

Roger Williams University

DOCS@RWU

Law Faculty Scholarship

Law Faculty Scholarship

Summer 2018

Forum Selection Clauses and Consumer Contracts in Canada

Tanya Monestier

Roger Williams University School of Law

Follow this and additional works at: https://docs.rwu.edu/law_fac_fs



Part of the [Consumer Protection Law Commons](#), [Contracts Commons](#), and the [Jurisdiction Commons](#)

Recommended Citation

Tanya J. Monestier, Forum Selection Clauses and Consumer Contracts in Canada, 36 B.U. Int'l L.J. 177, 220 (2018)

This Article is brought to you for free and open access by the Law Faculty Scholarship at DOCS@RWU. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

HEINONLINE

Citation:

Tanya J. Monestier, Forum Selection Clauses and Consumer Contracts in Canada, 36 B.U. Int'l L.J. 177 (2018)

Provided by:

Roger Williams University School of Law Library

Content downloaded/printed from [HeinOnline](#)

Fri Feb 8 14:57:24 2019

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

FORUM SELECTION CLAUSES AND CONSUMER CONTRACTS IN CANADA

Tanya J. Monestier*

ABSTRACT

Every day, billions of people use the online social media platform, Facebook. Facebook requires, as a condition of use, that users “accept” its terms and conditions—which include a forum selection clause nominating California as the exclusive forum for dispute resolution. In *Douez v. Facebook*, the Supreme Court of Canada considered whether this forum selection clause was enforceable, or whether the plaintiff could proceed with her suit in British Columbia.

The Supreme Court of Canada ultimately decided that the forum selection clause was not enforceable. It held that the plaintiff had established “strong cause” for departing from the forum selection clause. The Court premised its decision on two primary considerations: the contract involved a consumer and was one of adhesion, and the claim involved the vindication of privacy rights.

The Court’s analysis suffers from several major weaknesses that will undoubtedly cause confusion in this area of law. This Article will examine those weaknesses, and argue that the Supreme Court of Canada actually abandoned the strong cause test that it claimed to be applying. The consequence of the *Douez* decision is that many forum selection clauses—at least in the consumer context—will be rendered unenforceable. While this may be a salutary development from the perspective of consumer protection, it will undoubtedly have an effect on companies choosing to do business in Canada.

I.	INTRODUCTION	178
II.	A BRIEF BACKGROUND ON FORUM SELECTION CLAUSES IN COMMON LAW CANADA	180
III.	DOUEZ V. FACEBOOK	187
	A. <i>The Factual Background</i>	187

* Professor of Law, Roger Williams University School of Law. The author would like to thank Jillian Nobis for her very helpful research assistance in the preparation of this Article.

B.	<i>The Judgments Below</i>	188
1.	Supreme Court of British Columbia (Griffin, J.)	188
2.	Court of Appeal for British Columbia (Bauman, C.J. and Lowry and Goepel, J.J.A.).....	189
C.	<i>The Supreme Court of Canada</i>	190
1.	The Majority Judgment (Karakatsanis, Wagner and Gascon, J.J.)	192
2.	The Concurrence (Abella, J.)	194
3.	The Dissent (McLachlin, C.J. and Moldaver and Côté, J.J.)	196
IV.	TAKING A CLOSER LOOK AT <i>DOUEZ V. FACEBOOK</i>	198
A.	<i>The Majority's Use of "Public Policy" Factors to Displace the Forum Selection Clause is Problematic</i>	198
1.	Unequal Bargaining Power	199
2.	The Privacy Rights at Issue.....	202
B.	<i>The "Secondary Factors" Used by the Majority Do Not Support Displacing the Forum Selection Clause</i>	207
1.	Interests of Justice	207
2.	Comparative Convenience and Expense of Litigating in the Alternative Forum	209
C.	<i>The Majority Did Not Consider, Much Less Balance, the Relevant Pompey Factors</i>	210
D.	<i>The Majority Did Not Hold the Plaintiff to the Burden of Establishing Strong Cause</i>	213
E.	<i>Justice Abella's Concurrence Muddies Contract Law Doctrines</i>	214
V.	WHERE DO WE GO FROM HERE?.....	216
VI.	CONCLUSION	220

I. INTRODUCTION

Emily, a Nova Scotia resident, logs onto Porter Airlines' website, www.flyporter.com, and sees that fares from Halifax to Boston are advertised as starting from CAD \$150 one way. Emily proceeds to choose the least expensive flights, which total \$300 roundtrip. On the last booking screen, however, the price jumped up to \$225 each way (for a total of \$450 roundtrip) with a notation that indicated "Price Change." Emily does not notice this change and proceeds to enter her credit card information and click "Purchase." She later discovers that she was charged \$450 for the transaction. Unbeknownst to Emily, there is a provision in fine-print on Porter's website that says "[i]n case of any discrepancy between advertised fares and the fares

shown on the website at the time of booking, the latter shall prevail.”¹ Emily wants to sue Porter in Nova Scotia, but is told by a lawyer that by booking with Porter she has also agreed to the following provision:

You hereby agree and confirm that your use of the Web Site and all of the communications, transmissions and transactions associated with the Web Site shall be deemed to have occurred in the Province of Ontario, Canada and that you irrevocably agree that the courts of the Province of Ontario, Canada as the proper and most convenient forum concerning the Web Site, shall have exclusive jurisdiction to settle any and all disputes arising out of these Terms of Use and you irrevocably submit and attorn to the jurisdiction of the courts of the Province of Ontario, Canada.²

Does Emily have to initiate suit against Porter in Ontario? Or, can she sue in Nova Scotia, her home jurisdiction? Prior to the Supreme Court of Canada’s decision in *Douez v. Facebook*, it was likely that a Nova Scotia court would enforce the forum selection clause and require Emily to pursue her claim in Ontario.³ After *Douez*, the answer is not so clear. *Douez* has opened up the possibility that forum selection clauses in consumer contracts (or at least *some* consumer contracts) may not be enforceable. If this is the case, *Douez* has the potential to cause major upheaval in the law.

In *Douez*, the Supreme Court of Canada refused to enforce a forum selection clause in favor of California in an online contract between Facebook and an individual plaintiff.⁴ The Court reasoned that public policy concerns militated against enforcement.⁵ In particular, the Court focused on the disparity of bargaining power in the contract and the nature of the rights at issue to conclude that the forum selection clause was not enforceable.⁶ The Court’s analysis suffers from several major weaknesses that have the potential to wreak havoc in this area of law. This Article will explore in detail those weaknesses, and argue that the *Douez* decision actually abandoned the “strong cause” test that the Court said it was applying. The consequence is that after *Douez*, the strong cause test remains in name only—in substance, the law related to forum selection clauses in consumer contracts has changed dramatically. While arguably a positive development for consumers, this will

¹ *Special Offers: Terms and Conditions*, FLY PORTER, <https://www.flyporter.com/en-ca/special-offers/website-savings> [<https://perma.cc/RUV8-Q2YM>].

² *Terms of Use*, FLY PORTER, <https://www.flyporter.com/en-ca/terms-of-use> [<https://perma.cc/7BL7-PDYT>].

³ See *Rudder v. Microsoft Corp.*, 1999 CanLII 14923 (Can. Ont. S.C.J.); *Douez v. Facebook, Inc.*, 2017 SCC 33 (Can.).

⁴ *Douez*, 2017 SCC 33, at para. 4.

⁵ *Id.*

⁶ *Id.*

undoubtedly have ripple effects on companies doing business in Canada.

This Article proceeds as follows: Part II of this Article provides a brief background on forum selection clauses in common law Canada and discusses the prevailing “strong cause” test for enforceability. Part III explores the *Douez* decision in detail, examining each of the majority, concurring, and dissenting judgments. Part IV takes a closer look at the *Douez* decision and makes the following arguments: a) the Court’s use of two separate “public policy” considerations in *Douez* is problematic; b) the Court’s use of “secondary factors” to bolster its decision to displace the forum selection clause is equally problematic; c) the Court failed to consider, much less balance, the relevant factors under the strong cause analysis; d) the Court did not hold the plaintiff to her burden of establishing strong cause, and e) the concurring judgment focusing on public policy and unconscionability muddies contract law doctrine. Part V makes some global observations about the shift in the law related to forum selection clauses and what this means for future cases. Finally, Part VI offers some concluding remarks.

II. A BRIEF BACKGROUND ON FORUM SELECTION CLAUSES IN COMMON LAW CANADA

A forum selection clause, also known as a jurisdiction clause or choice of court clause, is a provision that parties put in their contract designating in advance what court they would like to hear their case in the event of a dispute.⁷ Such clauses can be “exclusive” (mandatory) or “non-exclusive” (permissive).⁸ An exclusive jurisdiction clause mandates that the dispute be heard only in the designated forum.⁹ Thus, an exclusive jurisdiction clause purports to prevent the assertion of jurisdiction by any court other than that nominated in the clause. By contrast, a non-exclusive jurisdiction clause simply confers jurisdiction on the nominated court, but does not preclude the possibility of the parties suing in a court other than the one named in the clause.¹⁰

⁷ *Forum Selection Clause*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁸ Maxwell J. Wright, *Enforcing Forum-Selection Clauses: An Examination of the Current Disarray of Federal Forum-Selection Clause Jurisprudence and a Proposal for Judicial Reform*, 44 LOY. L.A. L. REV. 1625, 1635 (2011) (“The taxonomy that is generally employed distinguishes between ‘mandatory’ and ‘permissive’ clauses. A mandatory clause has been described as one that requires any dispute arising under the contract to be brought only in a specified state or foreign court. Alternatively, a permissive clause has been described as one that allows a contract dispute to be brought in either a state or federal court located in the designated forum.”).

⁹ *Id.*

¹⁰ See Mariana Pavlović, *Contracting Out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts*, 62 MCGILL L.J. 389, 395 (2016) (“An exclusive forum-selection clause contains both the positive and negative elements. The clause provides

An issue arises when a party sues in contravention¹¹ of an exclusive jurisdiction clause (hereinafter referred to as a “forum selection clause”).¹² For instance, a forum selection clause might provide that the parties agree to the exclusive jurisdiction of the courts of Ontario, but the plaintiff sues in Nova Scotia instead. The Nova Scotia court must decide what the forum selection clause in favor of Ontario means for its possible assertion of jurisdiction over the defendant. Historically, forum selection clauses were thought to “oust” the jurisdiction of courts other than those designated in the clause.¹³ Over time, however, this ouster theory was rejected; instead, the clause was not regarded as having an effect on the ability of a non-nominated court to assert jurisdiction over a defendant.¹⁴ Thus, in the above example, so long as Nova Scotia otherwise had jurisdiction over the defendant, it could exercise jurisdiction. With that said, courts faced with a forum selection clause in favor of another jurisdiction would regard the fact that the parties had chosen another court to adjudicate the dispute as significant in the jurisdictional calculus. Accordingly, courts would stay their proceedings in the face of a forum selection clause (even though they had jurisdiction), in effect requiring a party to sue in the designated forum if they wished to pursue their claim.¹⁵

that only the nominated court will decide a dispute and ‘preclude[s] the parties from seeking relief in [an]other for[um].’ A *non-exclusive* (permissive) forum-selection clause contains only the positive obligation. It provides that a nominated court may decide a dispute, but the clause on its own does not exclude the jurisdiction of other courts.”) (footnote omitted).

¹¹ It is not possible to sue in contravention of a non-exclusive jurisdiction clause, since a non-exclusive clause presupposes that other courts may also assert jurisdiction. Where a party sues in a forum other than that designated in a non-exclusive jurisdiction clause, a Canadian court will consider the jurisdiction clause as part of a general *forum non conveniens* analysis. *See id.* (“The enforcement of non-exclusive clauses is not subject to a distinct jurisdictional test; rather, these clauses are considered as one of the factors in the *forum non conveniens* analysis by either the nominated or non-nominated court.”).

¹² Even though it is common to use the expression “exclusive jurisdiction clause,” it is not common to use the expression “exclusive forum selection clause.” The use of the term forum selection clause generally presupposes that the clause is an exclusive one.

¹³ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (“Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were contrary to public policy, or that their effect was to oust the jurisdiction of the court.”) (citations omitted).

¹⁴ In common law provinces, a forum selection clause cannot bind a court or interfere with a court’s jurisdiction. *Douez*, 2017 SCC 33, at para. 27. (“As the English Court of Appeal recognized long ago, ‘no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them’ (*The Fehmarn*, [1958] 1 All E.R. 333, at p. 335).”).

¹⁵ For a fulsome discussion of the history of forum selection clauses in Canada, *see* Geneviève Saumier & Jeffrey Bagg, *Forum Selection Clauses Before Canadian Courts: A Tale of Two (or Three?) Solitudes*, 46 UBC L. REV. 439 (2013).

The Supreme Court of Canada addressed the issue of the enforceability of forum selection clauses fifteen years ago in *Z.I. Pompey v. ECU Line*.¹⁶ *Pompey* involved a forum selection clause in a bill of lading providing that “any claim or dispute arising [under the contract of carriage] . . . shall be determined by the courts in Antwerp and no other Courts.”¹⁷ The plaintiff alleged that the defendant was responsible for damage to cargo while in transit and sued in the Federal Court of Appeal in contravention of the forum selection clause.¹⁸ The case was eventually appealed to the Supreme Court of Canada.¹⁹ The Court held that the proper test in deciding whether to enforce a forum selection clause was the “strong cause” test set out in the English case, *The “Eleftheria.”*²⁰ Importantly, the Supreme Court of Canada in *Pompey* did not create or endorse a new test for the enforceability of forum selection clauses. It simply reaffirmed that the strong cause test—which had already been used for decades to assess forum selection clauses in common law Canada—continued to apply.²¹ The test provides:

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

¹⁶ *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 (Can.).

¹⁷ *Id.* at 455.

¹⁸ *Id.* at 450.

¹⁹ *Id.*

²⁰ *Id.* at 451.

²¹ *Id.*

religious or other reasons be unlikely to get a fair trial.²²

The Supreme Court of Canada observed that there was an overlap between the factors that are to be taken into account in the strong cause analysis and those factors that are typically considered by a court in deciding whether to stay proceedings under the *forum non conveniens* doctrine.²³ The major difference, however, lies in the burden of proof. Under the strong cause test, the “starting point” is that “parties should be held to their bargain, and . . . the plaintiff has the burden of showing why a stay should not be granted.”²⁴ The Court noted that the “test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause”²⁵ and that “[i]t is essential that courts give full weight to the desirability of holding contracting parties to their agreements.”²⁶

The Supreme Court emphasized that forum selection clauses “are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law.”²⁷ The Court did not believe that there was “reason to consider forum selection clauses to be non-responsibility clauses in disguise.”²⁸ And, in any event, the strong cause test “provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.”²⁹

Lower courts in common law Canada have largely followed the strong cause test and routinely stayed proceedings in the face of an otherwise enforceable forum selection clause.³⁰ Courts have emphasized the

²² *Id.* at 462. Clearly, the relevant Canadian forum is substituted for the word “England.”

²³ *Id.* at 463.

²⁴ *Id.* at 464.

²⁵ *Id.* at 463.

²⁶ *Id.*

²⁷ *Id.* (citation omitted).

²⁸ *Id.*

²⁹ *Id.*

³⁰ See generally Pavlović, *supra* note 10. Professor Pavlović’s analysis reveals that “[t]he level of the courts’ analysis can be grouped into three categories: conflated jurisdictional tests; application and under-analysis of the strong-cause test; and traditional application of the strong-cause test.” *Id.* at 410. She further observes that:

The majority of cases, which comprise the third group, applied the strong-cause test and analyzed the applicable strong-cause factors in light of the ‘factual matrix’ of the cases. All five of the factors listed in *The Eleftheria*—the location of evidence; the applicable law; the connection between the parties and the forum or the other relevant jurisdiction; the impact on the defendant and the impact on the plaintiff to sue in the nominated jurisdiction—have been considered in these cases. More recent cases, which used the *Expedition Helicopters* version of the test, considered juridical advantage, public

importance of holding parties to their bargains, particularly in the commercial context. For instance, in *Expedition Helicopters Inc. v. Honeywell Inc.*,³¹ the Ontario Court of Appeal took a very strict approach to enforcing forum selection clauses in commercial contracts:

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 the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy. Apart from circumstances such as these, a forum selection clause in a commercial contract should be enforced.³²

Canadian courts have largely treated commercial and consumer contracts alike in their application of the strong cause test.³³ For instance, in *Rudder v. Microsoft Corp.*,³⁴ plaintiffs were members of MSN online services and brought an action in Ontario on behalf of Canada-wide subscribers, alleging that Microsoft breached its “Member Agreement.”³⁵ The Member Agreement contained a provision stating that “[t]his Agreement is governed by the laws of the State of Washington, U.S.A., and you consent to the exclusive jurisdiction and venue of courts in King County, Washington, in all disputes arising out of or relating to your use of MSN or your MSN membership.”³⁶ Relying on this clause, the defendant sought to have the intended class proceeding permanently stayed, arguing that under this clause, both parties agreed to the exclusive jurisdiction of Washington.³⁷ Applying the strong cause test, the Ontario Superior Court of Justice found that

policy, as well as other relevant factors.

Id. at 411-12.

³¹ *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351 (Can.).

³² *Id.* at para. 24.

³³ Pavlović, *supra* note 10; at 406 (“With the exception of four cases, the courts have applied the existing (commercial) rules as they are, with little regard, if any, to the specific nature of the consumer transactions or the crucial implications that staying local proceedings has on consumers’ ability to seek and obtain redress.”) (footnote omitted).

³⁴ *Rudder*, 1999 CanLII 14923.

³⁵ *Id.* at paras. 4-5.

³⁶ *Id.* at para. 5.

³⁷ *See id.*

plaintiffs did not meet their burden and permanently stayed the action.³⁸

Similarly, in *Ezer v. Yorkton Securities*,³⁹ the plaintiff opened up a brokerage account with the defendant corporation, agreeing to the following standard provision: “Any disputes arising between Yorkton and the Client shall be exclusively within the jurisdiction of the Courts of the Province in which Yorkton accepts this agreement.”⁴⁰ The plaintiff subsequently sought to sue in British Columbia, despite having agreed to sue in Ontario (the province where the defendant had accepted the agreement).⁴¹ The plaintiff argued that his medical condition prevented him from bringing proceedings in Ontario, and also noted that there were procedural advantages to bringing a class action in British Columbia as opposed to Ontario.⁴² The British Columbia Supreme Court applied the strong clause test, and ultimately upheld the forum selection clause in favor of Ontario.⁴³

The Ontario Court of Appeal came to a similar result in *Manjos v. Fridgant*,⁴⁴ a case involving a forum selection clause in favor of British Columbia contained in a client account agreement. The plaintiffs had tried arguing that “the principles set out in *Expedition Helicopters* should be modified to recognize that their client account agreements were more in the nature of consumer contracts, not commercial ones,” and that “less weight should be accorded to a forum selection clause in a consumer contract.”⁴⁵ The Ontario Court of Appeal disagreed. The court noted that the individual plaintiffs were well educated and sophisticated, and that “[a] person who signs an investment contract acts at his or her own peril if they fail to read the document before signing it.”⁴⁶ Accordingly, the Court of Appeal upheld the lower court’s stay of the Ontario action.⁴⁷

Some courts, however, have struggled to apply the strong cause test in non-commercial contexts. For instance, in *Stubbs v. ATS International BV*,⁴⁸ the Ontario Court of Appeal “question[ed] whether the ‘strong cause’ test applies without modification because the clause in this case arises in an employment context, rather than a commercial situation where the parties are assumed to have equal bargaining power.”⁴⁹ In *Friesen v. Norwegian Cruise Lines*

³⁸ *Id.* at paras. 19, 26.

³⁹ *Ezer v. Yorkton Securities Inc.*, 2004 BCSC 487 (Can.).

⁴⁰ *Id.* at para. 7.

⁴¹ *Id.* at para. 1.

⁴² *Id.* at para. 26.

⁴³ *Id.* at para. 29.

⁴⁴ *Manjos v. Fridgant*, 2016 ONCA 176 (Can.).

⁴⁵ *Id.* at para. 5.

⁴⁶ *Id.* at para. 8.

⁴⁷ *Id.* at para. 12.

⁴⁸ *Stubbs v. ATS International BV*, 2010 ONCA 879 (Can.).

⁴⁹ *Id.* at para. 58.

Ltd.,⁵⁰ the British Columbia Supreme Court did apply the strong cause test, but ultimately concluded that it was satisfied, noting that “if [the court] were to stay this action in favour of a Florida Court, that would come close to denying the plaintiff access to a court at all.”⁵¹ The British Columbia court was clearly concerned about the forum selection clause in a contract of adhesion impeding the plaintiffs’ access to justice. And, in *Microcell Communications Inc. v Frey*, the Court of Appeal for Saskatchewan held that the plaintiff had, in fact, shown strong cause for departing from a forum selection clause.⁵² The court noted that “[the defendant] seeks procedural advantages rather than a true resolution of the claim against it. Resolution of its claim requires participation in a larger class action than one run along provincial lines. Further, these are contracts of adhesion in essentially a non-commercial setting.”⁵³

These courts have tapped into the sentiment that perhaps there is something unique about forum selection clauses in consumer contracts that warrants treating them differently. In particular, the concern is that these clauses interfere with a claimant’s access to justice by requiring them to litigate far away from home.⁵⁴ This effectively shields a company from liability, since few consumers will go through the hassle and expense of suing a defendant in the contractually designated forum. Professor Pavlović sums up the concerns about forum selection clauses in consumer contracts as follows:

[T]he practical effect is that forum-selection clauses restrict consumers’ access to justice, since the business dictates the choice of court (forum). The forum chosen by the business is its own home forum or a forum most favourable to its interests. In a cross-border business-consumer relationship, the chosen forum is a foreign forum for consumers and it may often, although not always, offer lesser substantive protection than a consumer’s home forum. On the surface, forum-selection clauses provide predictability, as consumers know ahead of time which forum will resolve the dispute. Yet, they significantly restrict consumers’ access to meaningful remedies, since the cost and complexities of pursuing a claim in a foreign forum often outweigh the financial benefits of the claim.⁵⁵

It is against this backdrop that the Supreme Court of Canada came to decide the *Douez* case—a case that squarely placed in issue whether forum selection

⁵⁰ *Friesen v Norwegian Cruise Lines Inc.*, 2003 BCSC 256 (Can.).

⁵¹ *Id.* at para. 27.

⁵² *Microcell Communications Inc. v Frey*, 2011 SKCA 136, at para. 125 (Can.).

⁵³ *Id.* at para. 119.

⁵⁴ See Pavlović, *supra* note 10, at 393-94.

⁵⁵ *Id.*

clauses in consumer contracts should be treated differently than forum selection clauses in commercial contracts.⁵⁶

III. DOUEZ V. FACEBOOK

A. *The Factual Background*

In 2011, Facebook launched a new form of advertising, referred to as “Sponsored Stories.”⁵⁷ The idea was that if a user “liked” a product,⁵⁸ the user’s name and photo would be used to promote the product to the Facebook user’s friends.⁵⁹ Deborah Douez, a resident of British Columbia, launched an action in 2012 alleging that Facebook’s use of her name and picture without her express consent violated her rights under British Columbia’s Privacy Act (“Privacy Act”).⁶⁰ Section 3(2) of the Privacy Act makes it:

[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

⁵⁶ Note that the law with respect to forum selection clauses in Québec differs significantly:

Article 3149 provides for the jurisdiction of Quebec courts in consumer transactions where the consumer is a resident of Quebec, and effectively prohibits contractual restrictions on accessing Quebec courts through arbitration or forum-selection clauses. Additionally, section 11.1 of Quebec’s *Consumer Protection Act* prohibits contractual restrictions on consumers’ “right to go before a court” and has an impact on the enforcement of arbitration clauses and class action waivers in domestic transactions.

See *id.* at 394.

⁵⁷ *Douez*, 2017 SCC 33, at para. 6.

⁵⁸ On Facebook, the “like” button is a feature which allows users to show positive support for what other users have posted. “Likes” can be used on items such as photos, videos, comments, pages, and text posts.

⁵⁹ The chambers described the practice in the following way:

The plaintiff alleges that Facebook used the names and likenesses of people who were users of Facebook, without their permission, for advertising. It did so by creating a product called “Sponsored Stories.” Advertisers paid Facebook for Sponsored Stories, which would feature the name and likeness of Facebook users and the advertising logo and other product or service information of the entity which had purchased the advertising service. These Sponsored Stories would be sent to the Facebook users’ contacts, unbeknownst to the Facebook user whose likeness appears in the ad. For example, a Sponsored Story might go to Deborah Douez’s contacts, saying that she liked a certain product, implying that she endorsed others using or buying the product.

See *Douez*, 2017 SCC 33, at paras. 6-8.

⁶⁰ Privacy Act, R.S.B.C. 1996, c. 373 (Can.).

that purpose.⁶¹

Douez sought to certify a class action on behalf of 1.8 million British Columbians who allegedly had their names and images appropriated by Facebook for Sponsored Stories without their consent.⁶² Facebook, for its part, claimed that it obtained users' consent to the practice when the user agreed to Facebook's Terms of Use.⁶³

Douez filed suit in British Columbia, despite the following clause in the Facebook user agreement that required any suits against Facebook to be brought in the State of California and to be governed by California law:

You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims.⁶⁴

Facebook brought a preliminary motion seeking to stay the action on the basis of the forum selection clause.⁶⁵

B. *The Judgments Below*

1. Supreme Court of British Columbia (Griffin, J.)

The chambers judge denied Facebook's motion for a stay of proceedings based on the forum selection clause in Facebook's terms of use. She concluded that section 4 of the Privacy Act vested exclusive jurisdiction in British Columbia courts with respect to Privacy Act claims, and that exclusive jurisdiction could not be overridden by a forum selection clause.⁶⁶

Even though her determination on exclusive jurisdiction would have resolved the issue, the chambers judge also went on to conclude that there

⁶¹ *Id.* at § 3(2).

⁶² *Douez*, 2017 SCC 33, at para. 7.

⁶³ Facebook says all people using its service had to register as members and accept its terms of use as set out in what it now calls a "Statement of Rights and Responsibilities" (the "Terms of Use"). Facebook claims that through the Terms of Use and other disclosures on its website, and by users' own actions such as in setting their "privacy settings," it obtained the express consent of Facebook users to use their names or likenesses in the Sponsored Stories products. *See id.* at paras. 120-21.

⁶⁴ *Id.* at para. 8. California was (presumably) chosen as the exclusive forum for the resolution of disputes because Facebook is headquartered in California.

⁶⁵ *Id.* at para. 2.

⁶⁶ *See id.* at para. 11.

was strong cause not to enforce the forum selection clause.⁶⁷ She was of the view that enforcing the forum selection clause would absolve Facebook from liability, because only the British Columbia Supreme Court had jurisdiction over the matter, i.e., the California court could not hear Privacy Act claims.⁶⁸ Additionally, she found the purposes behind the Privacy Act, along with public policy reasons, supported a finding of strong cause for displacing the forum selection clause.⁶⁹

2. Court of Appeal for British Columbia (Bauman, C.J. and Lowry and Goepel, JJ.A.)

The Court of Appeal for British Columbia found that the plaintiff had failed to show strong cause for why the forum selection clause should be displaced.⁷⁰ Accordingly, the Court of Appeal reversed the decision of the chambers judge.⁷¹

The Court of Appeal held that the chambers judge had misunderstood the effect of section 4 of the Privacy Act, and that this misunderstanding tainted her subsequent analysis.⁷² In the Court of Appeal's view, section 4 did not confer exclusive jurisdiction over Privacy Act claims to British Columbia courts in general (to the exclusion of other courts).⁷³ Rather, the Court of Appeal indicated that the section covers subject-matter jurisdiction, not territorial jurisdiction.⁷⁴ As such, section 4 conferred jurisdiction on the Supreme Court of British Columbia to the exclusion of all other courts in British Columbia.

The Court of Appeal went on to conclude that the plaintiff did not meet her burden in showing strong cause. The Court explained that the plaintiff did not provide any reason why the case could not be heard in California.⁷⁵ The Court clarified that it was not making a determination on California's territorial competence; rather, the plaintiff simply failed to meet her burden of showing that California lacked territorial competence.⁷⁶ Accordingly, the Court of Appeal found that the forum selection clause should be enforced.

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ *Id.* at para. 15.

⁷¹ *Id.* at para. 13.

⁷² *See id.* at para. 14.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at para. 166 (McLachlin, C.J., dissenting).

⁷⁶ *See id.*

C. *The Supreme Court of Canada*

The majority of the Supreme Court of Canada held that the British Columbia action should not be stayed on the basis of the forum selection clause in favor of California.⁷⁷ The majority divided, however, on why the action should proceed in British Columbia. Three judges concluded that the plaintiff had shown strong cause under *Pompey* that the forum selection clause should be displaced. One judge, however, found that the clause was unenforceable as a matter of contract law. The dissent would have stayed the proceeding on the grounds that the plaintiff had not shown strong cause for displacing the forum selection clause.

Prior to examining each of the Supreme Court judgments, it is helpful to identify areas of agreement in all three judgments. First, all the judges agreed that section 11 of the Court Jurisdiction and Proceedings Transfer Act (“CJPTA”)—the statutory authority for granting a stay of proceedings in the *Douez* case—did not purport to codify the test for the enforceability of forum selection clauses.⁷⁸ Section 11 of the CJPTA is the statutory counterpart to the common law *forum non conveniens* doctrine and directs courts to consider a variety of factors in “deciding the question of whether it or a court outside [the province] is the more appropriate forum in which to hear a proceeding”⁷⁹ The Supreme Court concluded that section 11, which makes no reference to forum selection clauses, “was never intended to codify the test for forum selection clauses.”⁸⁰ The Court held that in the absence of legislation to the contrary, the common law test from *Pompey* “continues to apply and provides the analytical framework” for analyzing the

⁷⁷ *Id.* at para. 76 (majority opinion). The parties are currently in the process of litigating what, if any, weight should be given to the Supreme Court of Canada’s decision in the separate motion to certify the action as a class proceeding under the British Columbia Class Proceedings Act. *Class Proceedings Act*, R.S.B.C. 1996., c. 50 (Can.); see e.g., Respondent’s Supplemental Factum, *Douez v. Facebook, Inc.*, 2017 SCC 33 (Can.) (No. CA041917); Appellant’s Supplemental Reply Factum, *Douez v. Facebook, Inc.*, 2017 SCC 33 (Can.) (No. CA041917).

⁷⁸ *Douez*, 2017 SCC 33, at para. 20 (majority opinion).

⁷⁹ *Id.* at para. 128 (Abella, J., concurring). The factors to be considered include:

- (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.

Id.

⁸⁰ *Id.* at para. 20 (majority opinion).

enforceability of forum selection clauses.⁸¹

Second, all the judges agreed on the relevant test for the enforceability of forum selection clauses in the consumer context—the strong cause test affirmed almost fifteen years earlier in *Pompey*.⁸² The test is actually a two-step test.⁸³ At the first step, the party seeking to enforce the forum selection clause (the defendant) must show that the clause is valid and enforceable as a matter of contract law.⁸⁴ If the clause passes muster under the first step, then the burden shifts to the party seeking to displace the clause (the plaintiff) to show strong cause for why the clause should not be enforced.⁸⁵ Accordingly, all of the judges rejected the plaintiff’s contention that the strong cause test should be abandoned in favor of a more holistic analysis that simply considers the presence of a forum selection clause as one factor, among many, to weigh in the *forum non conveniens* analysis.⁸⁶

While the Court was unanimous on the legal test to be applied,⁸⁷ the judges

⁸¹ *Id.* at para. 22.

⁸² *See id.* at paras. 28-29.

⁸³ *Id.* at para. 28.

⁸⁴ *Id.*

⁸⁵ *Id.* at para. 29. The majority described the two-part test as follows:

Instead, where no legislation overrides the clause, courts apply a two-step approach to determine whether to enforce a forum selection clause and stay an action brought contrary to it. At the first step, the party seeking a stay based on the forum selection clause must establish that the clause is “valid, clear and enforceable and that it applies to the cause of action before the court.” At this step of the analysis, the court applies the principles of contract law to determine the validity of the forum selection clause. As with any contract claim, the plaintiff may resist the enforceability of the contract by raising defences such as, for example, unconscionability, undue influence, and fraud.

Once the party seeking the stay establishes the validity of the forum selection clause, the onus shifts to the plaintiff. At this second step of the test, the plaintiff must show strong reasons why the court should not enforce the forum selection clause and stay the action. In *Pompey*, this Court adopted the “strong cause” test from the English court’s decision in *The “Eleftheria[.]”* In exercising its discretion at this step of the analysis, a court must consider “all the circumstances”, including the “convenience of the parties, fairness between the parties and the interests of justice.” Public policy may also be a relevant factor at this step.

Id. at paras. 28-29 (citations omitted).

⁸⁶ *See, e.g., id.* at para. 133 (McLachlin, C.J., dissenting) (rejecting plaintiff’s contention that the *Pompey* test should be rolled into the *forum non conveniens* analysis).

⁸⁷ The dissent adds a bit more nuance to the two-part test:

Where the parties have agreed to a forum selection clause, the court must apply that clause unless the test in *Pompey* is satisfied. If the test is satisfied and the forum selection clause is inapplicable, the result is a situation where there are two competing possibilities for forum. At this point, the *CJPTA* which codifies the common law provisions for *forum non conveniens* applies.

strongly disagreed on the application of the test to the facts of the case. Below, each of the three judgments is examined in turn.

1. The Majority Judgment (Karakatsanis, Wagner and Gascon, JJ.)

The majority acknowledged at the outset that “[f]orum selection clauses serve a valuable purpose”⁸⁸ in providing “certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law.”⁸⁹ With respect to consumer contracts, however, the majority believed that the analysis of strong cause must account for the unique realities of consumer contracting. In this respect, the majority stated:

But commercial and consumer relationships are very different. Irrespective of the formal validity of the contract, the consumer context may provide strong reasons not to enforce forum selection clauses. For example, the unequal bargaining power of the parties and the rights that a consumer relinquishes under the contract, without any opportunity to negotiate, may provide compelling reasons for a court to exercise its discretion to deny a stay of proceedings, depending on the other circumstances of the case.

... Canadian courts have recognized that the test may apply differently, depending on the contractual context. The English courts have also recognized that not all forum selection clauses are created equally. . . . Similarly, Australian courts have found “that in a consumer situation [courts] should not place as much weight on an exclusive jurisdiction clause in determining a stay application as would be placed on such a clause where there was negotiation between business people.”

As these cases recognize, different concerns animate the consumer context than those that this Court considered in *Pompey*, where a sophisticated commercial transaction was at issue. Because of these concerns, we agree with Ms. Douez and several interveners that the strong cause test must account for the different considerations relevant to this context.⁹⁰

Accordingly, the majority thought that the strong cause test needed to be modified to account for the consumer context, thereby endorsing an approach that would “take account of all the circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake.”⁹¹

Id. at para. 131.

⁸⁸ *Id.* at para. 24 (majority opinion).

⁸⁹ *Id.*

⁹⁰ *Id.* at paras. 33-35 (citations omitted).

⁹¹ *Id.* at para. 38.

The majority did not spend much time discussing step one of the *Pompey* analysis (the enforceability of the forum selection clause as a matter of contract law). It noted, briefly, that the British Columbia Electronic Transactions Act (“Electronic Transactions Act”)⁹² permits offer and acceptance to occur through electronic means, e.g., by “clicking” online.⁹³ The majority referenced Justice Abella’s concurring opinion finding that the contract was not enforceable based upon “other considerations,”⁹⁴ and concluded that it “prefer[red] to address these considerations at the ‘strong cause’ step of the test.”⁹⁵ The majority then moved on to the heart of the analysis, the application of the strong cause test to the facts of the case. It concluded that a number of different factors, when considered collectively, supported the conclusion that the forum selection clause in favor of California should be displaced.⁹⁶ The majority divided the analysis here into two parts: “public policy” and “secondary factors.”

The first public policy consideration militating against enforcing the forum selection clause was the “gross inequality of bargaining power between the parties.”⁹⁷ The Court noted that Facebook was a multi-billion dollar company, while the plaintiff was an individual who had agreed to an online contract of adhesion.⁹⁸ Consumers like the plaintiff are “faced with little choice but to accept Facebook’s terms of use.”⁹⁹ In response to Facebook’s suggestion that the plaintiff could simply have rejected Facebook’s terms, the majority noted that in the internet era, “[h]aving the choice to remain ‘offline’ may not be a real choice”¹⁰⁰

The second public policy consideration that the majority considered in rejecting the stay of proceedings related to the rights that were being asserted in the underlying lawsuit. The majority noted that the core issue in this case was the plaintiff’s right to privacy.¹⁰¹ The majority observed that privacy legislation has been accorded quasi-constitutional status, and that the Court has repeatedly emphasized the significance of privacy rights.¹⁰² The majority was of the view that “since Ms. Douez’s matter requires an interpretation of a statutory privacy tort, only a local court’s interpretation of privacy rights under the *Privacy Act* will provide clarity and certainty about the scope of

⁹² Electronic Transactions Act, S.B.C. 2001, c. 10, art. 15 (Can.).

⁹³ *Douez*, 2017 SCC 33, at para. 46.

⁹⁴ *Id.* at para. 47.

⁹⁵ *Id.*

⁹⁶ *Id.* at para. 50.

⁹⁷ *Id.* at para. 54.

⁹⁸ *Id.*

⁹⁹ *Id.* at para. 55.

¹⁰⁰ *Id.* at para. 56.

¹⁰¹ *Id.* at para. 59.

¹⁰² *Id.*

the rights to others in the province.”¹⁰³ The majority further stated that British Columbia’s creation of a statutory cause of action demonstrates “an intention to create local rights and protections” for British Columbia residents, and that local courts are “better placed to adjudicate these sorts of claims”¹⁰⁴ The majority concluded that these two public policy considerations—disparity of bargaining power and the nature of the rights at issue—weighed heavily against enforcing the forum selection clause.¹⁰⁵

In addition, the majority considered two secondary factors in determining that the forum selection clause should not be enforced: the “interests of justice” and “comparative convenience and expense of litigating in the alternate forum.”¹⁰⁶ The majority described the former as concerned with “which forum is best positioned to hear the case on its merits.”¹⁰⁷ The majority indicated that irrespective of whether California would hear the case and/or apply the Privacy Act, British Columbia courts were better positioned to adjudicate the matters at issue.¹⁰⁸ The judges noted that “[a British Columbia court], as compared with a California one, is better placed to assess the purpose and intent of the legislation and to decide whether public policy or legislative intent prevents parties from opting out of rights created by the *Privacy Act* through a choice of law clause.”¹⁰⁹ With respect to the latter factor, the majority believed that the comparative expense and convenience of litigating in California vs. British Columbia bolstered the strong cause test.¹¹⁰ The majority accepted the chamber judge’s finding that “it would be more convenient to have Facebook’s books and records made available for inspection in British Columbia than requiring the plaintiff to travel to California to advance her claim.”¹¹¹ It concluded that, although these secondary factors “might not have justified a finding of strong cause on their own, they nonetheless support our conclusion that Ms. Douez has established sufficiently strong reasons why the forum selection clause should not be enforced and the action should proceed in British Columbia.”¹¹²

2. The Concurrence (Abella, J.)

Justice Abella agreed with the two-step approach endorsed by the majority:

¹⁰³ *Id.*

¹⁰⁴ *Id.* at para. 60.

¹⁰⁵ *Id.* at para. 63.

¹⁰⁶ *Id.* at para. 64.

¹⁰⁷ *Id.* at para. 65.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at para. 72.

¹¹⁰ *Id.* at para. 73.

¹¹¹ *Id.* at para. 74.

¹¹² *Id.* at para. 75.

first, consider whether the clause is enforceable as a matter of contract law, and second, consider whether there is strong cause for departing from the choice of forum in the clause.¹¹³ In Justice Abella's view, the clause in question failed at step one of the test.¹¹⁴ Justice Abella primarily focused on the doctrine of public policy for invalidating the clause in question as a matter of contract law. She emphasized the adhesive nature of these consumer contracts and the artificial notion of consent:

We are dealing here with an online *consumer* contract of adhesion. Unlike *Pompey*, there is virtually no opportunity on the part of the consumer to negotiate the terms of the clause. To become a member of Facebook, one must accept all the terms stipulated in the terms of use. No bargaining, no choice, no adjustments.

Online contracts such as the one in this case put traditional contract principles to the test. What does "consent" mean when the agreement is said to be made by pressing a computer key? Can it realistically be said that the consumer turned his or her mind to all the terms and gave meaningful consent? In other words, it seems to me that some legal acknowledgment should be given to the automatic nature of the commitments made with this kind of contract, not for the purpose of invalidating the contract itself, but at the very least to intensify the scrutiny for clauses that have the effect of impairing a consumer's access to possible remedies.¹¹⁵

Justice Abella also highlighted the burden of forum selection clauses on consumers, including "added costs, logistical impediments and delays, [as well as] deterrent psychological effects."¹¹⁶ Justice Abella was particularly concerned about the use of forum selection clauses that unduly impeded a consumer's ability to vindicate constitutional or quasi-constitutional rights in domestic courts.¹¹⁷ Like the majority, she viewed the nature of the claims at issue—the assertion of privacy rights—to be significant to the analysis. According to Justice Abella, section 4 of the Privacy Act was intended to grant exclusive jurisdiction to British Columbia courts over privacy torts.¹¹⁸ Where a legislature grants exclusive jurisdiction to its own courts, this necessarily overrides a forum selection clause in a private contract.¹¹⁹

¹¹³ *Id.* at para. 93 (Abella, J., concurring).

¹¹⁴ *Id.* at para. 96.

¹¹⁵ *Id.* at paras. 98-99.

¹¹⁶ *Id.* at para. 101. She notes that Professor Purcell refers to these constraints as "burdens of distance" or "burdens of geography." *Id.*

¹¹⁷ *Id.* at para. 104.

¹¹⁸ *Id.* at para. 107.

¹¹⁹ *Id.* at para. 108.

Accordingly, it would be against public policy to enforce a forum selection clause in a contract that would have the effect of ousting the jurisdiction of a “statutorily mandated court” in a matter as important as privacy rights.¹²⁰

Justice Abella also held that the doctrine of unconscionability—what she called “a close jurisprudential cousin to both public policy and gross bargaining disparity”—also applied so as to render the forum selection clause in *Douez* unenforceable as a matter of contract law.¹²¹ She saw both elements of the doctrine (inequality of bargaining power and unfairness) as being satisfied in the *Douez* case. In this respect, Justice Abella stated:

In my view, both elements are met here. The inequality of bargaining power between Facebook and Ms. Douez in an online contract of adhesion gave Facebook the unilateral ability to require that any legal grievances Ms. Douez had, could not be vindicated in British Columbia where the contract was made, but only in California where Facebook has its head office. This gave Facebook an unfair and overwhelming procedural—and potentially substantive—benefit. This, to me, is a classic case of unconscionability.¹²²

Because Justice Abella found the forum selection clause unenforceable under step one of *Pompey*, there was no need to consider whether it also would have failed under step two.¹²³

3. The Dissent (McLachlin, C.J. and Moldaver and Côté, JJ.)

The dissent also reaffirmed the two-step *Pompey* framework for the enforceability of forum selection clauses in consumer contracts. However, in the dissent’s view, this was simply a case where the plaintiff had not shown strong cause for displacing an otherwise enforceable forum selection clause.¹²⁴

The dissent started its analysis by examining the arguments raised by the plaintiff in resisting the enforcement of the forum selection clause as a matter of contract law. First, the plaintiff had tried arguing that the forum selection clause was not specifically brought to her attention.¹²⁵ The dissent did not find this argument persuasive, noting that under the Electronic Transactions Act, an “enforceable contract may be formed by clicking an appropriately

¹²⁰ *Id.*

¹²¹ *Id.* at para. 112.

¹²² *Id.* at para. 116.

¹²³ Justice Abella would have endorsed a broader version of the strong cause test. *Id.* at para. 94 (“Unlike my colleagues in dissent, I think, with respect, that a compelling argument can be made for modifying the strong cause test to include a wider range of factors than the *forum non conveniens* kind of considerations that have been traditionally applied . . .”).

¹²⁴ *Id.* at para. 170 (McLachlin, C.J., dissenting).

¹²⁵ *Id.* at para. 136.

designated online icon.”¹²⁶ Since the plaintiff did agree to the terms of use by clicking such an icon, this “suffices to indicate acceptance.”¹²⁷ Second, the plaintiff argued that the terms of use contradicted the forum selection clause.¹²⁸ Specifically, she argued that “[t]he tension between the strict terms of the forum selection clause in the contract, and the provision that Facebook will ‘strive to respect local laws’, introduces an ambiguity, rendering the forum selection clause unenforceable.”¹²⁹ The dissent also rejected this argument, stating that “[t]he contract on its face is clear. There is no inconsistency between a commitment to ‘strive’ to apply local laws and an agreement that disputes will be tried in California. A forum selection clause does not disrespect the laws of British Columbia.”¹³⁰ Finally, the plaintiff argued that the Privacy Act invalidates forum selection clauses for actions brought under the Privacy Act.¹³¹ In particular, she argued that section 4 provided for exclusive jurisdiction over Privacy Act claims in British Columbia courts.¹³² Again, the dissent disagreed. The dissent viewed section 4 as granting subject-matter jurisdiction over Privacy Act claims to the Supreme Court of British Columbia, to the exclusion of other British Columbia courts.¹³³ Accordingly, nothing in the Act should be construed as rendering an otherwise valid forum selection clause unenforceable. The dissent also commented on Justice Abella’s holding that the forum selection clause was unconscionable and contrary to public policy. With respect to the former, the dissent held that an argument based on unconscionability “would have to be based on evidence; none was adduced in this case.”¹³⁴ With respect to the latter, the dissent indicated that a court could not invalidate a contractual provision simply because “it is contrary to public policy in the abstract.”¹³⁵

After concluding that step one of the *Pompey* test had been satisfied, the dissent proceeded to analyze whether the plaintiff had demonstrated strong cause for departing from the forum selection clause. In doing so, the dissent specifically considered the factors outlined in *Pompey*. First, the dissent indicated that the plaintiff had not shown that the facts and evidence shifted the balance of convenience from California to British Columbia.¹³⁶ In

¹²⁶ *Id.* at para. 137.

¹²⁷ *Id.* at para. 138.

¹²⁸ *Id.* at para. 139.

¹²⁹ *Id.*

¹³⁰ *Id.* at para. 140.

¹³¹ *Id.* at para. 141.

¹³² *Id.*

¹³³ *Id.* at para. 142.

¹³⁴ *Id.* at para. 145 (citation omitted).

¹³⁵ *Id.* at para. 147.

¹³⁶ *Id.* at para. 163.

particular, the dissent found that there was “no evidence” regarding the relative convenience and expense of trial in one jurisdiction versus the other.¹³⁷ Second, the dissent did not view the applicable law as providing strong cause to override the forum selection clause. It pointed out that applying the Privacy Act (to the extent that British Columbia law would apply) does not require special knowledge or expertise.¹³⁸ Moreover, the dissent reasoned that if “possible sensitivity to local context [were] sufficient to show strong cause, forum selection clauses [would] never be upheld where a tort occurs in a different country.”¹³⁹ Third, the dissent held that the country with which the parties are connected does not establish strong cause. In order to show strong cause, a plaintiff must do more than simply point out that she lives in the jurisdiction where she seeks to have the action tried.¹⁴⁰ Fourth, there was no indication that the defendant inserted the clause in the contract merely to seek out a procedural advantage.¹⁴¹ It was clear that the defendant’s purpose in designating California as the forum for the resolution of disputes was to “avoid costly and uncertain litigation in foreign countries, which . . . would increase its costs and divert its energy.”¹⁴² Finally, the dissent concluded that the plaintiff had not shown that enforcement of the forum selection clause would deprive the plaintiff of a fair trial.¹⁴³ Accordingly, the dissent held that “all of the [*Pompey*] factors . . . point to enforcing the forum selection clause to which Ms. Douez agreed.”¹⁴⁴

IV. TAKING A CLOSER LOOK AT *DOUEZ V. FACEBOOK*

Douez represents a very significant shift in the law relating to forum selection clauses. How this shift has taken place—largely through a very expansive and selective interpretation of the *Pompey* strong cause test—is problematic. Below, this Article analyzes five aspects of the *Douez* decision that are likely to cause issues for courts in the future.

A. *The Majority’s Use of “Public Policy” Factors to Displace the Forum Selection Clause is Problematic*

The majority’s decision in *Douez* centered on two public policy factors that, collectively, supported the plaintiff’s showing of strong cause to not enforce the forum selection clause: the disparity in bargaining power between

¹³⁷ *Id.* at para. 164.

¹³⁸ *Id.* at para. 165.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at para. 167.

¹⁴¹ *Id.* at para. 168.

¹⁴² *Id.*

¹⁴³ *Id.* at para. 169.

¹⁴⁴ *Id.* at para. 170.

the parties and the nature of the rights at issue. Each of these public policy factors is examined in turn.

1. Unequal Bargaining Power

The majority in *Douez* focused on the gross inequality of bargaining power between the parties to support the conclusion that the plaintiff had demonstrated strong cause to displace the forum selection clause. The defendant is a multi-billion dollar global conglomerate with a net worth higher than most small countries.¹⁴⁵ The plaintiff is an individual consumer who, presumably, has limited resources. The contract presented to the plaintiff was one of adhesion; the plaintiff had no ability to dispute or change the terms of the bargain. The majority believed that this huge disparity in resources and bargaining power between the defendant and the plaintiff provided strong cause for departing from the forum selection clause in favor of California.¹⁴⁶

The problem with the majority's logic is that the disparity in bargaining power is in no way unique to this case.¹⁴⁷ Virtually every consumer contract will share the same hallmarks as the contract in *Douez*. Consumers enter into dozens of contracts of adhesion where there is no opportunity to negotiate, and, functionally, no alternative but to accept the terms. Contracts with cell phone providers, banks, natural gas companies, car rental agencies, payday lenders, automobile dealerships, airlines, and online merchants are just a sampling of the contracts that consumers routinely enter into with absolutely no power to change the terms of the deal.¹⁴⁸

Take, for instance, a consumer's contract with Verizon for cell phone service. Verizon is a large, multi-billion dollar business.¹⁴⁹ When a consumer

¹⁴⁵ See Matt Egan, *Facebook and Amazon Hit \$500 Billion Milestone*, CNN MONEY (July 27, 2017, 10:29 AM), <http://money.cnn.com/2017/07/27/investing/facebook-amazon-500-billion-bezos-zuckerberg/index.html> [<https://perma.cc/4NUZ-DMP6>].

¹⁴⁶ *Douez*, 2017 SCC 33, at para. 76.

¹⁴⁷ At one point in the judgment, the majority attempts to argue that there is something unique about Facebook that renders the non-choice aspect particularly difficult, compared to other consumer transactions. The majority states, "... unlike a standard retail transaction, there are few comparable alternatives to Facebook, a social networking platform with extensive reach." *Id.* at para. 56. It seems like the majority is attempting to distinguish a "standard retail transaction" from a contract with Facebook. The distinction, however, is one without a difference. In a standard retail transaction (e.g., a contract with a bank, a contract for an airplane ticket, etc.), a consumer may have a choice to select a competitor's product, but will not have any choice but to agree to a contract of adhesion.

¹⁴⁸ See generally Nora K. Duncan, *Adhesion Contracts: A Twentieth Century Problem for a Nineteenth Century Code*, 34 LA. L. REV. 1081 (1973).

¹⁴⁹ See Michael J. de la Merced & Mark Scott, *Verizon Seals Long-Sought \$130 Billion Deal to Own Wireless Unit*, N.Y. TIMES (Sept. 2, 2013, 12:29 PM), [https://dealbook.nytimes.com/2013/09/02/verizon-reaches-130-billion-deal-to-buy-out-vodafone-](https://dealbook.nytimes.com/2013/09/02/verizon-reaches-130-billion-deal-to-buy-out-vodafone/)

wishes to purchase Verizon wireless services, he or she is provided with a contract which is non-negotiable.¹⁵⁰ The consumer either accepts the terms, or does not. Much like the “choice” afforded to the plaintiff in *Douez*, i.e., the choice not to accept Facebook’s terms of use, a consumer technically has the choice not to accept the terms of the Verizon contract. However, since every cell phone provider has standard form, non-negotiable contracts, the consumer is stuck agreeing to *something*, or foregoing phone service altogether. Accordingly, everything that the majority said regarding the plaintiff’s relationship with Facebook could easily have been said about an average consumer’s relationship with Verizon—not to mention hundreds of other companies. There was really nothing unique about the facts of *Douez* that rendered it anything other than a run-of-the-mill consumer contract of adhesion.¹⁵¹

The *Douez* majority seemed to be saying that the very fact that the contract involves a consumer and is one of adhesion is what provides strong cause for displacing a forum selection clause.¹⁵² This could prove to be a very expansive holding. It would mean that a forum selection clause can be displaced simply by showing that the consumer contract is one of adhesion—which will likely comprise ninety-nine percent of consumer contracts. In effect, there would be a presumption of non-enforceability of forum selection clauses in consumer contracts.¹⁵³

wireless-stake/?_r=0 [https://perma.cc/P43Q-L3CU].

¹⁵⁰ See *Customer Agreement*, VERIZON WIRELESS, <https://www.verizonwireless.com/legal/notices/customer-agreement/> [https://perma.cc/4J77-DLDX].

¹⁵¹ See Pavlović, *supra* note 10, at 421-22 (“The terms of consumer contracts are non-negotiable, and are presented to consumers on a take-it-or-leave-it basis. Using the standard of a powerful consumer, the courts start from a premise that consumers have a choice to ‘turn down’ a standard-form contract by not getting the goods and services. While the consumers may have an option to choose an alternative provider, the alternative will, by-and-large, be conditional upon another standard-form contract. The essential terms (such as price or duration) of the new contract may be different from the contract which the consumers refused, but its general terms (such as warranties, limitations of liability, or jurisdictional issues) are likely to be identical.”).

¹⁵² Granted, there was a separate policy consideration which, together with the gross inequality of bargaining power, is what led the majority to the conclusion that the forum selection clause should be displaced. See *Douez*, 2017 SCC 33, at para. 33. But given the general tenor of the reasoning of the majority, coupled with Justice Abella’s reinforcing of the inequality of consumer contracts of adhesion (going so far as to invalidate the forum selection clause as a matter of contract law), it appears that the very fact that a contract is a consumer contract of adhesion will go a long way towards establishing strong cause for overriding the forum selection clause. See *id.* at para. 63.

¹⁵³ See also Stephen Pitel, *Law on Jurisdiction Clauses Changes in Canada*, CONFLICT OF LAWS.NET (June 24, 2017), <http://conflictoflaws.net/2017/law-on-jurisdiction-clauses-changes-in-canada/> [https://perma.cc/HA4K-JDMP] (“If these factors are sufficient, then a great many exclusive jurisdiction clauses in standard form contracts with consumers are

One final observation: at one point in the judgment, the majority seemed to suggest that contracts between individuals and social media platforms (or at least Facebook) were somehow more “important” than other sorts of consumer contracts—and therefore worthier of increased protection.¹⁵⁴ In its analysis, the majority distinguished between a “standard retail transaction” and the plaintiff’s contract with Facebook:

[U]nlike a standard retail transaction there are few comparable alternatives to Facebook, a social networking platform with extensive reach. British Columbians who wish to participate in the many online communities that interact through Facebook must accept that company’s terms or choose not to participate in its ubiquitous social network. As the intervener the Canadian Civil Liberties Association, emphasizes, “access to Facebook and social media platforms, including the online communities they make possible, has become increasingly important for the exercise of free speech, freedom of association and for full participation in democracy.” Having the choice to remain “offline” may not be a real choice in the Internet era.¹⁵⁵

In this passage, the majority appears to elevate contracts with social media providers to some level of comparative importance. Assuming that contracts can be categorized as “more” or “less” important,¹⁵⁶ consumer contracts involving living essentials, transportation, bank accounts, etc. would presumably be *more* important than contracts involving social media. To the extent that the majority intended to distinguish between different types of contracts, it stands to reason that what is predominantly viewed by most as a form of distraction or entertainment would be worthy of less consumer protection, not more.¹⁵⁷

subject to being defeated on a similar basis. Lots of consumer contracts involve unequal bargaining strength and are in essence ‘take it or leave it’ contracts. And it may well not be that difficult for claims to be advanced, alongside other claims, that involve some form of quasi-constitutional rights (the breadth of this is untested). This possibility that many other clauses do not provide the protection once thought is likely the most notable dimension of the decision.”).

¹⁵⁴ At the very least, the majority suggested they were different. However, the suggestion that these sorts of contracts were different was, in turn, used to support the argument that forum selection clauses should be displaced in this context. *See Douez*, 2017 SCC 33, at para. 56.

¹⁵⁵ *Id.* (citation omitted).

¹⁵⁶ Similar to the argument made in Part IV.A.2., *infra*, with respect to privacy rights, it seems to be bad policy for courts to get into any sort of weighing of the underlying importance of the *type* of contract at issue.

¹⁵⁷ As noted by the dissent, “the strength of the contention of unequal bargaining power seems tenuous, when one realizes that Ms. Douez received the Facebook services she wanted, for free and without any compulsion, practical or otherwise. Even if remaining ‘offline’ may not be a real choice in the internet era’, as suggested by our colleagues Karakatsanis, Wagner

2. The Privacy Rights at Issue

In addition to the disparity in bargaining power, the majority in *Douez* concentrated on the nature of the rights at issue in concluding that the strong cause test was satisfied. The majority repeatedly emphasized the importance of privacy rights, their quasi-constitutional status, and the concern that only a local court's interpretation of the Privacy Act would provide "clarity and certainty about the scope of the rights to others in the province."¹⁵⁸

The majority's focus on the nature of the rights at issue is problematic for a myriad of reasons. First, the majority has seemed to inject a hierarchy of rights into the strong cause analysis—something that will undoubtedly lead to confusion and inconsistency.¹⁵⁹ It is certainly true that British Columbia residents should not have their privacy rights infringed. So too, British Columbia residents should not pay usurious rates of interest, be stuck with penalties for breach of contract, or be subject to draconian exculpatory clauses. However, it is difficult to say, in the abstract, that one set of claims or rights is more important than another, such that a forum selection clause should be overridden. If lower courts begin to consider the nature of the rights at issue, and their respective importance in a scheme of rights, parties will never have any sense of whether a forum selection clause will be enforceable.

Second, even if it were appropriate to examine the nature of the rights at issue, then the focus should be on the particulars of case at hand—not "privacy rights" in the abstract.¹⁶⁰ The reality is that the plaintiff in *Douez* was seeking monetary damages for an alleged misappropriation of her image

and Gascon JJ. (at para. 56), there is no evidence that foregoing Facebook equates with being 'offline'. In any case, enforcement of the forum selection clause does not deprive Ms. Douez, or anyone else, of access to Facebook." *Id.* at para. 173 (McLachlin, C.J., dissenting).

¹⁵⁸ *Id.* at para. 59 (majority opinion).

¹⁵⁹ *See id.*

¹⁶⁰ Facebook made a similar argument in its submission to the Supreme Court of Canada:

Similarly, the Appellant's attempts to supply "strong cause" based on abstract arguments about the importance of privacy legislation are unavailing. Facebook does not dispute the importance of privacy protection or the quasi-Constitutional status of certain privacy legislation. But this case is about whether the parties' agreed-upon forum selection clause should be enforced. This involves considerations of whether the agreed-upon court could or would enforce the Appellant's privacy rights. In the courts below, the Appellant presented no evidence on this question despite having the burden of proof.

The Appellant cannot fill the evidentiary vacuum by arguing now in the abstract that privacy is afforded quasi-Constitutional status in Canada. These arguments are beside the point and do not speak to any of the issues on which the Appellant failed in her onus to present evidence.

Respondent's Factum, *Douez v. Facebook*, SCC File No. 36616, at paras. 98-99.

that took place in 2011 in connection with Facebook's Sponsored Stories.¹⁶¹ The plaintiff identified only one instance where her image was misappropriated.¹⁶² To the extent that a monetary remedy would be appropriate for the plaintiff, one would surmise it to be fairly low.¹⁶³ The *Douez* case was not about safeguarding the plaintiff's privacy rights, or the privacy rights of over a million British Columbia residents. Facebook stopped the practice complained of many years ago. The *Douez* case was about having Facebook pay damages to plaintiffs, many (if not most) of whom do not know or care that their image was used by Facebook for commercial purposes.¹⁶⁴ Thus, given the particular factual matrix in this case, it seems that the intense emphasis on "privacy rights" may not have been appropriate.

Third, the majority uncritically assumed that the Privacy Act would (or should) apply to the case, and then used this as a critical fact to displace the forum selection clause in favor of California.¹⁶⁵ However, what law applies to the dispute is actually an open question. The choice of law clause in Facebook's terms of use provides that "[t]he 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 laws provisions."¹⁶⁶ Following normal conflict of laws principles, it appears that a British Columbia court would be obligated to apply California law.¹⁶⁷ Importantly, the clause excludes the

¹⁶¹ The plaintiff also sought an injunction, but Facebook stopped its Sponsored Stories in 2014. See Drew Hendricks, *Facebook To Drop Sponsored Stories: What Does This Mean For Advertisers?*, FORBES (Jan. 16, 2014, 5:16 PM), <https://www.forbes.com/sites/drewhendricks/2014/01/16/facebook-to-drop-sponsored-stories-what-does-this-mean-for-advertisers/#4285fb102a81> [<https://perma.cc/C7XQ-HBAE>].

¹⁶² Notice of Civil Claim, *Douez v. Facebook, Inc.*, 2017 SCC 33, at para. 40 (Can.) (No. VLC-S-S-122316) ("On at least one occasion since January 25, 2011, Facebook authored a Sponsored Story which displayed the plaintiff's name and portrait to at least one of her Friends in the following format: 'Debbie Douez likes Cool Entrepreneurs.'").

¹⁶³ In the corresponding U.S. class action against Facebook with respect to Sponsored Stories, the parties reached a settlement whereby the maximum amount payable to any individual plaintiff would be \$10. See Notice of Class Action and Proposed Settlement at 1, *Fralely, et al. v. Facebook Inc.*, No. CV-11-01726 RS (N.D. Cal., filed Apr. 4, 2011), <http://docs.fralelyfacebooksettlement.com/docs/notice.pdf> [<https://perma.cc/KUD8-EJHJ>].

¹⁶⁴ By this, I do not mean to suggest that the actions of Facebook were legal or appropriate.

¹⁶⁵ See *Douez*, 2017 SCC 33, at para. 59.

¹⁶⁶ *Id.* at para. 8.

¹⁶⁷ Janet Walker, *Castel and Walker: Canadian Conflict of Laws, 6th Edition* § 31.3 (2005) ("The [*Vita Food Products Inc. v. Unus Shipping Co.*] decision therefore stands for two fundamental principles of choice of law. One is that the parties' choice of a system of law to govern their agreement will be given effect. The other is that provisions of a law other than the proper law will generally not be regarded as affecting the parties' contractual

possibility of renvoi, meaning that a British Columbia court is directed to apply *internal* California law, without regard to what law a court in California might otherwise apply under a domestic choice of law analysis.¹⁶⁸ Thus, absent some other basis for applying British Columbia law, California law seems to govern the claim at issue. If this is true, then the argument for displacing the forum selection clause based on the importance of applying the Privacy Act is rendered nugatory.

There is another possibility, however. It could be that the Privacy Act is considered “mandatory law” from which the parties cannot derogate by way of contract. The majority alluded to this possibility when it stated, “even if a choice of law clause is generally enforceable, local laws may still apply to a dispute if the local forum intends such laws to be mandatory and not avoidable through a choice of law clause.”¹⁶⁹ However, the majority of the Supreme Court did not seem to consider the Privacy Act to be mandatory law, or presumably, it would have said as much in its judgment.¹⁷⁰

Even assuming that the Privacy Act were mandatory law, there is no indication that California law does not provide equal (or even greater) privacy protection for individuals than British Columbia law does. Normally, the concern underlying the notion of mandatory law is that one of the parties will choose a law in order to deliberately avoid an important law of the forum.¹⁷¹ For instance, assume a contract between an employee based in Ontario and an employer based in Florida. The contract is governed by Florida law, which allows termination at-will, with no notice to the employee. The law in Ontario, on the other hand, requires an employer to provide at least two weeks’ notice to an employee who is being terminated. It may be that an Ontario court regards Ontario’s employment law as mandatory law that cannot be avoided through the choice to have Florida law govern the dispute. If, however, Florida law provided equal protection to terminated employees, then it would be nonsensical to categorize Ontario law as mandatory law. Accordingly, if California law provided privacy protection

obligations.”).

¹⁶⁸ *Douez*, 2017 SCC 33, at para. 8.

¹⁶⁹ *Id.* at para. 70.

¹⁷⁰ Additionally, the majority refers in a different part of the judgment to the fact that choice of law is an open question. If the Privacy Act were mandatory law, then choice of law would not be an open question. *See id.* at para. 69.

¹⁷¹ Philip J. McConnaughay, *Reviving the “Public Law Taboo” in International Conflict of Laws*, 35 STAN. J. INT’L L. 255, 303–04 (1999) (“Mandatory rules are ‘rules of law of a country which cannot be derogated from by contract.’ A mandatory law ‘applies irrespective of or despite the proper law of a contract,’ whether determined by a contractual choice of law clause or the conflicts rules that apply in the absence of a contractual designation. In that sense, mandatory laws are largely equivalent to laws within that prong of the public law taboo forbidding the displacement of forum public law. . . . Mandatory law, like public law, is said to be ‘designed to protect the public interest . . . [o]r the . . . weaker against a stronger party.’”).

akin to that provided under the Privacy Act, then a court would be hard-pressed to maintain that the Privacy Act must apply (and, further, must be applied only by a British Columbia court).¹⁷²

Although apparently not argued in *Douez*, California has a statute that is very similar to the Privacy Act. Section 3344 of California's Right of Publicity Statute provides, in part:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.¹⁷³

The California Right of Publicity Statute is actually more protective of the right to privacy than the Privacy Act. California law provides for a minimum of USD \$750 for a violation of the statute, or such damages actually suffered.¹⁷⁴ Additionally, the plaintiff may recover "any profits" the defendant made from the unauthorized use of the plaintiff's likeness, thereby requiring the defendant to disgorge any benefit it received from the unauthorized use.¹⁷⁵ In appropriate cases, the plaintiff may be awarded

¹⁷² See Respondent's Factum, *Douez v. Facebook*, SCC File No. 36616, at para. 95 ("For the Appellant to satisfy her burden of converting these assertions into 'strong cause', there must be actual *evidence* of the private international law of the forum named in the contract showing, for example, that the interests implicated by the relevant statute (the *Privacy Act*) would not be protected in that forum. Yet the Appellant offered no expert evidence at all of California law to ground this argument.").

¹⁷³ CAL. CIV. CODE § 3344(a) (West 2010).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

punitive damages.¹⁷⁶ Finally, the plaintiff may also be entitled to attorney's fees and costs.¹⁷⁷

In light of California's Right of Publicity Statute, the majority's exclusive focus on the Privacy Act, and its treatment of the Act as being somehow unique to British Columbia and capable of interpretation only by a British Columbia court, seems misplaced. If the majority wanted to focus on the nature of the claim at issue—privacy rights—then the analysis should not have centered on the Privacy Act as the exclusive vehicle for vindicating privacy rights. Rather, the Court should have considered whether British Columbians' privacy rights could have been vindicated in the chosen forum (California).¹⁷⁸ There is no indication that a California court could not have resolved the claims at issue in *Douez*, whether under British Columbia law or under California law.¹⁷⁹

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Interestingly, the Canadian Civil Liberties Association argued in favor of a modified strong cause test in the context of privacy claims, yet conceded that the appropriate inquiry should focus on whether the alternative forum provided sufficient privacy protection. See Factum of the Canadian Civil Liberties Association et. al., *Douez v. Facebook*, SCC File No. 36616, at para. 26 (“The need to give this public policy consideration legal effect is required by the decision of the British Columbia legislature to create the statutory tort. The British Columbia legislature can be presumed to have intended to provide a remedy for British Columbians for breach of their *quasi* constitutional privacy interests, consistent with the need to provide meaningful protection for this *quasi* constitutional interest. *Before an individual can be said to be contractually obligated to seek enforcement of those rights elsewhere, Canadian courts should be satisfied that the other jurisdiction will ensure that those rights can, legally and practically, be enforced.*”) (emphasis added) (footnote omitted). This analysis of whether the alternative forum (California) would ensure the enforcement of privacy rights was wholly absent in *Douez*. See *Douez*, 2017 SCC 33, at para. 165.

¹⁷⁹ It is highly likely that a California court would apply the latter:

Nor does the applicable law show strong cause to override the forum selection clause, in our view. It is true that the law giving rise to the tort is a British Columbia statute. However, the British Columbia tort created by the *Privacy Act* does not require special expertise. The courts of California have not been shown to be disadvantaged in interpreting the Act as compared with the Supreme Court of British Columbia. The most the motions judge could say on this factor was that local courts may be more sensitive to the social and cultural context and background relevant to privacy interests of British Columbians, as compared to courts in a foreign jurisdiction. This could be important in determining the degree to which privacy interests have been violated and any damages that flow from this. If possible sensitivity to local context is sufficient to show strong cause, forum selection clauses will never be upheld where a tort occurs in a different country. What this factor contemplates is evidence that the local court will be better placed to interpret the legal provisions at issue than the court stipulated in the forum selection clause. Ms. Douez presented no such evidence.

Douez, 2017 SCC 33, at para. 165 (citation omitted).

Finally, the majority's focus on privacy rights is problematic in light of its brief acknowledgement that the Privacy Act might not apply, *even if* the case were heard in British Columbia. The majority stated, "[t]his court, as compared to a California one, is better placed to assess the purpose and intent of the legislation and to decide whether public policy or legislative intent prevents parties from opting out of rights created by the *Privacy Act* through a choice of law clause in favour of a foreign jurisdiction."¹⁸⁰ This passage undercuts the very basis upon which the majority held that the forum selection clause should be displaced. The majority's reasoning is predicated on the right to privacy embodied in the Privacy Act being of such critical importance that the entire action belongs in British Columbia, despite the forum selection clause in favor of California. If there is the possibility that a British Columbia court could decide that California—and not British Columbia—law applies, then how can the Privacy Act, and the rights enshrined in it, provide the basis for the plaintiff showing strong cause to depart from the forum selection clause? In other words, a major part of the premise underlying the majority's judgment is that the action needed to be heard in British Columbia to vindicate the privacy rights granted to the plaintiff under British Columbia law. That premise is gutted by the (seemingly) newly introduced possibility that California law might actually apply to the action. Overall, the majority failed to adequately reconcile the choice of law question with its conclusion that the significance of the privacy rights at issue militated in favor of hearing the action in British Columbia.

B. *The "Secondary Factors" Used by the Majority Do Not Support Displacing the Forum Selection Clause*

The majority focused primarily on the public policy factors in the strong cause analysis. However, it bolstered its analysis by looking at what it called "secondary factors": the interests of justice and comparative convenience. Neither of these secondary factors provides strong cause for departing from the forum selection clause. Again, each of these factors is addressed in turn.

1. Interests of Justice

The majority indicated that the interests of justice militated in favor of having the action heard in British Columbia. The majority stated that this "factor is concerned not only with whether enforcement of the forum selection clause would unfairly cause the loss of a procedural advantage, but also with which forum is best positioned to hear the case on its merits."¹⁸¹ It is unclear where the interests of justice factor comes from, or how to specifically gauge which forum is "best positioned" to hear the case in a way

¹⁸⁰ *Id.* at para. 72.

¹⁸¹ *Id.* at para. 65.

that differs from considering the other *forum non conveniens* factors identified in the CJPTA.¹⁸²

In any event, the majority focused its discussion largely on whether it was significant that the plaintiff failed to introduce evidence on whether California would hear the case, and if so, what law California would apply. The majority noted that the lack of evidence on these issues was “a significant focus of the hearing before us.”¹⁸³ However, the majority did not think that the plaintiff’s failure to introduce evidence on these issues was particularly problematic, concluding that “there is no separate requirement for the party trying to avoid the forum selection clause to prove that her claim would necessarily fail in the foreign jurisdiction.”¹⁸⁴ While this is true, the fact that the plaintiff did not introduce this evidence must be interpreted as suggesting that California would indeed hear the case pursuant to the forum selection clause, which, in turn, should have weighed in favor of enforcing the clause.

The majority also concluded that the interests of justice were best served if the matter of choice of law were adjudicated in British Columbia. The majority believed that a British Columbia court was “better placed” to make the choice of law determination.¹⁸⁵ It could be said that a domestic forum is always going to be better positioned to determine whether, as a matter of domestic public policy or legislative intent, domestic law or foreign law should apply. However, the parties did not choose a domestic forum to adjudicate the issue—they chose a foreign forum. And so, the relevant question should have been whether the foreign forum is capable of making the choice of law determination, guided, necessarily, by the parties’ choice of California law.

Overall, the majority’s analysis related to the interests of justice is murky. Boiled down to its essence, the majority seemed to be saying that it is in the interests of justice to have domestic law issues, i.e., the applicability of the Privacy Act, decided by a domestic court. Yet, the whole domain of the conflict of laws presupposes that foreign courts are able to adjudicate matters involving Canadian claimants and are capable of making effective choice of law determinations. To conclude that there is strong cause for overriding a forum selection clause because British Columbia courts are better positioned

¹⁸² Stephen Pitel argues that the Court’s discussion of “secondary factors” actually melds the *forum non conveniens* and strong cause inquiry, something that the Court in *Douez* said should not be done. See Pitel, *supra* note 153 (“Leaving public policy aside for the moment, it is telling that the secondary factors are ‘the interests of justice’ and ‘comparative convenience and expense’. These are the most conventional of *forum non conveniens* factors. If this analysis is followed by lower courts . . . the separate [strong cause] analysis might end up not being very separate.”).

¹⁸³ See *Douez*, 2017 SCC 33, at para. 66.

¹⁸⁴ *Id.* at para. 67.

¹⁸⁵ *Id.* at para. 72.

to undertake the choice of law exercise seems to be a very weak reason for displacing a forum selection clause.

2. Comparative Convenience and Expense of Litigating in the Alternative Forum

Finally, the majority considered the comparative expense and convenience of litigating in the alternative forum. The majority's analysis in this respect consists of the following two sentences:

Although Facebook argued its relevant books and records were located in California, the chambers judge found it would be more convenient to have Facebook's books and records made available for inspection in British Columbia than requiring the plaintiff to travel to California to advance her claim. There is no reason to disturb this finding.¹⁸⁶

The majority did not truly grapple with the comparative convenience and expense of litigating in British Columbia or California. The majority made it appear like all Facebook would have to do in order to litigate in British Columbia would be to ship a couple of cases of "books and records" to the

¹⁸⁶ *Id.* at para. 74. The motion judge's findings on this factor are fairly sparse and based partly on conjecture and the absence of evidence on point:

Facebook submits that its head office is in California. It says that it does not keep books and records in BC.

Facebook has not described the form of its books and records but it would surprise me if it does not have electronic records which can readily be made available in British Columbia. Even in paper form, there is no barrier to bringing paper from California to BC, and there is a common language in the two jurisdictions.

There is no evidence that it would be difficult for Facebook witnesses to attend court in BC.

In September 2012, Facebook filed affidavit evidence that it does not have any business operations in British Columbia. Since then, the plaintiff filed hearsay evidence of a newspaper article in Vancouver, BC in March 2013 reporting that Facebook intended to open an office in Vancouver in May 2013. Facebook has not filed any responsive evidence on this point but I note that counsel for Facebook did not argue orally that Facebook has no business operations in British Columbia, just that the relevant books and records are with head office.

The plaintiff points out that she lives in BC, and so do the many members of the putative class.

I find that it will be more convenient to examine the circumstances of the plaintiff in a BC court than in a California court. There will likely be less inconvenience in having the books and records of Facebook made available for inspection here in BC than in having the plaintiff travel to California to advance her claim.

Douez v. Facebook, Inc., 2014 BCSC 953, paras. 110-15 (Can.), *overruled by Douez v. Facebook, Inc.*, 2017 SCC 33 (Can.).

province.¹⁸⁷ It failed to account for the true burden—financial and otherwise—in having Facebook litigate the claim in British Columbia. The majority also failed to consider how difficult or inconvenient it would be for the plaintiff to litigate in California. To what extent would the plaintiff actually have to travel to California to advance her claim?¹⁸⁸ Would the plaintiff be paying out-of-pocket to litigate in California?¹⁸⁹ Could the plaintiff hire local California counsel to handle her case? In short, a more robust analysis of the *actual* comparative inconvenience and expense should be called for if this is to be a significant factor in the strong cause analysis.

One final observation about the comparative convenience factor in the context of consumer claims: it is almost always going to favor the consumer because of the inherent difficulty of the comparison. That is, how does one truly gauge comparative convenience and expense when one party is an individual consumer and the other is a large corporation? It is an almost impossible exercise. A court will always be inclined to conclude that it is comparatively more convenient for a corporation to litigate in the plaintiff's home jurisdiction, rather than vice versa. The thinking is that even if it costs a corporation, say, CAD \$200,000 to litigate outside its home jurisdiction,¹⁹⁰ the corporation is better positioned to absorb the expense and deal with the inconvenience factor than an individual plaintiff for whom it costs, say, \$20,000. Thus, because of the inherent sympathy that a court will have for a plaintiff who is faced with the prospect of litigating outside his or her home jurisdiction, this factor will almost always favor the plaintiff.

C. *The Majority Did Not Consider, Much Less Balance, the Relevant Pompey Factors*

One of the most glaring problems with the majority's judgment is that it was so focused on demonstrating that the plaintiff had shown strong cause for displacing the forum selection clause that it failed to objectively examine all the relevant *Pompey* factors.¹⁹¹ The majority, in fact, seemed to cherry-pick factors that were favorable to the plaintiff in the strong cause test, while ignoring countervailing factors in favor of the defendant.

¹⁸⁷ *Douez*, 2017 SCC 33, at para. 74.

¹⁸⁸ How often would the plaintiff have to physically be in California? Once for a deposition? Once to testify at trial (if the case went to trial)? *See id.* at paras. 73-75.

¹⁸⁹ Would the plaintiff actually be paying out-of-pocket for any travel expenses associated with the case, given her contingency fee agreement with a prominent plaintiff class action firm? *See id.*

¹⁹⁰ Costs for a corporation might include travel and lodging for multiple witnesses, shipping documents, costs associated with lost employee time, etc. Costs for an individual might include travel and lodging, and costs associated with being temporarily out of work.

¹⁹¹ In fact, in its entire judgment, it failed to actually list the factors. *See generally Douez*, 2017 SCC 33.

Many—if not most—of the *Pompey* factors favored the defendant, or were neutral as between the parties.¹⁹² The first *Pompey* factor focuses on the question of where the majority of evidence is located.¹⁹³ In *Douez*, the evidence is overwhelmingly situated in the United States. Yet, the majority in *Douez* glossed over this fact and summarily concluded that the relative convenience and expense of trial favored British Columbia. As the dissent pointed out, “there is no evidence regarding the ‘relative convenience and expense of trial’ in California as compared to British Columbia.”¹⁹⁴

The second *Pompey* factor looks to the law to be applied, and whether it differs from domestic law.¹⁹⁵ Here, the parties agreed to a choice of law clause in favor of California law. This should militate in favor of the defendant. Even if a California court were to apply British Columbia law (something that would be highly unlikely), there is no indication that interpreting the Privacy Act “require[s] special expertise.”¹⁹⁶ At bottom, this will be a case about contractual and statutory interpretation, which a California court is surely competent to do.

The third *Pompey* factor examines “with what country either party is connected, and how closely.”¹⁹⁷ This factor appears to be a wash, given that the defendant is connected with California and the plaintiff (and the plaintiff class) is connected with British Columbia. In the words of the dissent:

The country with which the parties are connected does not establish strong cause. Facebook has its headquarters in California. Ms. Douez, while resident in British Columbia, was content to contract with Facebook at that location. Nothing in her situation suggests that the class action she wishes to commence could not be conducted in California just as easily as in British Columbia. To show strong cause to oust a foreign selection clause on the basis of residence, the plaintiff must point to more than the mere fact that she lives in the jurisdiction where she seeks to have the action tried. If this sufficed, forum selection clauses would be routinely held inoperative.¹⁹⁸

The fourth *Pompey* factor asks whether the defendant genuinely desires trial in California, or is only seeking out the forum for procedural

¹⁹² The dissent goes through each of the factors and suggests that “all of the factors endorsed by this Court in *Pompey* point to enforcing the forum selection clause to which Ms. Douez agreed. None of them establish strong cause.” *Id.* at para. 170 (McLachlin, C.J., dissenting).

¹⁹³ *Id.* at para. 93 (Abella, J., concurring).

¹⁹⁴ *Id.* at para. 164 (McLachlin, C.J., dissenting).

¹⁹⁵ *Id.* at para. 93 (Abella, J., concurring).

¹⁹⁶ *Id.* at para. 165 (McLachlin, C.J., dissenting).

¹⁹⁷ *Id.* at para. 93 (Abella, J., concurring).

¹⁹⁸ *Id.* at para. 167 (McLachlin, C.J., dissenting).

advantages.¹⁹⁹ This factor favors the defendant; there is no indication that California was chosen for an improper purpose. Facebook's headquarters are in California, and it stands to reason that Facebook would prefer to litigate claims against it in a singular forum, rather than in each of the countries where its two billion users are located.²⁰⁰

Finally, the fifth *Pompey* factor looks at whether the plaintiff would be prejudiced by having to sue in California for a number of reasons (inability to enforce a judgment, statute of limitations, etc.).²⁰¹ This factor again tends to favor the defendant. There was no evidence presented that the plaintiff in *Douez* would face any sort of significant prejudice in having to pursue her claim in California.²⁰² As the dissent correctly pointed out, “[the plaintiff] does not and cannot take issue with the fact that the state of California has a highly developed and fair legal system, nor with the fact that she will get a fair trial there.”²⁰³

Instead of analyzing the actual *Pompey* factors, the majority premised its decision largely on two new factors: the unequal bargaining power between the parties, and the nature of the rights at issue.²⁰⁴ It then focused selectively on the *Pompey* factor dealing with comparative convenience and expense, and created another new “interests of justice” factor.²⁰⁵ In short, three of the four main considerations in *Douez* were new, and not part of the original *Pompey* analysis. While it is not problematic to consider new or different factors, it is problematic that the majority did not engage in a holistic weighing of all the *Pompey* factors, but rather selectively honed in only on the factors that would support displacing the forum selection clause.

¹⁹⁹ *Id.* at para. 93 (Abella, J., concurring).

²⁰⁰ *See id.* at para. 168 (McLachlin, C.J., dissenting) (“The next factor to consider is whether the defendant is merely seeking procedural advantages. If Ms. Douez could show that Facebook does not genuinely desire the trial to take place in California, but wants the trial there simply to gain procedural advantages over her, this might support her case that strong cause lies to oust the forum selection clause. However, she has not shown this. There is no suggestion that Facebook does not genuinely wish all litigation with users to take place in California. Indeed, it is clear it does so, for reasons of substance and convenience. The purpose of the forum selection clause is to avoid costly and uncertain litigation in foreign countries, which in turn would increase its costs and divert its energy.”); STATISTA, <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> [<https://perma.cc/72CB-7SZ4>] (noting the number of Facebook users worldwide).

²⁰¹ *Douez*, 2017 SCC 33, at para. 93.

²⁰² If one were to add to this list additional factors that are called for in the “regular” *forum non conveniens* analysis, those factors too would largely favor the defendant. *See id.*

²⁰³ *Id.* at para. 169 (McLachlin, C.J., dissenting).

²⁰⁴ *Id.* at para. 38 (majority opinion).

²⁰⁵ *Id.* at para. 65.

D. *The Majority Did Not Hold the Plaintiff to the Burden of Establishing Strong Cause*

In applying the strong cause test, the majority did not hold the plaintiff to her burden of showing strong cause to depart from the forum selection clause. Indeed, the majority referenced the significance of the burden of proof only once, simply to say “[t]he burden remains on the party wishing to avoid the clause to establish strong cause.”²⁰⁶ Conversely, the issue was addressed in some depth by the dissent:

The party seeking to displace the forum selection clause bears the burden of establishing strong cause. There are good reasons for this. First, enforceability of forum selection clauses is the rule, setting them aside the exception. Generally, parties seeking an exceptional exemption must show grounds for what they seek. Second, it is the party seeking the exception who is in the best position to argue why it should be granted, not for the party seeking to rely on the rule to show why the rule should not be vacated; generally, burdens fall on the party asserting a proposition and in the best position to prove it. . . . Finally, to reverse the burden would undermine the general rule that forum selection clauses apply and introduce uncertainty and expense into commercial transactions that span international borders. It would detract from the “certainty and security in transaction” that is critical to private international law. . . . Accordingly, the law in Canada and elsewhere has consistently held that it is the plaintiff—the party seeking to set aside the forum selection clause—who bears the burden of showing strong cause for not giving effect to the enforceable forum selection clause by entering a stay of proceedings.²⁰⁷

The majority seemed to not appreciate the significance of the burden of proof. It routinely overlooked failures of proof on the part of the plaintiff and interpreted facts in the way most favorable to the plaintiff. For instance, the plaintiff did not introduce any proof: that a California court could not have heard her cause; that California law would not have sufficiently safeguarded the plaintiff’s privacy rights; that she could not have travelled to California or hired local California counsel because it would have been cost-prohibitive; or that the privacy interest in this particular case was so compelling as to override a forum selection clause.²⁰⁸ The majority excused these failures,

²⁰⁶ *Id.* at para. 38. There are two other references to the burden of proof in the majority judgment, but only to sum up or explain Facebook’s argument.

²⁰⁷ *See id.* at para. 153 (McLachlin, C.J., dissenting) (citations omitted). *See also id.* at para. 154 (explaining the reasons for embracing the strong cause test and placing the burden on the plaintiff to prove strong cause).

²⁰⁸ *See Douez*, 2017 SCC 33, at paras. 150-67.

stating, “none of the leading authorities on the strong cause test, *Pompey* included, make proof that the claim would fail in the foreign jurisdiction a mandatory element of strong cause” and “[u]nder the *Pompey* analysis, there is no separate requirement for the party trying to avoid the forum selection clause to prove that her claim would necessarily fail in the foreign jurisdiction.”²⁰⁹ The majority further noted, “while such evidence may be helpful, its absence is not determinative.”²¹⁰ The majority did not appreciate that the failure of the plaintiff to introduce any evidence on the alternative forum (whether California would hear the case and whether California law could provide sufficient protection for privacy rights) must weigh in favor of the defendant in the strong cause analysis. Instead, the majority did not give it any weight, and instead looked for any other facts that could be used to tilt the scales in favor of British Columbia.

E. *Justice Abella’s Concurrence Muddies Contract Law Doctrines*

Thus far, I have focused on the majority judgment holding that the plaintiff was able to show strong cause for overriding the forum selection clause. Justice Abella also would have refused to enforce the forum selection clause, but for a different reason. Justice Abella concluded that that the defendant failed to show that the forum selection clause was valid and enforceable as a matter of contract law.²¹¹ Justice Abella held that that the clause was unenforceable because it both violated public policy and was unconscionable.²¹²

With respect to public policy, Justice Abella stated:

In general, . . . when online consumer contracts of adhesion contain terms that unduly impede the ability of consumers to vindicate their rights in domestic courts, particularly their quasi-constitutional or constitutional rights . . . public policy concerns outweigh those favouring enforceability of a forum selection clause.²¹³

²⁰⁹ *Id.* at para. 67 (majority opinion).

²¹⁰ *Id.*

²¹¹ *Id.* at para. 96 (Abella, J., concurring).

²¹² *Id.* at paras. 108-12.

²¹³ *Id.* at para. 104. Justice Abella also states:

Where a legislature grants exclusive jurisdiction to the courts of its own province, it overrides forum selection clauses that may direct the parties to another forum. It would, in my respectful view, be contrary to public policy to enforce a forum selection clause in a consumer contract that has the effect of depriving a party of access to a statutorily mandated court. To decide otherwise means that a clear legislative intention can be overridden by a forum selection clause. This flies in the face of *Pompey’s* acknowledgment that legislation takes precedence over a forum selection clause.

Id. at para. 108 (citations omitted). If the legislature has indeed granted exclusive jurisdiction

Justice Abella appears to view forum selection clauses in consumer contracts as *de facto* unenforceable—since by definition, a forum selection clause in favor of a foreign court will “impede the ability of consumers to vindicate their rights in domestic courts.”²¹⁴ It is not clear that this is the appropriate inquiry.²¹⁵ That is, the analysis should focus on whether *this* forum selection clause in *this* contract is contrary to public policy. There is no indication that the plaintiff’s access to justice in *Douez* will be impeded by enforcing this forum selection clause. The dissent makes this point as follows:

It is unclear to us how a court can invalidate a contractual provision simply because the court finds it is contrary to public policy in the abstract. While the court can refuse to enforce otherwise valid contractual provisions that offend public policy, the party seeking to avoid enforcement of the clause must prove “the existence of an overriding public policy . . . that outweighs the very strong public interest in the enforcement of contracts.” In our view, no such overriding public policy is found on the facts of this case.²¹⁶

Moreover, it is fairly rare for a court to determine that a contract, or a particular provision of a contract, violates public policy.²¹⁷ Contracts that are sometimes cited as violating public policy include contracts for indentured servitude, contracts to buy and sell organs, and contracts to carry out an unlawful act.²¹⁸ It is not clear that a contract to litigate in a foreign jurisdiction—one where the other party to the contract is based—runs counter to public policy in the same way that these examples do. In finding that the clause at issue violates public policy, Justice Abella’s judgment runs the risk of diluting contract law doctrine.

Justice Abella also concluded that the doctrine of unconscionability rendered the forum selection clause unenforceable in this case. In order to establish unconscionability, two elements must be present: inequality of bargaining power and unfairness.²¹⁹ Justice Abella concludes:

to the courts of its own province over this claim, then the analysis should simply begin and end there. In other words, if the courts of British Columbia have exclusive jurisdiction, then this overrides the common law strong cause test. There is no need to consider the enforceability of the exclusive jurisdiction clause under stage one of the strong cause test. *See id.*

²¹⁴ *Id.* at para. 104.

²¹⁵ Certainly, Justice Abella could have explicitly held that forum selection clauses in consumer contracts were *de facto* contrary to public policy, but she did not go that far. Instead, she seemed to use concerns about forum selection clauses *generally* to invalidate this forum selection clause *specifically*. *See id.*

²¹⁶ *See id.* at para. 147 (McLachlin, C.J., dissenting) (quoting *Tercon Contractors Ltd. v. British Columbia (Transp. & Highways)*, [2010] 1 S.C.R. 69, at para. 123 (Can.)).

²¹⁷ *Id.* at para. 148.

²¹⁸ *See Tercon Contractors Ltd.*, [2010] 1 S.C.R. 69, at paras. 117-18.

²¹⁹ *Douez*, 2017 SCC 33, at para. 115 (Abella, J., concurring).

In my view, both elements are met here. The inequality of bargaining power between Facebook and Ms. Douez in an online contract of adhesion gave Facebook the unilateral ability to require that any legal grievances Ms. Douez had, could not be vindicated in British Columbia where the contract was made, but only in California where Facebook has its head office. This gave Facebook an unfair and overwhelming procedural—and potentially substantive—benefit.²²⁰

Justice Abella failed to conduct a meaningful unconscionability analysis; instead she cursorily concluded that this is a “classic case of unconscionability.”²²¹ Unconscionability as a contract doctrine focuses on whether or not there is *gross* unfairness to the plaintiff.²²² Nowhere in the judgment did Justice Abella truly grapple with whether or not enforcing the forum selection clause in favor of California would be grossly unfair. Specifically, she did not consider whether or not enforcement of the clause would amount to a deprivation of plaintiff’s access to justice. As with the doctrine of public policy, Justice Abella’s expansive interpretation of unconscionability risks setting too low a bar for the unconscionability doctrine.

V. WHERE DO WE GO FROM HERE?

Douez looks like a major victory for consumers. And it may be. But, based on how the Supreme Court of Canada came to the conclusion that the forum selection clause was unenforceable, the net result of the decision will likely be years of uncertainty over the legal effect of forum selection clauses.²²³

²²⁰ *Id.* at para 116.

²²¹ *Id.* It appears that the plaintiff did not even allege that the forum selection clause was unconscionable. *Id.* at para 145 (McLachlin, C.J., dissenting). Accordingly, evidence on unconscionability was not adduced by either party. *See id.* This makes Justice Abella’s conclusion that the forum selection clause was unconscionable even more of a stretch. *See id.*

²²² *Id.* at paras. 38-39 (majority opinion).

²²³ *See, e.g.,* Alexandra Cocks & Edmond Chen, *Douez v. Facebook, Inc.: Supreme Court of Canada decision creates new uncertainty about enforceability of forum selection clauses in consumer contracts*, MCCARTHY TÉTRAULT LLP (June 30, 2017), <http://www.canadianclassactionsmonitor.com/2017/06/douez-v-facebook-inc-supreme-court-of-canada-decision-creates-new-uncertainty-about-enforceability-of-forum-selection-clauses-in-consumer-contracts/> [<https://perma.cc/3RMT-VECS>] (“The precedent set by this case creates more uncertainty around how forum selection clauses will be applied by Canadian courts and could give plaintiffs new ammunition to avoid forum selection clauses in pursuing their claims.”); Robin Reinerston & Joshua Hutchinson, *Supreme Court of Canada Allows British Columbians to Pursue Privacy Class Action Against Facebook*, BLAKE CASSELS & GRAYDON LLP (June 29, 2017), <http://www.blakesbusinessclass.com/supreme-court-of-canada-allows-british-columbians-to-pursue-privacy-class-action-against-facebook/> [<https://perma.cc/LB2Q-TLYU>] (“This decision may result in more uncertainty with respect to the legal framework

Under the strong cause test, as it was envisaged prior to *Douez*, parties were fairly confident in where they stood on the issue of forum selection clauses: such clauses would routinely be enforced unless there was something unique or exceptional about the case that provided strong cause for overriding the forum selection clause.

Professor Pavlović recently conducted a study involving the enforceability of forum selection clauses in consumer contracts. She examined a total of nineteen cases, during the period between January 1, 1996 and July 1, 2016.²²⁴ The results of the survey were as follows:

The courts found that the forum-selection agreements were validly formed in all but two cases. Out of the seventeen cases in which the clause was found to be valid, the courts applied the strong-cause test in all but two cases. Forum-selection clauses were enforced in twelve cases resulting in the stay of proceedings.²²⁵

These results are to be expected. Because the strong cause test creates a presumption of enforceability, it is not surprising that the clauses were upheld in twelve of the seventeen cases where the clauses were found to be validly formed. What the data does not show is how many plaintiffs sued in the chosen court, or chose not to sue at all because of the clause. One would imagine that the very nature of the strong cause test, as interpreted prior to *Douez*, meant that parties would be dissuaded from suing in contravention of the clause. After *Douez*, plaintiffs will attempt to circumvent forum selection clauses in consumer contracts (including plaintiffs who otherwise would not have attempted to litigate in contravention of the clause). Depending on how lower courts interpret *Douez*, many of these plaintiffs have a real chance at having their forum selection clauses declared unenforceable. One should expect years of uncertainty—and years of litigation—concerning the status of forum selection clauses in consumer contracts.²²⁶

The disconnect between the test that the *Douez* majority endorsed (the

for assessing the enforceability of forum selection clauses, but it signals that forum selection clauses are less likely to be upheld when the contract involves consumers or privacy rights.”); Molly Reynolds et al., *SCC: Facebook’s Forum Selection Clause is Unenforceable*, TORYS LLP (June, 27, 2017), <https://www.torys.com/insights/publications/2017/06/scc-facebook-forum-selection-clause-is-unenforceable> (last visited Jan. 12, 2017) (“While litigating in Canada may not represent an overly onerous burden to Facebook relative to its size, this decision will concern online businesses that want certainty that they will not need to defend consumer claims all over the world. The expense and uncertainty raised by this decision may increase the cost of doing business with Canadian consumers.”).

²²⁴ Pavlović, *supra* note 10, at 389.

²²⁵ *Id.* at 405 (footnotes omitted).

²²⁶ Although litigants will surely attack forum selection clauses on both available fronts, i.e., formation and strong cause, it is likely that most of the litigation will focus on the strong cause test as articulated by the *Douez* majority. *Douez*, 2017 SCC 33, at para. 29.

strong cause test from *Pompey*) and the test that the *Douez* majority applied (a policy-based test favoring the plaintiff) will undoubtedly lead to confusion and chaos as lower courts try to sort out the future of the strong cause test. The confusion arises from the fact that the *Douez* majority held to the rhetoric of the *Pompey* strong cause test, but did not actually apply it. Instead, the majority largely abandoned the test in favor of broad policy considerations. These policy considerations have now become the epicenter of the forum selection clause analysis, even though they were not part of the original *Pompey* strong cause test. Essentially, the majority said one thing and did another. The majority said that it was retaining and applying the strong cause test; in reality, it created and applied a wholly different test.

This wholly different test, which privileges policy considerations and eschews the traditional *Pompey* factors, actually works to undermine the presumption that forum selection clauses are entitled to great deference. That is, by reformulating the test in a manner that makes policy considerations paramount, the test is skewed in favor of displacing a forum selection clause in a consumer contract. This makes the test pretty much the opposite of the strong cause test. In the dissent, Justices McLachlin and Côté emphasized that “[s]trong cause means what it says—it is not any cause, but strong cause. The default position is that forum selection clauses should be enforced.”²²⁷ Under the reformulated—but not renamed—strong cause test, the default position is that forum selection clauses in consumer contracts will not be enforced. Rather, the policy considerations and secondary factors will almost always militate in favor of displacing forum selection clauses in consumer contracts.

These policy considerations will prove problematic for courts to meaningfully apply in future cases. With respect to unequal bargaining power, the majority’s analysis boils down to the argument that where there is unequal bargaining power in a consumer contract, a forum selection clause should not be enforced.²²⁸ However, the nature of consumer contracts is that they are all characterized by unequal bargaining power. Accordingly, this public policy factor will always weigh in favor of displacing a forum selection clause. How to apply a factor that always weighs in one direction is a difficult question. The other public policy factor that the *Douez* majority considered was the nature of the rights at issue.²²⁹ If courts begin to consider the nature of the rights (or claims) at issue, it will invite creative pleading and/or litigation on the significance of the underlying claim. By interjecting this new variable into the strong cause test, the *Douez* majority has simply

²²⁷ *Id.* at para. 157 (McLachlin, C.J., dissenting).

²²⁸ *Id.* at paras. 111-12, 115-17 (Abella, J., concurring).

²²⁹ *Id.* at para. 95.

introduced more complexity into the analysis.²³⁰

From a certainty standpoint, it would have been preferable for the Court to have actually overruled, or significantly modified, the strong cause test. The Court could have said that the strong cause test does not apply in the consumer context; instead, the court should conduct a regular *forum non conveniens* analysis, with the clause being but one factor to consider. Or, the Court could have reversed the burden of proof, requiring, in the consumer context, the defendant to show why the clause should be upheld. Either of these solutions would have provided more direction for courts and litigants as to the enforceability of forum selection clauses in consumer contracts.

Certainly, companies doing business with consumers in Canada will not be pleased with the *Douez* decision. The case makes it impossible for businesses to predict whether or not they will be subject to jurisdiction in a given Canadian forum, notwithstanding an exclusive forum selection clause in favor of a foreign forum. While businesses may not be able to accurately predict whether a given forum selection clause will be enforceable, it is a fair statement to say that such clauses are less likely to be enforced post-*Douez* than they were pre-*Douez*.

Businesses employ forum selection clauses in order to control, *ex ante*, where they are subject to suit.²³¹ A company that does business across Canada would clearly prefer to litigate any claims in one singular forum (usually its home forum), rather than ten separate ones. If businesses that conduct business across provincial lines now face the prospect of suit in every Canadian province, this might have second and third order effects.²³² Companies might choose not to do business in Canada, or choose not to do business in certain Canadian provinces. Alternatively, businesses may pass on the increased costs of litigating across the country to Canadian consumers, in the form of higher prices for goods and services.²³³ Some businesses may attempt to creatively structure their affairs to avoid the *Douez* holding, such as by electing to include arbitration provisions in their contracts, rather than

²³⁰ It is not a far stretch from the “nature of the rights at issue” to consider related variables: the amount of money at stake; the significance of the claim for the plaintiff personally; the number of claimants affected by the alleged breach; the purported willfulness of the alleged breach; and the public interest in having the claim litigated in the plaintiff’s chosen forum. *See id.* at para. 58 (majority opinion); *see generally Pompey*, 2003 SCC 27.

²³¹ *Douez*, 2017 SCC 33, at para. 123.

²³² *See* 1400467 Alberta Ltd. v. Adderley, 2014 ABQB 339 (Can.) (“[I]nterprovincial and international commerce depend on certainty. In the absence of assurance about the law that will govern a contract and the jurisdiction where the law will be enforced, businesses might be unwilling to engage with others even outside the province but within Canada; that would have a negative effect not only on Canadian businesses, but also on Canadian customers and consumers.”).

²³³ “The expense and uncertainty raised by this decision may increase the cost of doing business with Canadian consumers.” Reynolds et al., *supra* note 223.

forum selection clauses.²³⁴ Suffice it to say that the impact of *Douez* will definitely be felt by companies doing business in Canada.

VI. CONCLUSION

Douez marks a significant departure from existing law. Despite the majority of the Supreme Court saying that it was applying the strong cause test, the truth is that the majority abandoned it—at least for cases involving (some) consumer contracts. The strong cause test, as originally envisioned, holds parties to their bargain unless exceptional circumstances exist to justify departing from the clause. The *Douez* approach, on the other hand, considerably loosens the strong cause test, with the result that many forum selection clauses in consumer contracts will be rendered unenforceable. At the core of the new analysis are broad public policy considerations; specifically, courts are directed to examine the adhesive nature of the bargain at issue and the nature of the rights at stake in order to determine whether a clause should be upheld. In virtually every consumer contract, the first public policy consideration (the adhesive nature of the bargain) will militate against enforcing the clause, and the second public policy consideration (the nature of the rights at issue) has the potential to create a sliding scale for enforceability of forum selection clauses depending on a judge's weighing of the underlying significance of the legal claims. Added to the inquiry are miscellaneous "secondary factors," along with the traditional *Pompey* factors, and the result is a hodge-podge of considerations that complicate and confuse the forum selection clause analysis. The only thing certain about the *Douez* case is that it will cause years of uncertainty with respect to the fate of forum selection clauses in consumer contracts.

²³⁴ In three provinces, pre-dispute arbitration clauses in consumer contracts are unenforceable to the extent that they purport to preclude a plaintiff's access to the court system. *See* Pavlović, *supra* note 10, at 392-93 ("In Canada, arbitration clauses have attracted a significant amount of litigation and academic criticism. In response, Alberta, Ontario, Quebec, and Saskatchewan have enacted consumer protection legislation regulating pre-dispute mandatory arbitration clauses.").