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)

MOTION RECORD OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

(Motion for leave to intervene)

Pursuant to Rules 47 and 55 of the Rules of the Supreme Court of Canada

---

Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)
University of Ottawa, Faculty of Law,
Common Law Section
57 Louis Pasteur Street
Ottawa, ON, K1N 6N5

Paul Bates
Marina Pavlovic
Tamir Israel

Tel: (613) 562-5800 x 2914
Fax: (613) 562-5417
Email: tisrael@cippic.ca

Counsel for the Proposed Intervener

Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)
University of Ottawa, Faculty of Law,
Common Law Section
57 Louis Pasteur Street
Ottawa, ON, K1N 6N5

Tamir Israel

Tel: (613) 562-5800 x 2914
Fax: (613) 562-5417
Email: tisrael@cippic.ca

Agent for the Proposed Intervener

TO: **THE REGISTRAR**

COPY TO:

Branch MacMaster LLP
1410-777 Hornby Street
Vancouver, BC, V6Z 1S4

Ward K Branch, QC
Christopher A Rhone

Tel: (604) 654-2999
Fax: (604) 684-3429
Email: wbranch@branmac.com,
crhone@branmac.com

Counsel for the Appellant, Deborah Louise Douez

Michael J Sobkin
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON, K2P 0J8

Michael J Sobkin

Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Counsel for the Appellant, Deborah Louise Douez

AND TO:

Osler, Hoskin & Harcourt LLP
100 King Street West
1 First Canadian Place, Suite 6200
Toronto, ON, M5X 1B8

Mark A Gelowitz
Tristram Mallett

Tel: (416) 362-2111
Fax: (416) 862-6666
Email: mgelowitz@osler.com
tmallett@osler.com

Counsel for the Respondent, Facebook Inc

Osler, Hoskin & Harcourt LLP
Suite 1900
340 Albert Street
Ottawa, ON, K1R 7Y6

Patricia Wilson

Tel: (613) 787-1009
Fax: (613) 235-2867
Email: pwilson@osler.com

Agent for the Respondent, Facebook Inc

TABLE OF CONTENTS

TAB 3

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)

MEMORANDUM OF ARGUMENT
OF SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC
(Motion for leave to intervene)

Pursuant to Rules 47 and 55 of the Rules of the Supreme Court of Canada

---

PART I – FACTS

A. OVERVIEW

1. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC") seeks an Order granting it leave to intervene in this appeal. This appeal will address issues with broad public policy implications for digital platforms, consumer protection, privacy rights and online jurisdiction. Its determination will affect the ability of Canadians to benefit from domestic standards, legal protections and access to Canadian courts in disputes arising from their digital activities. As greater amounts of daily activity adopt a digital aspect, the outcome of this appeal will have farther-reaching impact.

2. By means of its proposed intervention, CIPPIC offers to assist the Court in its consideration of the Internet policy and public interest issues before it by offering useful submissions different from those of other parties. In formulating these submissions, CIPPIC will draw on the unique and multi-faceted knowledge and expertise it has developed through its specialized activities in this area of law.

B. THE PROPOSED INTERVENER – CIPPIC

3. CIPPIC is a legal clinic based at the University of Ottawa's Centre for Law, Technology and Society. Its core mandate is to advocate in the public interest where the law intersects with technology in ways that may detrimentally impact on individuals. CIPPIC's advocacy and public outreach activities have extensively engaged matters relating to digital platforms, consumer protection, privacy rights and online jurisdiction such as those at issue in this appeal.

Affidavit of David A Fewer, "Fewer Affidavit", sworn on July 29, 2016, Motion Record, Tab 2

4. Courts have regularly recognized CIPPIC's capacity to assist on questions relating to Internet policy and the public interest. In particular, CIPPIC has participated in a number of judicial proceedings that implicate many of the same issues raised by this appeal. These include: *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34, (can an online e-commerce platform vitiate customers' procedural rights to sue in court and, effectively, as a class, by means of a non-negotiable contract term); *Lawson v Accusearch*, 2007 FC 125 (legal jurisdiction of a Canadian privacy regulator over a foreign e-commerce platform and the application of Canada's federal privacy law to that platform); *Bell Canada v Amtelecom*, 2015 FCA 126 (the need to account for broader public interest and public policy implications when applying common law doctrines relating to the retrospective application of regulatory action to pre-existing customer contracts).

Fewer Affidavit, Motion Record, Tab 2, paras 7-9

5. CIPPIC's expertise in this field is multi-faceted, including non-judicial activity such as its Parliamentary testimony on matters relating to the protection of privacy on global social networking sites (ETHI Parliamentary Study on Privacy and Social Media); its participation in global policy-making on cross-border privacy protection (30 year review of the OECD Guidelines on Privacy and Transborder Data Flows); its filing of a regulatory complaint applying Canadian privacy standards to a global social media site (*CIPPIC v Facebook*, OPC File No 2009-008); and its participation in a regulatory proceeding establishing extensive consumer protections in wireless telephone and internet service provider contracts (Telecom Notice of Consultation CRTC 2012-557). CIPPIC additionally

provided an Affidavit in support of the Appellant's Application for Leave to Appeal in this matter.

Fewer Affidavit, Motion Record, Tab 2, paras 7-12

PART II – STATEMENT OF QUESTIONS AT ISSUE

6. The only issue before the Court in this motion is whether CIPPIC should be granted leave to intervene in this matter of important public interest.

PART III – ARGUMENT

7. An applicant seeking leave to intervene before this Court must address two issues:

(a) whether the applicant has an interest in the issues raised by the parties to the appeal; and

(b) whether the applicant's submissions will be useful to the Court and different from those of the other parties.

***Reference re Workers' Compensation Act, 1983 (Nfld),* [1989] 2 SCR 335, para 8; *R v Finta*, [1993] 1 SCR 1138, para 5; *Rules of the Supreme Court of Canada*, SOR/2002-156, ss 55, 57(2)**

A. CIPPIC'S INTEREST IN THIS APPEAL

8. The matters raised by this appeal engage the activities of digital platforms, consumer protection and privacy rights of Canadians, and online jurisdiction. These matters are all of central importance to CIPPIC's mandate, which is to advance Internet policy in the public interest. The resolution of this Appeal directly and seriously implicates this aspect of CIPPIC's work and mandate.

Fewer Affidavit, Motion Record, Tab 2, paras 6-12

B. USEFUL AND DIFFERENT SUBMISSIONS

9. An applicant seeking leave to intervene before this Court must demonstrate that its proposed intervention will provide "useful and different submissions". The "useful and different submission" criterion is satisfied by an applicant who has a history of involvement in the issues raised by an appeal, giving the applicant expertise that can shed fresh light or provide new information on the matter.

***Reference re re Workers' Compensation Act, 1983 (Nfld)*, [1989] 2 SCR 335, at para 12**

10. CIPPIC's submissions will be useful because CIPPIC brings to these proceedings the experience of a legal clinic that has worked with various stakeholders and in multi-faceted policy and

law-making processes on matters concerning digital platforms, consumer protection, privacy and online jurisdiction. CIPPIC can therefore offer the Court a useful, public interest-oriented perspective on the issues raised in this Appeal.

Fewer Affidavit, Motion Record, Tab 2

11. CIPPIC's submissions will be different from those of the other parties. Its submissions will be informed by its extensive experience in law and policy relating to digital platforms, consumer protection, privacy rights and online jurisdiction. CIPPIC is eminently capable in assisting the Court by providing thoughtful submissions on the considerations that should guide the enforcement of forum selection clauses in this context.

12. Additionally, CIPPIC's proposed intervention does not raise any concerns that have traditionally led this Court to refuse intervention. CIPPIC does not intend to expand the issues under appeal beyond those raised by the existing parties. We outline our proposed intervention in the following paragraphs.

***Reference re Workers' Compensation Act, 1983 (Nfld)*, [1989] 2 SCR 335, at para 12**

C. CIPPIC'S PROPOSED SUBMISSIONS

13. If granted leave, CIPPIC proposes to submit that the high degree of deference to forum selection clauses that emerges from this Court's analysis of commercial contracts should not be applied to online consumer contracts affecting privacy rights, for the following reasons:

- enforcement of forum selection clauses on digital platforms often raises specific challenges that significantly undermine the principles of order, fairness and comity;
- the prevailing supremacy of forum selection clauses undermines access to justice and substantive rights of digital customers; and
- the privacy rights at issue in this proceeding protect Charter principles and are core values, not to be effectively overridden by a non-negotiable forum selection clause.

CIPPIC will further provide the Court with specific guidance on the considerations that could justify the enforcement of forum selection clauses in this context, and will argue that the onus for demonstrating this justification rests on the digital platform seeking enforcement of such a clause.

Supremacy of Forum Selection Clauses in Digital Contexts Will Has Far-Reaching Implications

14. The historic deference this Court's jurisprudence has shown for forum selection clauses is unworkable as a means of navigating jurisdiction in online customer interactions. Digital platforms are often disassociated from the territorial boundaries that guide the legal and normative expectations of their customers. Granting forum selection clauses supremacy over national laws will greatly undermine the ability of Canadian courts and policy-makers to establish standards for their citizens in their increasingly ubiquitous online activities. This, in turn, creates an unworkable framework for navigating "exchanges and communications between people in different jurisdictions that have different legal systems" in that it fails to reflect principles of order, fairness and comity. Indeed, it effectively displaces such considerations in general arrangements with a non-negotiable forum selection clause.

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

15. Online platforms – the social media sites, search engines, domain name registrars, e-commerce, payment services, mobile devices and participative platforms through which our online activities are mediated – are predominantly global in nature. Such platforms operate almost uniformly on the basis of contracts of adhesion with forum selection clauses a common feature, binding their customers to the courts (and, effectively, the laws) of distant jurisdictions on a take it or leave it basis. Upholding the supremacy of forum selection clauses would therefore greatly restrict the ability of Canadian courts to apply domestic standards to interactions between Canadian citizens and these platforms. While the impact of this approach will have serious implications for the 1.8 million members of the class proposed herein, it will extend well beyond to affect all Canadians in their online activities. It would permit any digital platform to effectively 'opt out' of Canadian courts and standards. It therefore undermines certainty, as Canadian individuals are subjected to a potentially unknowable range of foreign jurisdictions and laws in their online interactions on the basis of non-negotiable standard form conditions.

> ***Equustek Solutions Inc v Jack*, 2014 BCSC 1063, paras 96-97, aff'd 2015 BCCA 265, leave to appeal granted, [2015] SCCA No 355; *ZI Pompey Industrie v ECU-Line NV*, [2003] 1 SCR 450, 2003 SCC 27, paras 20-21; *Club Resorts Ltd v Van Breda*, [2012] 1 SCR 572, 2012 SCC 17, para 74**

16. As digital networks and platforms become even more embedded in other components of our lives, the implications of such a ruling will only continue to increase. This digitization offers companies an opportunity to extend control over services and products that would not be possible or acceptable in a purely physical context. The vehicles we operate, the door locks, security systems and fire detectors in our homes, our health monitoring tools, our refrigerators, all are increasingly operated on the basis of integrated platforms, each with its own home jurisdiction, its own contract of adhesion and potential to insert its own forum selection clause. Moreover, while contracts of adhesion and cross-border service provision are persistent hallmarks of this medium, rapid innovation is equally indicative of e-commerce and digital platforms. It is therefore difficult to predict what future products and services will become mediated by forum selection clauses. While allowing digital services with a real and substantial market presence in Canada to effectively opt out of legal standards conferred to Canadians generally undermines fairness, the wide breadth of activities increasingly covered by digital platforms heightens the potential for this unfairness by expanding it to include several areas of consumer protection. Further exacerbating this unfairness the unilateral nature of the arrangement, as digital platforms may continue to rely on the benefits of the Canadian legal system when convenient.

United States, National Security Agency, "Internet of Things", (2016) 21(2) *The Next Wave* 2; Mark Lemley, "Terms of Use", (2006) 91 *Minnesota L Rev* 459; Jason Schultz, "The Internet of Things We Don't Own?", (2016) 59(5) *Communications of the ACM* 36

17. Conferring supremacy to forum selection clauses imposed by digital businesses that are substantially connected to Canada will undermine the ability of Canadian policy makers to establish legal standards for Canadians in several areas of life. Doing so bypasses all the safeguards and rules that this Court has put in place to navigate the challenges of cross-territorial jurisdiction. These rules are designed to carefully balance competing judicial considerations, such as convenience, fairness, comity and the need to avoid forum shopping. In place, digital platforms are granted almost limitless latitude to impose the forum and legal system of their choice onto their entire Canadian customer base. The increasingly global and ever-present nature of digital platforms is such that the prevailing rule undermines comity by diminishing the ability for "differences in legal tradition which are deserving of respect" to prevail in the digital world. A framework for navigating jurisdiction in the

digital world must be able to accommodate these differences in legal tradition in spite of the global nature of the entities that constitute that world. Such a framework must not use the global reach of these entities to impose domestic laws and standards globally, nor must it permit that global reach to render domestic laws and standards inapplicable.

Black v Breeden, [2012] 1 SCR 666, 2012 SCC 19, generally and para 26; _Equustek Solutions Inc v Google Inc_, 2015 BCCA 265, leave to appeal granted, [2015] SCCA No 355

Forum Selection Clause Supremacy Undermines Access to Justice & Procedural Rights

18. The potential legal impact of forum selection clauses can be far-reaching. Online platforms are substantially present in numerous jurisdictions around the world at once, allowing such entities to choose the jurisdiction with the least rigorous consumer protection standards. Even in the absence of such jurisdictional tourism, the rule adopted by the courts below would enforce a forum selection clause in the absence of any guarantee that a substantive remedy would be available in the digital platform's jurisdiction of choice, let alone one of comparable quality to that offered by the domestic jurisdiction of first instance. Indeed, there is no account taken for basic procedural safeguards otherwise conferred to litigants in Canada.

19. The prevailing supremacy accorded to forum selection clauses fails to account for the quality – or even presence – of substantive remedies in the jurisdiction of choice. Overcoming a forum selection clause reduces to proof of territorial incompetence on the part of the foreign court of choice. It is not sufficient to demonstrate that the domestic jurisdiction has explicitly conferred specific rights and remedies to its citizens. Nor are Canadian courts called upon to assess whether these specific rights and remedies might be available in the foreign jurisdiction of choice, or even what nation's laws the foreign court will choose to apply. The current framework for enforcing forum selection clauses likewise ignores the public interest in allowing Canadians to benefit from Canadian legal standards, even where clear differences exist between jurisdictions. While it is desirable to permit sophisticated commercial parties to decide the rules by which their disputes will be settled and the fora of settlement, the same cannot be said for digital platforms seeking to impose foreign rights, remedies fora and standards *en masse* onto their entire Canadian customer base.

> ***Douez v Facebook Inc*, 2014 BCSC 953, paras 20-21, 76, 91 and 93; *Douez v Facebook Inc*, 2015 BCCA 279, para 74-76 and 83; *Black v Breeden*, [2012] 1 SCR 666, 2012 SCC 19, para 36; *Equustek Solutions Inc v Google Inc*, 2015 BCCA 265, leave to appeal granted, [2015] SCCA No 355, paras 91-92**

20. The prevailing framework for forum selection clauses also fails to adequately account for procedural safeguards. The BC *Privacy Act* confers onto citizens of British Columbia the right to have their claims adjudicated before a superior court of record. This would preclude resort to other adjudicative venues including inferior courts and arbitration mechanisms. It is unclear how the prevailing framework will ensure that foreign jurisdictions imposed by forum selection clauses will emulate such procedural rights. Other provincial jurisdictions confer protection to comparable rights by means of the common law, with the implicit implication that residents will be able to enforce these rights in provincial courts. Additionally, the general framework for navigating "exchanges and communications between people in different jurisdictions that have different legal systems" encodes access to justice guarantees. Compelling Canadian plaintiffs to plead their case in foreign courts in order to resolve disputes that are substantially domestic in nature undermines the procedural safeguards that Canada's jurisdictional framework seeks to confer to its citizens.

> ***Club Resorts Ltd v Van Breda*, [2012] 1 SCR 572, 2012 SCC 17; *Seidel v TELUS Communications Inc*, [2011] 1 SCR 531, 2011 SCC 15; *Jones v Tsige*, 2012 ONCA 32; *Black v Breeden*, [2012] 1 SCR 666, 2012 SCC 19**

Privacy Considerations Raise Heightened Concerns

21. While forum selection clauses are problematic in any online customer context, they pose heightened concerns when applied to privacy rights. Privacy is protected by the Canadian *Charter*. Statutes and legal principles designed to realize that right are considered quasi-constitutional under Canadian law, engaging core Canadian values in need of heightened protection. On the other hand, privacy protections are far from standardized across international jurisdictions, with significant variations in afforded protections. Allowing forum selection clauses to supersede domestic privacy rights on digital platforms can therefore greatly undermine privacy protection for Canadians in general.

22. Privacy is an internationally protected human right, recognized in Canada as an important constitutional value intricately linked to the well being, dignity and autonomy of individuals and

protected by sections 7 and 8 of the *Charter*. Canadian courts have recognized the importance of privacy as an animating legal value, and that the common law should develop in a manner that is consistent with and protective of the right to privacy. Canadian legislation that is 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. Principles of comity recognize the importance of allowing sovereign states to determine constitutionally protected human rights in accordance with domestic values and norms. 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." The prevailing rule will frustrate Canadian individual's to have their core privacy protections determined on the basis of the historical and social context that guide their reasonable expectations of privacy.

> ***Jones v Tsige*, 2012 ONCA 32, paras 39, 44-46; *Equustek Solutions Inc v Google Inc*, 2015 BCCA 265, leave to appeal granted, [2015] SCCA No 355, paras 91-92; *R v Hape*, [2007] 2 SCR 292, 2007 SCC 26, paras 88, 110; *Douez v Facebook Inc*, 2014 BCSC 953, paras 20-21**

23. There is significant variation in the specific treatment of privacy rights across different jurisdictions, further exacerbating the risk that forum selection clause enforcement will translate into a *de facto* substantive privacy impact. For example, Canadian courts recognize that privacy rights demand inherent protection, without need to prove ancillary harms in order to justify a remedy. This principle is encoded in the BC *Privacy Act*, which offers statutory damages for invasions of privacy. United States courts, on the other hand, often require proof of financial harm as a pre-requisite to establishing a wrong. Similarly, Canadian privacy standards recognize that contractual assent constitutes an insufficient basis for determining substantive privacy changes imposing more robust consent requirements. Courts in the United States, on the other hand, will often determine privacy disputes on the basis of contractual assent alone.

The Historic Supremacy of Forum Selection Clauses Cannot Apply to this Context

24. In summary, forum selection clauses have significant potential to undermine principles of order, fairness and comity when granted supremacy in interactions between digital platforms and their

customers. If granted leave to intervene, CIPPIC will argue that these considerations militate against the traditional deference granted by courts to forum selection clauses in other contexts. Different considerations must be taken into account when assessing the impact of such clauses in the digital consumer context. If granted leave to intervene, CIPPIC will provide guidance on the considerations courts should consider when assessing whether or not to enforce a forum selection clause against a digital customer, and that the onus of establishing those considerations must rest on the digital platform seeking to enforce it.

PART IV – COSTS

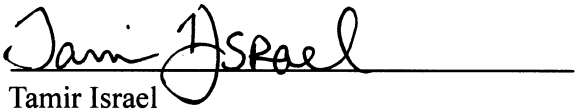
25. CIPPIC will not seek costs in this matter and asks that costs not be awarded against it in this motion or in the appeal if leave to intervene is granted.

PART V – ORDER SOUGHT

26. CIPPIC respectfully requests an Order from this Court:

(i) granting CIPPIC leave to intervene in this appeal;
(ii) permitting CIPPIC to file a factum of no greater length than 10 pages;
(iii) permitting CIPPIC to present oral argument at the hearing of this appeal; and
(iv) such further or other Order as deemed appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of July, 2016.



Tamir Israel

Samuelson Glushko Canadian Internet
Policy and Public Interest Clinic (CIPPIC)
University of Ottawa, Faculty of Law,
Common Law Section
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

Tel: (613) 562-5800 x 2914
Fax: (613) 562-5417
Email: tisrael@cippic.ca

Counsel for the Proposed Intervener

PART VI – TABLE OF AUTHORITIES

Authority		Reference in Argument
	Cases	**Tab**
1	*Black v Breeden*, [2012] 1 SCR 666, 2012 SCC 19	17, 19-20
2	*Club Resorts Ltd v Van Breda*, [2012] 1 SCR 572, 2012 SCC 17	14-15, 20
3	*Douez v Facebook Inc*, 2014 BCSC 953	19, 22
4	*Douez v Facebook Inc*, 2015 BCCA 279	19
5	*Equustek Solutions Inc v Jack*, 2014 BCSC 1063, paras 96-97, aff'd 2015 BCCA 265, leave to appeal granted, [2015] SCCA No 355	15
6	*Equustek Solutions Inc v Google Inc*, 2015 BCCA 265, leave to appeal granted, [2015] SCCA No 355	17, 19, 22
7	*Jones v Tsige*, 2012 ONCA 32	20, 22
8	*Reference re Workers' Compensation Act, 1983 (Nfld)*, [1989] 2 SCR 335	7, 9, 12
9	*R v Finta*, [1993] 1 SCR 1138	7
10	*R v Hape*, [2007] 2 SCR 292, 2007 SCC 26	22
11	*Seidel v TELUS Communications Inc*, [2011] 1 SCR 531, 2011 SCC 15	20
12	*ZI Pompey Industrie v ECU-Line NV*, [2003] 1 SCR 450, 2003 SCC 27	14-15
	Academic	
13	Mark Lemley, "Terms of Use", (2006) 91 *Minnesota L Rev* 459	16
14	Jason Schultz, "The Internet of Things We Don't Own?", (2016) 59(5) *Communications of the ACM* 36	16
15	United States, National Security Agency, "Internet of Things", (2016) 21(2) *The Next Wave* 2	16
	Legislation	
16	*Rules of the Supreme Court of Canada*, SOR/2002-156, Rules 55, 57(2)	7