforceable. She did not decide whether Facebook had shown the forum selection clause applied to Ms. Douez's claim. She disposed of the issue by holding that, even assuming Facebook had met its burden, s. 4 of the *Privacy Act* "overrides" the forum selection clause or, alternatively, Ms. Douez had shown strong cause to not enforce the forum selection clause.

[13] The judge held that s. 4 of the *Privacy Act* confers exclusive jurisdiction on the B.C. Supreme Court, to the exclusion of other courts worldwide. Accordingly, a court in Santa Clara would not have jurisdiction to hear Ms. Douez's claim. To enforce the forum selection clause would therefore be to exclude Facebook from liability under the *Privacy Act.* However, this could not be the legislative intent of s. 4. Rather, the judge held, the intent of s. 4 was to override any forum selection clauses in favour of courts other than the B.C. Supreme Court.

[14] The judge also held, alternatively, that Ms. Douez had shown strong cause to not enforce the forum selection clause. In a sense this was simply a different way of framing her conclusion that s. 4 overrides the forum selection clause. To deprive Ms. Douez of her right to bring a claim under s. 3(2) of the *Privacy Act* would be

contrary to the legislative intent of the *Privacy Act* and to public policy more generally. Thus, the forum selection clause should not be enforced.

[15] The judge then considered the factors in s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 ("*CJPTA*"). That section sets out a non-exhaustive list of factors a court must consider when deciding whether to decline to exercise its territorial competence on the ground that it is *forum non conveniens*.

[16] The judge reasoned that the comparative convenience and expense for the parties favoured B.C. over Santa Clara, because it would be easier for Facebook to bring its records here than for Ms. Douez to litigate her claim there.

[17] The judge stated that, at the early stage of the stay application, it was not yet clear which law would be applied to the merits. The Terms of Use contained a choice of law clause selecting California law:

> 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.

[18] However, the judge indicated that this may not be enforceable against Ms. Douez. More importantly, while the B.C. Supreme Court could determine that California law applies (perhaps defeating the claim), a Santa Clara court would lack jurisdiction under the *Privacy Act* to determine which law applies. This consideration also favoured B.C.

[19] The judge concluded that B.C. is not *forum non conveniens* and dismissed Facebook's application for a stay of proceedings.

IV. Grounds of Appeal

[20] Facebook submitted the judge erred in (1) interpreting s. 4 of the *Privacy Act* to override the forum selection clause, (2) holding that Ms. Douez had shown strong cause to not enforce the forum selection clause, and (3) failing to decide whether California or B.C. law applies to the merits.

V. Analysis

A. Analytical framework

[21] The first issue to be considered is how the *Pompey* test for forum selection clauses relates to the analytical framework for *forum non conveniens* in the *CJPTA*. When the defendant relies upon a forum selection clause, should the court consider the *Pompey* test and then, if necessary, carry out the *CJPTA* analysis, or should the court consider the *Pompey* test as *part* of the *CJPTA* analysis? This issue did not arise in *Pompey* because that proceeding began in Federal Court and there is no *CJPTA* at the federal level.

[22] As noted, the *Pompey* test requires the party relying on the forum selection clause to show it is valid, clear and enforceable, and that it applies to the cause of action. The burden then switches to the other party to show "strong cause" for the court to decline to enforce the forum selection clause.

[23] The *CJPTA* 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 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.

[24] The judge concluded that the *Pompey* test was a separate inquiry that should be conducted first, with the *CJPTA* analysis following if necessary (at para. 29).

[25] An apparent difficulty with this approach is that, in *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, a B.C. case, Chief Justice McLachlin described s. 11 of the *CJPTA* as "a complete codification of the common law test for *forum non conveniens*" that "admits of no exceptions" (at para. 22).

[26] Facebook submitted the judge's approach was correct, relying principally on *Viroforce Systems Inc. v. R&D Capital Inc.*, 2011 BCCA 260, and *Preymann v. Ayus Technology Corporation*, 2012 BCCA 30.

[27] In *Viroforce*, this Court held that the *Pompey* test is a separate inquiry. Mr. Justice Tysoe for the Court did not refer to *Teck*. He relied on *Momentous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd.*, 2010 ONCA 722 at paras. 35-39, reasoning as follows (at para. 14):

> In my opinion, the [*CJPTA*] does not alter the general approach to be taken when the parties agree to a forum selection clause. If it is determined or assumed that the British Columbia court has territorial competence, the issue is whether the court should decline jurisdiction, either because the forum selection clause ought to be enforced or a consideration of the factors contained in s. 11 of the [*CJPTA*] leads to the conclusion that a court in another jurisdiction is a more appropriate forum. The existence of a forum selection clause can, by itself, be sufficient reason for a court to decline jurisdiction, and it is not simply one of the factors to consider in making a determination under s. 11. It will not be necessary in all cases to first determine whether there is territorial competence because it may be clear that the forum selection clause will govern the outcome of the matter.

[28] *Momentous* was appealed to the Supreme Court of Canada. In very brief *per curiam* reasons (indexed as 2012 SCC 9), dismissing the appeal, the Court did not comment on the analytical framework employed by the Court of Appeal.

[29] *Viroforce* was considered in *Microcell Communications Inc. v. Frey*, 2011 SKCA 136. Saskatchewan also has a *CJPTA* (S.S. 1997, c. C-41.1). Madam Justice Jackson disagreed with this Court's analytical approach. In her view, forum selection clauses should be considered as factors bearing on "the fair and efficient working of the Canadian legal system as a whole" within the meaning of s. 11(2)(f) of the *CJPTA* (at paras. 106-115; see also *Hudye Farms Inc. v. Canadian Wheat Board*, 2011 SKCA 137 at paras. 8-11).

[30] In *Preymann*, this Court revisited *Viroforce* and also considered *Microcell* and *Hudye*. Madam Justice Garson rejected the submission that *Viroforce* was inconsistent with *Teck* (at paras. 37-39). She noted that, in *Pompey*, the Court referred to the need for "a separate approach to applications for a stay of proceedings involving forum selection clauses" (at para. 21). "If *forum non conveniens* is exhaustively codified in s. 11 (*Teck*) but forum selection clauses trigger a separate inquiry (*Pompey*), there is no concern that *Teck* and *Viroforce* conflict" (at para. 39). She found no reason to depart from the *Viroforce* analysis.

[31] I consider that we are bound by *Viroforce* and *Preymann*. In B.C., when the defendant relies upon a forum selection clause, the *Pompey* test is a separate, standalone inquiry that is conducted first. The *CJPTA* analysis may be conducted second, if necessary.

B. Evidentiary issues

[32] The parties agreed that, under the *Pompey* test, Facebook bears the persuasive burden of showing that the forum selection clause is valid, clear and enforceable, and that it applies to the cause of action. The persuasive burden then switches to Ms. Douez to show "strong cause" for the court to decline to enforce the forum selection clause.

[33] However, the parties did not agree as to whether either of them bears an *evidentiary* burden to adduce expert evidence about the law of the selected forum, *i.e.*, the law of California.

[34] Facebook submitted that it bears no such evidentiary burden, for two reasons. First, *Pompey* did not refer to an evidentiary burden and the *Pompey* test is a separate, standalone inquiry in B.C. Second, it is "axiomatic" that, absent evidence to the contrary, foreign law must be presumed to be the same as B.C. law. Thus, Facebook said, this Court could determine whether California has territorial competence simply by assuming that California has the same territorial competence rules as does B.C.

[35] I agree with Facebook that it was not required to adduce expert evidence about California rules of territorial competence. I accept its first submission. The *Pompey* test is a separate inquiry in B.C. and that test, in my view, does not expressly or impliedly impose an evidentiary burden on the party relying on the forum selection clause. The *Pompey* test requires Facebook to show only that the clause is valid, clear and enforceable, and that it applies to this proceeding. This test does not entail any evidentiary burden.

[36] In my opinion, Ms. Douez had the *option* of adducing evidence that shows Santa Clara courts would lack territorial competence over this proceeding. If this proceeding could not be heard in Santa Clara, the forum selection clause would effectively operate as an exclusion of liability clause. That might amount to strong cause to not enforce it.

[37] While my acceptance of Facebook's first submission is dispositive, I feel compelled to express doubt about Facebook's alternative submission. The principle relied upon by Facebook is not incorrect, but I doubt it operates in the manner Facebook submitted. If it did, in certain cases within the *CJPTA* framework, it would effectively reverse the evidentiary burden. To be clear, this problem would be limited to the *CJPTA* framework for *forum non conveniens*; it would not arise in the *Pompey* framework for forum selection clauses.

[38] Another forum could not be more appropriate if the proceeding could not even be heard there. For this reason, a court will generally be reluctant to stay proceedings without some evidence that the proposed alternate forum will have territorial competence (see *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460 at 476 (H.L.); *Hindocha v. Gheewala*, [2003] UKPC 77 at para. 22). (Alternatively, the party seeking the stay might agree, as a term of the stay, to attorn to the alternate forum (see *Lubbe v. Cape Plc*, [2000] UKHL 41 at para. 50).)

[39] Facebook is correct that, when a B.C. choice of law rule provides that the law of a foreign jurisdiction applies to the merits of a proceeding but there is no available expert evidence about that foreign law, the court will presume it is the same as B.C.

law (*Old North State Brewing Co. v. Newlands Services Inc.* (1998), 58 B.C.L.R. (3d) 144 at para. 39 (C.A.)). In my opinion, however, this principle likely applies only in the context of choice of law. I doubt that foreign territorial competence rules should, in the absence of evidence, be presumed to be the same as our own.

[40] Foreign territorial competence rules (particularly in civil law states) often do differ from our rules. Thus, if a party seeking a stay declined to adduce evidence about the territorial competence rules of its proposed alternate forum, in some cases the presumption would make it seem as though the alternate forum would have territorial competence, when it actually would not. In these cases the party without the persuasive burden would effectively be compelled to adduce evidence about the territorial competence rules of the alternate forum (unless that forum was less appropriate than B.C. for other reasons). In my view, the persuasive and evidentiary burdens should coincide.

[41] It is convenient at this point to provide a summary of my interpretation of the analytical framework in different types of applications for stays of proceedings:

(a) If the defendant does not rely on a forum selection clause, the analytical framework in s. 11 of the *CJPTA* applies. The defendant must identify a specific alternate forum and show that it would be more appropriate for the proceeding to be heard and determined there. In most cases the court will expect the defendant to adduce opinion evidence from an expert in the law of the alternate forum, indicating that that forum would have territorial competence under its own law. (I leave open the possibility that the persuasive burden may switch to the plaintiff in some circumstances. In such cases evidentiary concerns would be less salient because the defendant's preferred forum may be inappropriate for reasons other than a lack of territorial competence.)

(b) If the defendant does rely on a forum selection clause, the *Pompey* test applies instead. The defendant must show only that the clause is valid, clear and enforceable, and that it applies to the cause of action.

> (The defendant need not adduce expert evidence indicating that the forum would have territorial competence under its own law.) The persuasive burden then switches to the plaintiff, who must show strong cause to decline to enforce the clause. In this regard the plaintiff may choose to adduce expert evidence that the forum would *lack* territorial competence under its own law, as this may (on its own or in combination with other factors) amount to strong cause. If the plaintiff shows strong cause, the defendant may submit that the court should nonetheless find it is *forum non conveniens* on the analytical framework in s. 11 of the *CJPTA*. (Again, I leave open the possibility that the persuasive burden under the *CJPTA* may switch to the plaintiff in some circumstances.)

C. Is the forum selection clause valid, clear and enforceable, and does it apply to this cause of action?

[42] The trial judge accepted on a *prima facie* basis that Facebook had shown the clause to be valid, clear and enforceable. She did not decide whether the clause applied; she assumed *arguendo* that it did.

[43] Ms. Douez did not submit that the forum selection clause is unenforceable against her, or that it does not apply to this dispute. She appears to accept that Facebook met its burden under the *Pompey* test.

[44] However, Ms. Douez did raise an issue as to the enforceability of the forum selection clause against members of her proposed class who are under 19 years of age. Relying on the *Age of Majority Act*, R.S.B.C. 1996, c. 7, s. 1, she submitted that persons who are under 19 do not have the capacity to contract and therefore cannot validly agree to a forum selection clause. However, even assuming Ms. Douez is correct that persons who are under 19 cannot validly contract, the issue at this stage is whether the forum selection clause is enforceable against her. Logically, only if the clause is unenforceable against Ms. Douez can the action continue and potentially be certified as a class proceeding. At this point in the analysis there is no class;

there is only Ms. Douez (see *Ezer v. Yorkton Securities and Danzig*, 2004 BCSC 487 at para. 29, aff'd 2005 BCCA 22).

D. Does s. 4 of the *Privacy Act* override the forum selection clause?

[45] The judge held that s. 4 of the *Privacy Act* confers exclusive jurisdiction on the B.C. Supreme Court, to the exclusion of other courts worldwide. In this sense, s. 4 "overrides" the forum selection clause by providing that the courts of Santa Clara do not have jurisdiction to hear this proceeding.

[46] Facebook submitted that this conclusion was in error. It said s. 4 of the *Privacy Act* means only that the B.C. Supreme Court has jurisdiction to the exclusion of other courts in B.C. – in particular, the Provincial Court, which cannot grant injunctions or other equitable relief that may be necessary to enforce the *Privacy Act*. Ms. Douez responded that similar arguments have been rejected in a number of analogous cases in various jurisdictions.

[47] In my respectful opinion, the judge erred in her interpretation of s. 4. She failed to give effect to the principle of territoriality.

[48] The principle of territoriality is that B.C. law applies only in B.C. Our Legislature is powerless to affect the law of other jurisdictions. To the extent B.C. law has any effect outside B.C., it is because other jurisdictions choose, for reasons of comity, to provide in their own law that this shall be the case – typically with a choice of law rule. So, for example, the reason that two people who were married in B.C. may still be regarded as married while visiting England is that English private international law accords them that status, not that B.C. marriage law somehow applies extraterritorially in England.

[49] These principles are longstanding. In the mid-19th century, Joseph Story expressed them so (*Commentaries on the Conflict of Laws*, 4th ed. (Boston: Little, Brown, 1852) at 11):

> It is plain that the laws of one country can have no intrinsic force, *proprio vigore* [by their own operation], except within the territorial limits and jurisdiction of that country. They can only bind its own subjects and those who remain within its jurisdictional limits; and the latter only, while they remain therein. No other nation, or its subjects, are bound to yield the slightest obedience to those laws. Whatever extra-territorial force they are to have, is the result not of any original power to extend them abroad, but of that respect, which from motives of public policy other nations are disposed to yield to them, giving them effect … with a wise and liberal regard to the common convenience and mutual benefits and necessities.

[50] The Supreme Court of the United States adopted these ideas in *Pennoyer v. Neff*, 95 U.S. 714 (1877) at 722, *per* Mr. Justice Field: "the laws of one State have no operation outside of its territory except so far as is allowed by comity".

[51] Lord Chief Justice Russell of the United Kingdom expressed a similar view in *R. v. Jameson*, [1896] 2 Q.B. 425 at 430:

> One other general canon of construction is this—that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.

(For a recent affirmations of this principle, see *Masri v. Consolidated Contractors International (UK) Ltd (No 4)*, [2009] UKHL 43 at para. 10; *Al Skeini v. Secretary of State for Defence*, [2007] UKHL 26 at para 11.)

[52] In Canada, s. 92 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, begins "*In each Province* the Legislature may exclusively make Laws in relation to …" (emphasis added). The legislative power of each province is constitutionally circumscribed to its territory.

[53] In *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, Mr. Justice La Forest for the Court found the following principle to be "self evident" (at 1052):

> State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country, or for that matter the actions in State B of citizens of State C, and it would lead to unfair and unjust results if it did.

[54] These comments resonate with those of Lord Justice Brooke in *Kuwait Airways Corporation v. Iraqi Airways Company* [2001] 3 W.L.R. 1117 at para. 318 (E.W.C.A.), aff'd [2002] UKHL 19:

> there is the *prima facie* rule that a foreign sovereign is to be accorded that absolute authority which is vested in him to act within his own territory as a sovereign acts. This rule reflects concepts of both private and public international law as to territorial sovereignty. As such, we think that the rule is founded primarily on a view as to the comity of nations … each sovereign says to the other: 'We will respect your territorial sovereignty. But there can be no offence if we do not recognise your extraterritorial or exorbitant acts.'

[55] In *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, the issue was whether a loss-sharing provision of the Ontario *Insurance Act*, R.S.O 1990, c. I.8, applied to a B.C. insurer. Two Ontario residents were visiting B.C. when they were injured in a motor vehicle collision. They sued in B.C. and were awarded damages, payable by the Insurance Corporation of B.C. on behalf of the tortfeasor. The injured parties were also compensated by their own Ontario insurer. ICBC deducted the Ontario award from its payment to the injured parties. Relying on the loss-sharing provision in the Ontario *Insurance Act*, the Ontario insurer took the position that ICBC was required to indemnify it. The Court disagreed, with Mr. Justice Binnie explaining that "If the Ontario Act purported to regulate civil rights in B.C. arising out of an accident in that province, this would be an impermissible extraterritorial application of provincial legislation" (at para. 50). He emphasized that "a province has no legislative competence to legislate extraterritorially" (at para. 50; see also *Royal Bank of Canada v. The King*, [1913] A.C. 283 (P.C.); *Hunt v. T&N plc*, [1993] 4 S.C.R. 289).

[56] I am aware that some civil law states do purport to apply some of their laws extraterritorially. France, for example, purports to extend French law concerning status and capacity to French citizens wherever they are in the world (art. 3 C. civ.). It may be that these sorts of laws also have extraterritorial effect not by their own operation, but only to the extent that other states choose to give them such effect with a choice of law rule (see e.g. art. 3083 CCQ ("status and capacity of a natural person are governed by the law of his domicile")). In any event, I need not decide

this issue. This appeal involves only British Columbia and California, both of which are, of course, common law states.

[57] I am also aware that the principle of territoriality has been relaxed in a number of specific contexts. *Unifund* recognized that the principle of territoriality was traditionally expressed in "very physical terms" (at para. 62). However, as technology has made it easier to act within a state without being physically present there, the principle has come to be expressed in a more nuanced manner that focuses "less on the idea of actual physical presence and more on the relationships among the enacting territory, the subject matter of the law, and the person sought to be subjected to its regulation" (at para. 63). Thus, for example, Canada extends its criminal law to aircraft destined for Canada (*Criminal Code*, R.S.C. 1985, c. C-46, s. 7(1)(b)). It is also a criminal offence for a Canadian to engage in terrorism anywhere in the world (s. 7(3.73)). Most foreign states would likely acknowledge that Canada has a legitimate interest in applying its criminal law extraterritorially in this manner.

[58] However, in my opinion, most foreign states would not permit Canada or B.C. to apply its *jurisdictional* law extraterritorially. And yet Ms. Douez must establish that s. 4 of the B.C. *Privacy Act* applies extraterritorially in California. In support of this proposition she relied on *Voyage Co. Industries Inc. v. Craster*, 1998 CanLII 1776 (B.C.S.C.); *Incorporated Broadcasters Ltd v. Canwest Global Communications Corp.,* 2001 CanLII 28395 (O.N.S.C.); *Nord Resources Corp v. Nord Pacific Ltd.*, 2003 NBQB 201; *Zi Corp v. Steinberg*, 2006 ABQB 92; *Ironrod Investments Inc. v. Enquest Energy Services Corp.*, 2011 ONSC 308; and *Gould v. Western Coal Corp.*, 2012 ONSC 5184.

[59] In my view, the cases relied on by Ms. Douez do not assist her. In the instant case the judge concluded that s. 4 of the *Privacy Act* operates to deprive California courts of territorial competence over this proceeding. However, in *Voyage* (at para. 12) and *Incorporated Broadcasters* (which was appealed, 63 O.R. (3d) 431 (C.A.); see paras. 72-73), the court was persuaded by an analogous statutory

provision that it was *forum non conveniens*. The court did *not* find that the provision deprived it of territorial competence. *Forum non conveniens* and territorial competence are distinct issues, so these cases are of no assistance.

[60] Though it is not entirely clear, *Gould* may also have been decided on the basis of *forum non conveniens*. Mr. Justice Strathy, now Chief Justice of Ontario but then a justice of the Superior Court, reasoned as follows (at para. 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.

[61] I would have interpreted this passage as holding that B.C. legislation deprived the Ontario court of jurisdiction. However, in *Kaynes v. BP*, 2014 ONCA 580 at para. 47, the Ontario Court of Appeal interpreted *Gould* to be a *forum non conveniens* case rather than a jurisdiction case. *Gould* was cited for the proposition that, as part of the *forum non conveniens* analysis, the court must consider whether the alternate forum claims exclusive jurisdiction for itself. If this is the correct interpretation of *Gould*, it is of no assistance to Ms. Douez.

[62] Even if *Gould* did hold that B.C. law applied extraterritorially in Ontario, this would not assist Ms. Douez. She needs to satisfy the Court that B.C. law applies extraterritorially *in California*. *Gould*, dealing as it does with Ontario law, cannot establish such a proposition. Nor can *Nord Resources* (New Brunswick law), *Zi Corp* (Alberta law) or *Ironrod* (also Ontario law).

[63] In other words, even if some states consider the laws of other states to be binding in their territory, Ms. Douez has not provided any evidence that California is such a state. As a matter of B.C. law, no state (including B.C.) may unilaterally arrogate exclusive adjudicative jurisdiction for itself by purporting to apply its jurisdictional rules extraterritorially. If Ontario, New Brunswick or Alberta law provides otherwise, that tells us nothing about California.

[64] In the absence of evidence to the contrary, I must conclude that Santa Clara courts determine for themselves, using California law, whether they have territorial competence over any given proceeding. Santa Clara courts would presumably consider B.C. law and have due regard to comity, but nothing enacted by the B.C. Legislature can bind the courts of Santa Clara unless California so chooses.

[65] Therefore, I agree with Facebook that s. 4 must be interpreted to mean that the B.C. Supreme Court has jurisdiction to the exclusion only of other courts in B.C., not other courts worldwide.

[66] There is an important distinction between subject matter competence (*ratione materiae*) and territorial competence (*ratione loci*). The *CJPTA* defines both (s. 1):

> "subject matter competence" means the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence;
>
> "territorial competence" means the 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.

[67] Section 4 of the *Privacy Act* is a rule of subject matter competence. In effect, it means that even if the Provincial Court has territorial competence over a proceeding based on the *Privacy Act*, it does not have subject matter competence.

[68] I am fortified in this conclusion by the following considerations. The torts created by the *Privacy Act* have certain affinities with libel and slander in the sense that a defamatory statement might also be actionable as a breach of privacy. Indeed, there have been several instances in B.C. where a plaintiff has commenced an action both for libel or slander and breach of privacy (see e.g. *Fouad v. Longman*, 2014 BCSC 785; *Aschenbrenner v. Yahemech*, 2010 BCSC 905; *Griffin v. Sullivan*, 2008 BCSC 827). The *Privacy Act* was first enacted in 1968 (as S.B.C. 1968, c. 39). Then, as now, the Supreme Court had exclusive subject matter competence over claims for libel and slander (*Small Debts Courts Act*, R.S.B.C. 1960, c. 359, s. 5(a);

now *Small Claims Act*, R.S.B.C. 1996, c. 430, s. 3(2)). The Legislature was clearly aware of the potential overlap between defamation and breach of privacy, as the *Privacy Act* provides that a publication is not a breach of privacy if it was privileged within the meaning of the law of defamation (s. 2(3)(b)). It is consistent that the Legislature would have conferred the Supreme Court with exclusive subject matter competence over the new *Privacy Act* torts as well.

[69] Finally, Ms. Douez relied on *Seidel v. TELUS Communications Inc.*, 2011 SCC 15. In that case the parties had agreed to a mandatory arbitration clause but Ms. Seidel commenced an action in the B.C. Supreme Court, relying on a cause of action in the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "*BPCPA*"). Telus applied for a stay. The Court held that a stay should not be granted and the action should proceed. Crucially, s. 172 of the *BPCPA* provides that a person "may bring an action in Supreme Court" for a breach of that act and s. 3 provides that a contract is void to the extent it waives "rights, benefits or protections" conferred by the *BPCPA*. The Court held that the *BPCPA* conferred a right on Ms. Seidel to bring her claim in the B.C. Supreme Court and that, to the extent the mandatory arbitration clause abrogated this right, it was void under s. 3.

[70] Ms. Douez sought to extend this reasoning to the instant case. She submitted that, because s. 4 of the *Privacy Act* is mandatory rather than permissive, it operates just like the combination of ss. 3 and 172 of the *BPCPA*. In oral argument, counsel for Ms. Douez went as far as to say that, because of s. 4, parties can *never* contract out of the *Privacy Act*.

[71] I disagree. The reasoning in *Seidel* does not extend to the instant case, because there is nothing in the *Privacy Act* that is analogous to s. 3 of the *BPCPA*. Section 4 of the *Privacy Act* and s. 172 of the *BPCPA* are both rules of subject matter competence. The former is exclusive while the latter is not, but that does not change their essential character. There is no basis for interpreting s. 4 as operating like s. 3 of the *BPCPA*. If the Legislature had intended to render void (in B.C.) any forum selection clauses that might deprive B.C. residents of the right to bring *Privacy*

Act claims in the B.C. Supreme Court, it would have added language similar to s. 3 of the *BPCPA*, or it would said so explicitly (see e.g. *Marine Liability Act*, S.C. 2001, c. 6, s. 46(1): "If a contract … provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada [in certain circumstances]"). Section 4 provides only that it applies "Despite anything contained in another Act", not also despite anything contained in a contract.

[72] Finally, though I recognize this has occurred in the jurisprudence, I doubt it is appropriate to analogize a mandatory arbitration clause to an exclusive forum selection clause. Mandatory arbitration does not move the litigation outside the jurisdiction; it merely changes the venue and (generally) offers confidentiality. A forum selection clause transposes the litigation into an entirely different legal system. The policy considerations are not the same.

[73] In conclusion, the judge erred in interpreting s. 4 of the *Privacy Act* to "override" the forum selection clause by depriving California courts of territorial competence over *Privacy Act* proceedings. Section 4 is a rule of subject matter competence that, like all B.C. law, applies only in B.C. California courts determine for themselves, using California law, whether they have territorial competence over any given proceeding.

E. Has Ms. Douez shown strong cause to not enforce the clause?

[74] The judge also concluded, alternatively, that Ms. Douez had shown strong cause for the Court to decline to enforce the forum selection clause. This conclusion also depended on her interpretation of s. 4 of the *Privacy Act*. If the courts of California would not have territorial competence to hear this proceeding, then a stay in B.C. would effectively deprive Ms. Douez of her right to bring a claim under s. 3(2). In that case the forum selection clause would operate like an exclusion of liability clause. According to the judge, this would be contrary to the legislative intent of the *Privacy Act* and to public policy more generally.

[75] I agree with the judge that, if the effect of a stay would be to extinguish Ms. Douez's claim, that might very well be strong cause not to enforce the forum selection clause. However, as already explained, s. 4 of the *Privacy Act* does not deprive California courts of territorial competence to hear this proceeding.

[76] Because the burden to show strong cause rests on Ms. Douez, the first issue is whether Ms. Douez *otherwise* established that California courts would not have territorial competence (under California law) over this proceeding.

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

[78] To be clear, I am not making a finding that California courts *would* have territorial competence. I make no finding one way or the other. I find only that Ms. Douez did not show California courts would not have territorial competence.

[79] It remains to be considered whether Ms. Douez demonstrated other factors that would amount to strong cause for this Court to not enforce the forum selection clause. However, all her submissions depended on the judge's conclusion that the courts of Santa Clara would lack territorial competence. Once this conclusion falls away, Ms. Douez is left with no arguments capable of convincing this Court to decline to enforce the forum selection clause.

[80] In sum, the judge's holding that Ms. Douez had shown strong cause is undermined by the judge's erroneous interpretation of s. 4 of the *Privacy Act*. Ms. Douez did not make any submissions that did not depend on the same interpretation. I am left with no choice but to conclude that Ms. Douez did not show strong cause. I would enforce the forum selection clause.

F. *CJPTA*, s. 11

[81] In light of my conclusions on the *Pompey* test, it is unnecessary for me to consider Facebook's submission that the judge erred in concluding B.C. was not *forum non conveniens* within the *CJPTA* framework.

[82] However, I would remark that I do not agree with Facebook that the judge erred – at least as a matter of private international law – in not deciding the choice of law issue.

[83] The *CJPTA* requires a judge hearing an application for a stay of proceedings to "consider … the law to be applied" (s. 11(b)). As a matter of plain language, "consider" does not mean "decide". More importantly, it will often not be possible at the early stage of a stay application to decide which law applies to the merits. It is not always clear which choice of law rule applies. Even when it is, some rules are quite fact dependent. *Renvoi* may also need to be considered. In short, choice of law is complicated and I interpret s. 11(b) of the *CJPTA* to require only that the judge grapple with the issue, recognizing that it will often not be possible to fully resolve this issue at the early stage of a stay application. A good example, albeit one that was decided before the *CJPTA* was enacted, is *Loewen Group Inc. v. Continental Insurance Co. of Canada* (1997), 44 B.C.L.R. (3d) 387 at paras. 25-32 (S.C.).

[84] I recognize that these factors may be less salient in the instant case, because Ms. Douez agreed to a choice of law clause selecting California law "without regard to conflict of law provisions" (which I take to mean 'excluding the operation of *renvoi*'). Still, the judge did not fail to apply s. 11(b) by merely considering, rather than deciding, which law applies to the merits. (I do not express a view as to whether she erred as a matter of the law applying to certification applications.)

VI. Conclusion

[85] For these reasons, I conclude the judge erred in law (chiefly in her interpretation of s. 4 of the *Privacy Act*) when deciding not to enforce the forum selection clause. I agree with Facebook that the clause should be enforced. I would

therefore allow the appeal in CA41917 and enter a stay of the underlying action. (Ms. Douez is at liberty to bring her action in California.) This disposition of CA41917 would render CA41918 moot and I decline to address it.

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Mr. Justice Lowry"

I AGREE:

"The Honourable Mr. Justice Goepel"