

Federal Court of Appeal



Cour d'appel fédérale

Date: 20260515

Docket: A-100-25

Citation: 2026 FCA 97

**CORAM: RENNIE J.A.
MONAGHAN J.A.
WALKER J.A.**

BETWEEN:

TATIANA GORENSTEIN

Appellant

and

META PLATFORMS, INC.

Respondent

Heard at Vancouver, British Columbia, on January 19, 2026.

Judgment delivered at Ottawa, Ontario, on May 15, 2026.

REASONS FOR JUDGMENT BY:

RENNIE J.A.

CONCURRED IN BY:

**MONAGHAN J.A.
WALKER J.A.**

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] The appellant owns a luxury goods resale and consignment business which uses an Instagram account for sales and promotion. The respondent, Meta Platforms, Inc. (Meta), is the corporate owner of Instagram.

[2] The appellant created her Instagram account in November 2016 and began purchasing advertisements from Meta shortly thereafter. On May 11, 2024, Meta deactivated the account, based on “the alleged sale or promotion of counterfeit goods”. Ten days later Meta reinstated the account and acknowledged the deactivation had been in error. On May 29, 2024, Meta again deactivated the account, providing the same justification. On October 2, 2024, Meta again reactivated the account.

[3] The appellant commenced an action against Meta in the Federal Court seeking damages for economic losses. Meta sought to stay the action based on the forum selection clause in the contractual instruments associated with the creation and use of an Instagram account. The Federal Court acceded to Meta’s motion and granted an order under rule 208 of the *Federal Courts Rules*, SOR/98-106 permanently staying the appellant’s action against Meta (*Gorenstein v. Meta Platforms, Inc.*, 2025 FC 410 [Federal Court Decision] *per* Azmudeh J.). The appellant appeals from that decision.

[4] Following argument on appeal, this Court requested submissions from the parties on the question as to whether, under the *Federal Courts Act*, R.S.C. 1985, c. F-7, the Federal Court had jurisdiction to adjudicate the issues in the statement of claim. In her submissions, the appellant conceded that the matter was not within the jurisdiction of the Federal Court. Meta contended the same.

[5] I agree. The Federal Court does not have the statutory jurisdiction to adjudicate what is, in essence, a private contractual dispute between the appellant and Meta (*ITO-Int’l Terminal*

Operators v. Miida Electronics, [1986] 1 S.C.R. 752 at 766). This is not to say that the Federal Courts do not interpret and determine private contracts; they routinely do so in many areas of its jurisdiction, including, for example, in intellectual property matters (*Salt Canada Inc. v. Baker*, 2020 FCA 127). This claim, however, has no link to any of the recognized sources of Federal Court jurisdiction, and I would dismiss the appeal on this basis.

[6] However, this should not be understood as an endorsement of the reasons of the Federal Court.

[7] The enforceability of a forum selection clause is assessed against a two-part test. The party seeking a stay must establish that the clause is “valid, clear and enforceable and that it applies to the cause of action before the court” (*Douez v. Facebook, Inc.*, 2017 SCC 33 at paras. 28-29 [*Douez*], citing *Preymann v. Ayus Technology Corp.*, 2012 BCCA 30 at para. 43). If the validity of the clause is established, the onus shifts to the plaintiff to show strong reasons why the court should not enforce the forum selection clause.

[8] In the appeal before us, three different documents, engaging two forum selection clauses, are in issue. They are set forth below and I have emphasized the language that is pertinent to this appeal. The first forum selection clause arises in the Terms of Use agreement, which draws a distinction between private (“consumer”) and commercial uses of Instagram accounts. Whether the appellant was “a consumer” within the meaning of the Terms of Use was a threshold step in the Federal Court’s analysis.

7.4 How We Will Handle Disputes.

If you are a consumer, the laws of the country in which you reside will apply to any claim, cause of action, or dispute you have against us that arises out of or relates to these Terms ("claim"), and you may resolve your claim in any competent court in that country that has jurisdiction over the claim. In all other cases, you agree that the claim must be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, that you submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim, and that the laws of the State of California will govern these Terms and any claim, without regard to conflict of law provisions. Without prejudice to the foregoing, you agree that, in its sole discretion, Meta Platforms Inc. may also bring any claim we have against you related to efforts to abuse, interfere, or engage with our products in unauthorized ways in the country in which you reside that has jurisdiction over the claim.

[Emphasis added.]

[9] The purchase of advertisements on Instagram is governed by a second document, the “Ad Terms”. Paragraph 17 of the Ad Terms provides that the forum selection clause in a third document, the “Commercial Terms”, governs disputes arising from the Ad Terms:

17. Any claim, cause of action or dispute that arises out of or relates to these Self-serve Ad Terms is subject to the disputes resolution clause in the Commercial Terms.

[10] The forum selection clause in the Commercial Terms reads:

Commercial Claims outside the United States: If you reside outside the United States or your business is located outside the United States, you agree that:

Any Commercial Claim between you and Meta Platforms, Inc. must be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, that you submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim, and that the laws of the State of California will govern these Commercial Terms and any such claim, without regard to conflict of law provisions. [...]

Without prejudice to the foregoing, you agree that, in our sole discretion, we may also bring any claim we have against you related to efforts to abuse, interfere, or engage with our Products in unauthorized ways in the country in which you reside that has jurisdiction over the claim.

[Emphasis added.]

[11] Paragraph 14 of the Ad Terms contains a hyperlink to the Commercial Terms, but paragraph 17, which purports to incorporate the forum selection clause in the Commercial Terms, does not include any hyperlink. Paragraph 14 addresses a distinct issue, unrelated to the forum selection clause.

[12] In the Federal Court, the parties did not dispute that the appellant's account was used to support her business. The appellant accepted that, in purchasing advertisements, she must have clicked on the Ad Terms but did not recall agreeing to the Commercial Terms and the forum selection clause due to the "confusion of navigating multiple hyperlinks" (Federal Court Decision at para. 8).

[13] While the Federal Court stated the correct legal test governing the validity of forum selection clauses, at no point did it make the necessary findings that one or both of the forum selection clauses applied to the action before the Court, or that either of the forum selection clauses met the requirements of clarity, validity and enforceability established in *Douez*.

[14] In considering the forum selection clause in the Terms of Use, the judge limited the analysis to whether the appellant was a "consumer" because that forum selection clause requires only those who are not "consumers" to resolve their claims in the specified jurisdiction. The

judge did not address the appellant's argument that the forum selection clause in the Terms of Use is unconscionable, an argument which engages whether there is "strong cause" not to enforce it at the second step of *Douez*.

[15] Meta argued that the reasoning could be saved by paragraph 30 of the reasons, and that we could infer from it that the judge made all requisite findings for the first part of the *Douez* test. Notwithstanding the able advocacy, I am not persuaded.

[16] The fact that the judge concluded, at the end of her reasons (at para. 30), that the plaintiff was not a consumer for the purposes of the Terms of Use does not answer the question as to whether the forum selection clause in the Terms of Use met the standard of clarity, validity and enforceability. At no point does the judge conclude on any of these requirements. This is reinforced by the conditional language in paragraph 17 of the reasons, being the first paragraph in the section analyzing whether the appellant is a consumer, which reads in part, "[p]rovided that the [appellant] was bound by the Terms [of Use] and it was enforceable...".

[17] Nor is it clear from the reasons whether the judge was, in fact, considering the forum selection clause in the Commercial Terms or only the clause in the Terms of Use. While the clauses governing commercial use are identical, precision in this respect was necessary in order to consider the policy arguments engaged at the second stage of the *Douez* test. If the judge was considering the forum selection clause in the Commercial Terms, again, none of the essential findings under *Douez* were made.

[18] Meta’s argument on appeal was predicated on the Federal Court having found that the appellant agreed to the Ad Terms, which included a link to the Commercial Terms including the forum selection clause. I am not convinced; it remains an open question as to whether the Federal Court found, in fact, that the appellant agreed to the Ad Terms.

[19] Further, additional considerations are engaged in assessing the requirements of clarity and enforceability in the context of internet-based contracts of adhesion. In *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 [*Dell*], the Supreme Court established principles that guide the enforceability of an arbitration clause referenced in an internet-based contract of adhesion, noting that “[a]ccess to the clause in electronic format should be no more difficult than access to its equivalent on paper” (*Dell* at paras. 99–101).

[20] If the Federal Court was considering the application of the forum selection clause in the Commercial Terms, which is unclear, then it was also required to consider the criteria set forth in *Dell*. The criteria in *Dell* were not considered, although pertinent.

[21] To conclude, I would dismiss the appeal, but not for the reasons of the Federal Court. I would make no order as to costs.

"Donald J. Rennie"

J.A.

"I agree.

K. A. Siobhan Monaghan J.A."

"I agree.

Elizabeth Walker J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-100-25
STYLE OF CAUSE:	TATIANA GORENSTEIN v. META PLATFORMS, INC.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 19, 2026
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	MONAGHAN J.A. WALKER J.A.
DATED:	MAY 15, 2026

APPEARANCES:

Tatiana Gorenstein	FOR THE APPELLANT ON HER OWN BEHALF
Miranda Spence Josh Suttner	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Aird & Berlis LLP Toronto, Ontario	FOR THE RESPONDENT
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