SCC Court File No: **36616**

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for British Columbia)

B E T W E E N:

DEBORAH LOUISE DOUEZ

Appellant
(Respondent)

- and -

FACEBOOK, INC

Respondents
(Appellant)

- and -

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

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TABLE OF CONTENTS

Page

PART I – OVERVIEW

1. The historical deference this Court has accorded to forum selection clauses—developed in the context of sophisticated commercial agreements—is wholly unsuitable as a means of navigating jurisdictional conflicts on global online platforms. In *Tolofson*, Justice La Forest warned on behalf of this Court against applying existing rules of jurisdiction "with insufficient reference to the underlying reality in which they operate and to general principles that should apply in responding to that reality." The underlying reality raised by this appeal is that of digital platforms which are cross-territorial in constitution, are increasingly the venue where important aspects of our daily commercial, social and political interactions occur, and frequently feature non-negotiable forum selection clauses. Granting forum selection clauses supremacy over other jurisdictional considerations in a medium characterized by these features results in a framework for navigating online jurisdiction that ignores the salient "underlying reality" while undermining principles of order, fairness, and comity that must permeate a "workable system of international law". The prevailing system also exacerbates endemic challenges in consumer protection and privacy by compelling individual Canadians to advance increasingly important claims in foreign courts. As this Court noted in *Hunt*, "it is simply not just to place the onus on [affected individuals] to undertake costly constitutional litigation in another jurisdiction."

> ***Tolofson v Jensen***, [1994] 3 SCR 1022, paras 35-37; ***Club Resorts Ltd v Van Breda***, [2012] 1 SCR 572, 2012 SCC 17, paras 25-29; ***BNP Paribas (Canada) v BCE Inc***, 2007 ONCA 559, para 22; ***Hunt v T&N plc***, [1993] 4 SCR 289, para 39; ***Morguard Investments Ltd v De Savoye***, [1990] 3 SCR 1077, paras 55-56

PART II – POSITION ON APPELLANTS' QUESTIONS

2. The Intervener will argue that a workable system for online conflicts of law cannot be premised on deference to non-negotiable forum selection clauses imposed onto large numbers of Canadians.

PART III – STATEMENT OF ARGUMENT

3. This appeal raises novel questions relating to the enforceability of non-negotiable forum selection clauses imposed *en masse* onto consumers of online platforms. The high degree of deference accorded to such clauses in the commercial contracts is antithetical to order, fairness and comity when applied to this online consumers. It exacerbates systemic inequities that already deter enforcement of consumer rights. Moreover, it creates a framework for navigating jurisdiction online that provides minimal latitude for the application of important local standards and rights. Critically, it undermines important core

values adopted by statute and common law to realize full protection of the right to privacy. New considerations are needed to align private international law with the underlying realities at issue.

A. FORUM CLAUSE SUPREMACY UNDERMINES ORDER, FAIRNESS & COMITY

4. Order, fairness and comity are the core guiding principles for resolving conflicts that arise between different territorial legal systems in our increasingly inter-connected world. The primary means by which these principles are achieved is the 'real and substantial connection' test, which courts have refined to determine whether the laws and legal apparatus of a given state can govern certain actions and activities that have impacts within their sovereign territorial boundaries. Addressing activities that will inevitably be substantially connected to multiple jurisdictions, courts developed the *forum non conveniens* doctrine to identify conditions where order, fairness, and comity favour declining established jurisdiction so that a more appropriate forum can hear a given matter. However, this Court has set a high bar for defeating established jurisdiction, holding that the *forum non conveniens* should only defer to another forum where that forum has been shown to be *clearly* more appropriate and is "in a better position to dispose fairly and efficiently of the litigation". (*Van Breda*) By this framework, the analysis is inherently focused on determining the most appropriate forum, with the presence of a real and substantial connection in a jurisdiction as the central indicator that an entity has effectively submitted itself to the legal system of a state.

> ***Club Resorts Ltd v Van Breda***, [2012] 1 SCR 572, 2012 SCC 17, paras 26-28, 109; ***Breeden v Black***, [2012] 1 SCR 666, 2012 SCC 19, para 37; Teresa Scassa & Robert J Currie, "**New First Principles? Assessing the Internet's Challenges to Jurisdiction**", (2011) 42 *Georgetown J of Intl L* 1017

5. Forum selection clauses present a stark departure from this approach. Their enforcement overrides the "organizing principle" (*Van Breda*) for resolving conflicts in overlapping territorial laws, effectively substituting an analysis of contract enforceability for common law principles designed to achieve order, fairness, and comity. Following this Court's direction in *ZI Pompey Industrie*, Canadian courts have permitted other considerations to supersede a valid forum selection clause only in "exceptional circumstances." It would undermine order and fairness if "sophisticated parties" that have explicitly structured their "international commercial transactions" around a particular jurisdiction and its laws were permitted to retroactively resile. Applying this same rationale to non-negotiable forum selection clauses imposed *en masse* to large Canadian customer bases ignores the reality of inherently non-territorial online services. The resulting framework is unworkable as a means of navigating "exchanges

and communications between people in different jurisdictions that have different legal systems".

> ***ZI Pompey Industrie v ECU-Line NV***, [2003] 1 SCR 450, 2003 SCC 27, paras 20-21 and 29; ***Club Resorts Ltd v Van Breda***, [2012] 1 SCR 572, 2012 SCC 17, paras 31, 74

(i) Enforcing non-negotiable forum selection clauses undermines Order

6. Permitting sophisticated commercial actors to resile from freely negotiated forum selection agreements would undermine certainty and security in transactions which are derivatives of order. The same rationale does not apply to non-negotiable forum selection clauses in contracts of adhesion. In the context of commercial agreements, sophisticated actors will explicitly negotiate forum selection clauses. (*International Time Recorder*; *Benefact Consulting*) Accepting a forum selection clause or, by contrast, a service provider characterized by a forum selection clause, will frequently involve a sophisticated analysis of the foreign legal system in question and analysis of the risks inherent in submitting related business arrangements to the jurisdiction in question. (*OT Africa*; *Crown Resources*; *Manjos*; *Aldo Group*) As noted in *Aldo Group v Moneris*, it is this presumed foreseeability and salience that is central to the high deference allotted to forum selection clauses by the *Pompey* framework:

> Sophisticated parties are deemed to have informed themselves about the risks of foreign legal systems and are deemed to have accepted those risks in agreeing to a forum selection clause. ... It is precisely because signatories to a forum selection clause have weighed and accepted the forum and its risks that these clauses should be enforced. Non-signatories have not necessarily engaged in this weighing exercise.

Such analysis is characteristic of the commercial context and, as a result, sophisticated parties are rightly taken to have informed themselves of the risks inherent in submitting their business arrangements to a different legal system. (*Quinlan*; *OT Africa*; *Crown Resources*; *Aldo Group*)

> ***International Time Recorder Co v Lavie Computers Ltd***, [2000] 95 ACWS (3d) 847, (ONSC), para 7; ***Benefact Consulting Group Inc v Endura Manufacturing Co***, 2016 ONSC 3645, para 37; ***Crown Resources Corp v National Iranian Oil Co***, [2006] 273 DLR (4th) 65 (ONCA), leave to appeal rf'd, [2006] SCCA No 412, paras 26-27; ***Aldo Group Inc v Moneris Solutions Corporation***, 2013 ONCA 725, leave to appeal rf'd, [2014] SCCA No 31, paras 46-48; ***Manjos v Fridgant***, 2016 ONCA 176, paras 6-9; ***OT Africa Line Ltd v Magic Sportswear***, [2005] EWCA Civ 710 (UK CA), para 47; ***Quinlan v SAFE International Fakrings AB***, [2005] FCA 1362 (AUS FCA), paras 46, 49(e)

7. The forum selection clauses imposed on customers of online service providers invoke a different "underlying reality". The low threshold set for enforceability of online terms of service binds customers to such terms lacking awareness of submission to a foreign legal system. (*Dell*) While this

low threshold may be appropriate for the purpose of enforcing terms of service, it does nothing to displace individual customer expectations that their activities will remain guided by the legal system of their home. (*Tilden*; *OT Africa*; *Scala Fashions*; *Decaire*) This Court held in *Tolofson* that such expectations are robust: "Ordinary people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly." While enforcing forum selection clauses in this context may further certainty and security for the online service provider who imposed the clause, it does the opposite for the millions of ordinary people who would not foresee or expect its implications and cannot be deemed to have undertaken sophisticated analysis of foreign legal systems prior to opening an online account. For this substantial group, who experience online platforms from their home jurisdiction and cannot be taken to have "weighed and accepted the forum and its risks", default enforcement of forum selection clauses undermines certainty and by extension order. (*Aldo Group*)

> ***Aldo Group Inc v Moneris Solutions Corporation***, 2013 ONCA 725, para 47; ***Tilden Rent-A-Car v Clendenning***, [1978] 18 OR (2d) 601 (ONCA); ***Dell Computer Corp v Union des consommateurs***, [2007] 2 SCR 801, 2007 SCC 34; ***Tolofson v Jensen***, [1994] 3 SCR 1022; ***Straus v Decaire***, [2007] 156 ACWS (3d) 1058 (ONSC), para 34, af'd 2007 ONCA 854; ***Scalas Fashions Ltd v Yorkton Securities Inc***, 2003 BCCA 366, para 41; ***OT Africa Line Ltd v Magic Sportswear***, [2005] EWCA Civ 710 (UK CA), para 47; Marina Pavlovic, "**Contracting Out Access to Justice: Enforcement of Forum Selection Clauses in Consumer Contracts**", (2017) 62(2) *McGill L J*, forthcoming

(ii) Enforcing non-negotiable forum selection clauses undermines Fairness

8. A conflict of laws system by which forum selection clauses are predominantly enforced against individuals is also one that undermines fairness. The bargaining inequalities that render such clauses 'non-negotiable' substitute choice of law bargaining decisions that are fundamentally fair with unilateral determinations that are not. (*Butchart*; *Rosenthal*; *Quinlan*; *Océano*) While, it is appropriate to compel sophisticated actors to choose their services based on forum selection clauses, it is unfair to require individuals to choose online platforms on this basis. (*OT Africa*; *Aldo Group*) The nature of the Internet is such that innovative services will come from across the globe, often with no comparable domestic alternative available. A conflict of laws system characterized by fairness would not compel individual customers to waive their right to access local legal systems in order participate in digital platforms.

> ***Joined Cases C-240/98 to 244/98 Océano Grupo Editorial SA v Quintero***, [2000] ECR I-4941 (CJEU), paras 22-25; ***Fresh Mix Ltd v Bilwinco A/S***, [1999] 30 CPC (4th) 282, para 11; ***Rosenthal v Kingsway General Insurance***, [2002] 20 CPC (5th) 394 (Ont Div Ct); ***Butchart v EMC Corp of Canada***, [2001] 148 OAC 297 (ONSC); ***Quinlan v SAFE International Fakrings AB***, [2005] FCA 1362 (AUS FCA), paras 46,

49(e); ***OT Africa Line Ltd v Magic Sportswear***, [2005] EWCA Civ 710 (UK CA), para 47; ***Aldo Group Inc v Moneris Solutions Corporation***, 2013 ONCA 725, paras 46-48

9. There is no unfairness in compelling a global service provider to rely on the legal system of a jurisdiction which it has chosen to substantially enter – such is the foreseeable reality of global commerce. (*Beals*; *Hunt*; *Aldo Group*; *Fresh Mix*) By contrast, it is inherently unfair to diminish the ability of individual consumers to enforce or defend their legal rights by compelling them to advance their claims in foreign courts, as highlighted by the Court of Justice of the European Union:

> A term of this kind ... obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from [their] domicile. This may make it difficult for [them] to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause [them] to forgo any legal remedy or defence. Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action ... By contrast, the term enables the seller or supplier to deal with all the litigation relating to [its] trade, business or profession in the court in the jurisdiction of which [it] has [its] principal place of business. This makes it easier for the seller or supplier to arrange to enter an appearance and makes it less onerous for [it] to do so.
>
> It follows that where a jurisdiction clause is included, without being individually negotiated, in a contract between a consumer and a seller or supplier ... and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has [its] principal place of business, it must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

As individuals are simply not well placed to bear the costs of cross-jurisdictional litigation, forum selection clause enforceability systemically undermines the ability of consumers to advance claims that are already "the most frequently abandoned problems." (*Fresh Mix*; *Quinlan*; *Hunt*; *Texserv*) Applied broadly, this approach systemically favours online providers over individuals, disregarding the underlying reality that sophisticated global online platforms are far better situated to advance their claims in foreign courts than are individual subscribers. As this Court held in *Hunt*, a framework that systematically forces litigants to abandon local courts in favour of the headquarter territory of multi-jurisdictional companies fails to embody the jurisdictional principle of fairness.

Joined Cases C-240/98 to 244/98 Océano Grupo Editorial SA v Quintero, [2000] ECR I-4941 (CJEU), paras 22-25; ***Fresh Mix Ltd v Bilwinco A/S***, [1999] 30 CPC (4th) 282 (ONCJ), paras 11-12; ***Quinlan v SAFE International Fakrings AB***, [2005] FCA 1362 (AUS FCA), para 46; ***Texserv Inc v Incon Container USA Ltd***, [2000] 48 OR (3d) 427 (ONSC), para 21; ***OT Africa Line Ltd v Magic Sportswear***, [2005] EWCA Civ 710 (UK CA), para 47; ***Aldo Group Inc v Moneris Solutions Corporation***, 2013 ONCA 725,

paras 46-48; ***Beals v Saldanha***, [2003] 3 SCR 416, 2003 SCC 72, para 25, 32-33 and 37; ***Hunt v T&N plc***, [1993] 4 SCR 289, paras 39, 41 and 65 ("the manufacturer must be taken to have known that the goods would be used outside the province of manufacture in the manner they were. Given the significant connection with the province where the injury took place, it is difficult to see how it could be said to offend the principles of order and fairness for the British Columbia courts to take jurisdiction. ... Above all, it is simply not just to place the onus on the party affected to undertake costly constitutional litigation in another jurisdiction"); Marina Pavlovic, "**Contracting Out Access to Justice: Enforcement of Forum Selection Clauses in Consumer Contracts**", (2017) 62(2) *McGill L J*, forthcoming

(iii) Enforcing non-negotiable forum selection clauses undermines Comity

10. A framework characterized by broad enforcement of non-negotiable forum selection clauses in online consumer contracts is also one that undermines comity. The principle of Comity seeks to develop jurisdictional rules that, on the one hand, allow for the interoperation of several legal systems while, on the other, limit the overreach of each. The objective is to provide a framework that allows for "differences in legal tradition which are deserving of respect". Most online services are global in nature, with extensive real and substantial connections to a number of territorial jurisdictions. The prevailing deference to forum selection clauses provides minimal latitude for 'differences in legal tradition' as all legal disputes are effectively channelled to the online platform's home jurisdiction. This creates an unstable basis for navigating online multi-jurisdictional conflicts, as it eliminates the ability for multiple standards to co-exist on platforms that already impact significantly on important economic, social and political activity. As more daily activity becomes digitized, disputes with global e-commerce platforms ubiquitously governed by contracts of adhesion will exacerbate the impact of such an attitude towards jurisdictional conflicts, further undermining the ability of multiple standards to co-exist.

Breeden v Black, [2012] 1 SCR 666, 2012 SCC 19, generally and para 26; ***Club Resorts Ltd v Van Breda***, [2012] 1 SCR 572, 2012 SCC 17, paras 74-75; Teresa Scassa & Robert J Currie, "**New First Principles? Assessing the Internet's Challenges to Jurisdiction**", (2011) 42 *Georgetown J of Intl L* 1017

11. The current test for overcoming forum selection clauses, developed in the context of sophisticated commercial transactions, does not permit for legitimate differences in legal systems to interoperate in governing exchanges and communications between individuals in different jurisdictions. The current test obligates courts to stay properly initiated local actions without any assurance that the contractually selected foreign jurisdiction will apply procedural safeguards, legal standards, or substantive rights individuals expect in the local jurisdiction in question. There is no element of the current test that ensures locally guaranteed procedural safeguards—such as the explicit right to adjudication before a superior court of record that is found in the *Privacy Act* in the instant case—will be respected by the

contractually selected jurisdiction, risking adjudication by less expert courts, tribunals or arbitrators. (*Seidel*) There is also no effective mechanism to ensure contractually selected courts will properly apply, or be informed of, Canadian standards—an issue that does not arise where the Canadian individuals' choice of forum is not overridden by a non-negotiable forum selection clause. (*Hunt*)

> ***Seidel v TELUS Communications Inc***, [2011] 1 SCR 531, 2011 SCC 15; ***Hunt v T&N plc***, [1993] 4 SCR 289*;* ***Douez v Facebook Inc***, 2015 BCCA 279

12. Critically, lower courts no longer require any assurance that the contractually selected foreign court will apply the laws and rights of the local jurisdiction. Ontario courts, for example, will only retain jurisdiction if a contractually selected foreign court is demonstrably "unable to deal with the claim". (*Expedition*) The appellate court below found that in most instances, a Canadian court asked to enforce a forum selection clause need not—and in most instances will not even be able to—assess whether the contractually selected court will or will not apply Canadian law to the underlying dispute. (*Douez*) On appeal, the Respondent argues that Canadian courts should enforce forum selection clauses without any consideration as to whether to contractually designated court will recognize Canadian rights, yet the underlying reality is that most jurisdictions will apply local law where, as here, it is indicated by a choice of law provision. (Gould) Given the inherently global nature of most online service providers and the ubiquity of non-negotiable forum selection clauses, enforcement without attention to choice of law can amount to an effective exclusion of online conduct from Canadian laws and, more broadly, to a framework with minimal room for "differences in legal tradition which are deserving of respect."

> ***Expedition Helicopters Inc v Honeywell Inc***, 2010 ONCA 351, para 24; ***Douez v Facebook Inc***, 2015 BCCA 279, paras 80 and 82-84; **Respondent's Factum**, April 26, 2016, paras 96-97; ***Breeden v Black***, [2012] 1 SCR 666, 2012 SCC 19, generally and para 26; ***Club Resorts Ltd v Van Breda***, [2012] 1 SCR 572, 2012 SCC 17, paras 74-75; ***Joined Cases C-240/98 to 244/98 Océano Grupo Editorial SA v Quintero***, [2000] ECR I-4941 (CJEU), paras 22-25 ("Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action"); Marty Gould, "**The Conflict Between Forum-Selection Clauses and State Consumer Protection Laws: Why Illinois Got it Right in *Jane Doe v Match.com***", (2015) 90(2) *Chicago-Kent L R* 671, p 678

13. Finally, the principle of reciprocity (an element of comity), does nothing to prevent a rule that more rigorously scrutinizes non-negotiable forum selection clauses in consumer contracts. The European Union has adopted regulations shielding consumers against non-negotiable clauses that would waive jurisdiction of EU courts. States within the United States offer similar protection. (Gould) Other courts have recognized at common law that non-negotiable forum selection clauses imposed onto consumers

should be granted less deference. (*Quinlan*) Where forum selection clauses operate in a manner that effectively defeats rights granted to citizens, some jurisdictions render these unenforceable as unfair or otherwise contrary to public policy. (*Niedermeyer*; *VB Penzugyi*; *Frey*; *Gallo Winery*) As a matter of reciprocity, evolving Canadian rules of jurisdiction so as to account for the underlying realities faced by consumers of online service providers would not violate principles of reciprocity.

> ***Morguard Investments Ltd v De Savoye***, [1990] 3 SCR 1077; ***Quinlan v SAFE International Fakrings AB***, [2005] FCA 1362 (AUS FCA), paras 46, 49(e); ***Hunt v T&N plc***, [1993] 4 SCR 289; ***OT Africa Line Ltd v Magic Sportswear***, [2005] EWCA Civ 710 (UK CA), para 47; ***Case C-137/08 VB Penzugyi Lizing Zrt v Ferenc Schneider,*** [2010] ECR I-10847 (CJEU Grand Chamber); ***Niedermeyer v Charlton***, 2014 BCCA 165; ***Microcell Communications Inc v Frey***, 2011 SKCA 136; ***E&J Gallo Winery v Morand Bros Beverage Co***, (2002) 247 F.Supp.2d 973 (US, Dist Ct Ill)(" It is clear that the Illinois Beer Act embodies Illinois' strong public policy in favor of having these issues litigated within its borders. Allowing a privately contracted forum selection clause to supersede the Beer Act and its policies would frustrate the intention of the statute. The forum selection clause, therefore, is unenforceable under the Seventh Circuit's standards."); Marty Gould, "**The Conflict Between Forum-Selection Clauses and State Consumer Protection Laws: Why Illinois Got it Right in *Jane Doe v Match.com***", (2015) 90(2) *Chicago-Kent L R* 671

B. FORUM CLAUSE SUPREMACY UNDERMINES PRIVACY GOVERNANCE

14. When applied to situations implicating privacy and other constitutionally protected rights of individual subscribers, non-negotiable forum selection clauses pose heightened concerns. Canadian courts have recognized the importance of privacy as a constitutionally protected animating legal value, requiring the common law to develop in a manner that is consistent with and protective of privacy. (*Jones*) Canadian legislation designed to protect privacy is treated as quasi-constitutional, giving it pre-eminence over ordinary legislative initiatives in recognition of the important interests being protected. (*Cash Converters*) Principles of comity recognize that core constitutional values are rooted in a nation's social and historical context and should be determined in accordance with domestic standards and norms. (*Equustek*; *Breeden*; *Hunt*) Additionally, this Court has held that "an individual's reasonable expectation of privacy would be commensurate to the degree of protection provided by the law of the country in which she or he is located." (*Hape*) The prevailing rule will frustrate Canadian individual's ability to assert core privacy protections in accordance with Canadian standards. In the instant case, a provincial legislature has granted explicit protections to the privacy of its denizens, yet a forum selection clause is enforced without any assurance that these rights will be respected by the contractually designated court. In other provincial jurisdictions, the same privacy protections are provided as a matter of common law and would be equally frustrated by the prevailing rule. (*Jones*)

Jones v Tsige, 2012 ONCA 32, paras 39, 44-46; ***Cash Converters Inc v Oshawa (City)***, 2007 ONCA 502, para 29; ***Equustek Solutions Inc v Google Inc***, 2015 BCCA 265, paras 91-92; ***Hunt v T&N plc***, [1993] 4 SCR 289, para 39; ***R v Hape***, [2007] 2 SCR 292, 2007 SCC 26, paras 88, 110; ***Douez v Facebook Inc***, 2014 BCSC 953, paras 20-21; ***Breeden v Black***, [2012] 1 SCR 666, 2012 SCC 19

C. A WORKABLE FRAMEWORK FOR ONLINE JURISDICTION IS NEEDED

15. The current framework for assessing non-negotiable forum selection clauses in online consumer contracts undermines principles of order, fairness and comity, while, specifically, providing insufficient protection for constitutional and consumer rights. The Respondent argues that adopting a rule that is less deferential with respect to forum selection clauses can only occur following clear legislative action and, moreover, that no such action has been taken. However, the process proposed by the Respondent is unsustainable. On the one hand, the Respondent argues that the *Privacy Act*'s designation of the British Columbia Supreme Court as the exclusive venue for the rights it grants is not sufficiently express to override a forum selection clause. However, this imposes too demanding a standard on legislatures. On the one hand, other jurisdictions have found comparable provisions to be capable of overriding forum selection clauses. (*Gallo Winery*)

Hunt v T&N plc, [1993] 4 SCR 289, para 39; **Respondent's Factum**, April 26, 2016, paras 47-51; ***E&J Gallo Winery v Morand Bros Beverage Co***, (2002) 247 F.Supp.2d 973 (US, Dist Ct Ill), p *978

16. On the other, as this Court has noted, while legislatures are free to supplement jurisdictional rules, the Courts retain responsibility for ensuring the common law rules governing private international law remain aligned with modern realities. (*Morguard*; *Tolofson*) This responsibility is important where, as here, the prevailing rule is not aligned with the "underlying reality" it seeks to regulate. The instant case provides an example of the harm that can arise if it is left to legislatures to address all cross-border issues in the rapidly evolving context of online platforms. The BC *Privacy Act* was adopted in the 1960s, well before this Court's first attempt to modernize its body of private international law in recognition of increased cross-border interactivity. (*Morguard*) It took action to vest the BC superior court of record with adjudicative jurisdiction over the rights it granted, yet the Respondents maintain that this legislative action is not sufficiently clear to ground a public interest capable of overriding a forum selection clause. (*Douez*) In other provinces, the same rights of action that are statutorily granted in BC are governed by the common law. (*Jones*) Moreover, while many provinces have encoded factors relevant to the real and substantial connection and *forum non conveniens* doctrines, none have encoded the *Pompey* factors, leaving the question open to ongoing judicial elaboration. As

in other common law contexts, this elaboration should evolve in a manner that realizes constitutionally protected rights such as privacy. (*Jones*)

> ***Tolofson v Jensen***, [1994] 3 SCR 1022, paras 35-37; ***Morguard Investments Ltd v De Savoye***, [1990] 3 SCR 1077, paras 55-56; ***Douez v Facebook Inc***, 2015 BCCA 279, para 68; ***Jones v Tsige***, 2012 ONCA 32, paras 39, 44-46; ***Cash Converters Inc v Oshawa (City)***, 2007 ONCA 502, para 29

17. The current context demands consideration of additional factors to account for systemic issues that would otherwise greatly undermine principles of order, fairness and comity. First, a non-negotiable forum selection clause imposed onto customers of global online services must attract less deference than clauses freely bargained by sophisticated commercial actors. (*Quinlan*) Second, where individual customers sue a global online provider in their home jurisdiction, courts should be more hesitant "to place the onus on [these individuals] to undertake costly ... litigation in another jurisdiction" as consumers are generally less able to bear the cost and challenge of litigation abroad. (*Hunt*; *Beals*; *Oceano*; *Texserv*) Third, courts must be satisfied that the contractually designated court will offer comparable procedural (access to a competent court) and substantive (willingness and ability to apply relevant Canadian law) rights and standards. (*Gallo Winery; Frey*; *Niedermeyer*; *Breeden*) Where core constitutional values are at issue, the Court might require a waiver of any choice of law concerns. (*Equustek*; *Hape*; *Hunt*; *Breeden*) Finally, the obligation to ensure these criteria are met cannot rest with individual litigants, but must instead lie with the court itself. (*Oceano*; *VB Penzugyi*)

> ***Quinlan v SAFE International Fakrings AB***, [2005] FCA 1362 (AUS FCA), paras 46, 49(e); ***Texserv Inc v Incon Container USA Ltd***, [2000] 48 OR (3d) 427 (ONSC), para 21; ***Beals v Saldanha***, [2003] 3 SCR 416, 2003 SCC 72, para 25, 32-33 and 37; ***Niedermeyer v Charlton***, 2014 BCCA 165; ***Microcell Communications Inc v Frey***, 2011 SKCA 136; ***E&J Gallo Winery v Morand Bros Beverage Co***, (2002) 247 F.Supp.2d 973 (US, Dist Ct Ill), p *978 ("Allowing a privately contracted forum selection clause to supersede the Beer Act and its policies would frustrate the intention of the statute"); ***Equustek Solutions Inc v Google Inc***, 2015 BCCA 265, paras 91-92; ***Hunt v T&N plc***, [1993] 4 SCR 289, para 39; ***R v Hape***, [2007] 2 SCR 292, 2007 SCC 26, paras 88, 110; ***Douez v Facebook Inc***, 2014 BCSC 953, paras 20-21; ***Breeden v Black***, [2012] 1 SCR 666, 2012 SCC 19; ***Joined Cases C-240/98 to 244/98 Océano Grupo Editorial SA v Quintero***, [2000] ECR I-4941 (CJEU), paras 22-25; ***Case C-137/08 VB Penzugyi Lizing Zrt v Ferenc Schneider,*** [2010] ECR I-10847 (CJEU Grand Chamber)

PART IV – COSTS

18. The intervener will not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

19. The intervener respectfully that its submissions be considered in resolving this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26h day of October, 2016

[original signed]

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PART VI – TABLE OF AUTHORITIES

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24.	***Morguard Investments Ltd v De Savoye***, [1990] 3 SCR 1077, **BOA Tab 19**	1, 13, 16
25.	***Niedermeyer v Charlton***, 2014 BCCA 165, **BOA Tab 20**	13, 17
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