

Legal update

Supreme Court of Canada “unfriends” Facebook’s forum selection clause: Privacy action can proceed in British Columbia

June 2017

**Privacy and access to information
Technology and innovation**

In a surprising and closely divided decision, the Supreme Court of Canada has declared that Facebook is not entitled to rely on a forum selection clause to resist a class action commenced for breach of privacy in British Columbia.

The decision opens the door to claims in Canadian courts, even where a consumer has agreed to terms including forum selection which require that disputes be resolved outside of Canada.

In this case, the provisions in Facebook’s terms of use requiring that disputes be heard in California under California law did not, under the BC *Privacy Act*, bar a claim from being heard in British Columbia.

Strong cause not to limit consumer privacy rights

The BC Court of Appeal had previously enforced the forum selection clause, and stayed the BC class action, applying the well-established *Z.I. Pompey* test,¹ which requires that there be “strong cause” before a court declines to enforce the parties’ choice of forum.

Overturning that decision, three Supreme Court judges found that Facebook had established that the forum selection clause was enforceable but that it should not bar a claim in this case. The Court considered the public policy considerations relating to the “gross inequality of bargaining power”² exercised “without any opportunity to negotiate,”³ and the nature of the rights at stake.

The Court identified privacy as a quasi-constitutional right that plays an essential role in a free and democratic society and that embodies key Canadian values. The public policy value in having such rights adjudicated by a local court weighed heavily against enforcing the choice of forum provisions.⁴ The Court also found support in secondary considerations, being the interests of justice and the convenience of litigating in local courts.

These factors will exist in respect of many standard form agreements, including standard terms of use and privacy provisions for various electronic products and services. This decision will therefore have broad implications.

This decision casts a shadow over the enforceability of forum selection clauses in online consumer contracts. Abella J., in concurring with three justices to make the majority, went further, concluding that the forum selection clause was simply unenforceable as a result of the inequality of bargaining power at play.⁵

A divided court

Three Supreme Court justices (and the BC Court of Appeal) took a different view, concluding that there were not sufficient public policy grounds to override the jurisdiction selection clause. Rather, forum selection clauses are supported by strong policy considerations. For the minority, holding parties to their bargains—whether in the consumer context or not—remained a more important consideration.

Given that no single opinion garnered support from more than three justices, the decision is far from being a clear and definitive statement on Canadian law. Nonetheless, for the time being, any business in Canada seeking to rely on a forum selection clause in a standard form agreement ought to consider the prospect that they will not be enforced where constitutional and quasi-constitutional rights are engaged.

Ryan Berger
Mat Brechtel

Footnotes

- ¹ *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27.
- ² *Douez v. Facebook, Inc.*, 2017 SCC 33 at para. 38, 53.
- ³ at para. 33.
- ⁴ at para. 59.
- ⁵ at para. 117.

For further information, please contact one of the following lawyers:

> Julie Himo	Montréal	+1 514.847.6017	julie.himo@nortonrosefulbright.com
> Karen Jensen	Ottawa	+1 613.780.8673	karen.jensen@nortonrosefulbright.com
> Robert L. Percival	Toronto	+1 416.216.4075	robert.percival@nortonrosefulbright.com
> Roger A. Watkiss	Toronto	+1 416.202.6716	roger.watkiss@nortonrosefulbright.com
> Tony A. Morris	Calgary	+1 403.267.8187	tony.morris@nortonrosefulbright.com
> Ryan Berger	Vancouver	+1 604.641.4956	ryan.berger@nortonrosefulbright.com

Norton Rose Fulbright Canada LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright South Africa Inc and Norton Rose Fulbright US LLP are separate legal entities and all of them are members of Norton Rose Fulbright Verein, a Swiss verein. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.

References to "Norton Rose Fulbright", "the law firm", and "legal practice" are to one or more of the Norton Rose Fulbright members or to one of their respective affiliates (together "Norton Rose Fulbright entity/entities"). No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any Norton Rose Fulbright entity (whether or not such individual is described as a "partner") accepts or assumes responsibility, or has any liability, to any person in respect of this communication. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of the relevant Norton Rose Fulbright entity.

The purpose of this communication is to provide general information of a legal nature. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.