Demers v. Yahoo Inc: Québec Court Confirms that Québec Consumer Law Applies to Free Online Services

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This decision has important implications for online businesses operating in Québec.

In a September 19, 2017 decision in *Demers v Yahoo! Inc*., the Québec Superior Court rejected Yahoo! Inc. and Yahoo! Canada Co.'s (collectively, "Yahoo") motion to dismiss a motion for authorization of a class action resulting from two highly publicized data security incidents that occurred in 2013 and 2014.

This decision has important implications for online businesses operating in Québec, as the Court found that the Québec*Consumer Protection Act* ("CPA") can apply to free services like those offered by Yahoo, contradicting a 2011 ruling by the same court in *St-Arnaud v Facebook inc.* This ruling establishes the fact that choice of law and forum clauses, arbitration clauses and even class action waivers which are often included in Terms of Use agreements will be considered as not enforceable against Québec consumers.

Background

Yahoo is an American corporation with headquarters in California that provides internet-based services to users worldwide. In order to create a Yahoo account, a user must provide personal information such as name, email addresses, telephone numbers and birth dates. In August 2013 and late 2014, Yahoo accounts were affected by two important data security incidents.

The plaintiff, Demers, a resident of the province of Québec, asked for an authorization to bring a class action on behalf of a class of Yahoo users residing in Québec whose personal and financial information was allegedly lost by and/or stolen from Yahoo as a result of these two data security incidents, as well as all other persons who purportedly suffered damages as a result of these incidents.

Yahoo brought a motion asking the Court to decline jurisdiction based on various claims, including one that the courts of Québec do not have jurisdiction over Yahoo

because of the choice of law and forum clause in favour of Ontario in Yahoo! Canada's Terms of Use ("TOS").

Decision

Yahoo argued that Québec residents were required to agree to Yahoo's TOS in order to create a Yahoo account, which contained a choice of law and forum clause providing as follows:

"Choice of Law and Forum. The TOS and the relationship between you and Yahoo shall be governed by the laws of the province of Ontario and Canada without regard to its conflict of law provisions. You and Yahoo agree to submit to the personal and exclusive jurisdiction of the courts located within the province of Ontario, Canada."1

Yahoo further argued that the clause was valid given article 3148 *in fine* of the *Civil Code of Québec* ("CCQ") which reads as follows:

3148. In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases: (…) However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities.

Plaintiff Demers argued, and the court agreed, that the TOS is a consumer contract and therefore article 3149 CCQ and section 22.1 CPA rendered the choice of law and forum clause unenforceable. These two provisions read as follows:

3149. Québec authorities also have jurisdiction to hear an action based on a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

22.1. An election of domicile with a view to the execution of a juridical act or the exercise of the rights arising therefrom may not be set up against the consumer, except if it is made by notarial act.

In concluding that the TOS is a consumer contract, the Québec Superior Court rejected Yahoo's argument that free internet-based services cannot be the object of a consumer contract because there is no payment or exchange of valuable consideration. The Québec Superior Court also reversed the 2011 ruling in *St-Arnaud v Facebook inc.*, which was raised by Yahoo, where the same Court had taken the position that article 3149 CCQ was not applicable because Facebook users did not pay for the use of the service provided, which therefore precluded the possible existence of a consumer relationship.

In this Yahoo case, the Court decided otherwise, mentioning that there is a growing number of free internet-based applications, products and services that generate revenues through advertising. These activities are therefore conducted with a view to making a profit and Yahoo receives an advantage in terms of ad revenues from user traffic on its website. The Court therefore concluded that each party draws an advantage from the contract.

It should be noted that the Court also relied on the Supreme Court of Canada's recent ruling in *Douez v Facebook*, a case stemming from British Columbia on which we have also commented, in which the SCC found that the contract between Facebook and its users was a consumer contract and the choice of forum clause was not enforceable even though Facebook is a free service.

Business Takeaways

The Québec CPA includes many provisions that online businesses offering free services tend to ignore based on their assumption that they are not submitted to the statute. For instance, apart from choice of law and forum and mandatory arbitration clauses, the CPA regulates unilateral amendments to a contract and exclusions of warranty, prohibits class action waivers and regulates various prohibited business practices, including any form of advertising to children. Contravening this statute can provoke significant awards of compensatory and punitive damages.

In light of this pivotal decision and its broad implications for online consumer transactions, online businesses should take note that their contracts and terms of use might not be fully enforceable in Québec at the expense of consumer rights provided under the CPA, and that certain business models or practices may be illegal in Québec. The best approach would be for businesses to assess the validity of their contracts and the legality of their business models before launching a new online product or service in Québec given their increased legal exposure and associated risks and the fact that they could be subject to consumer class action lawsuits in Québec.

1The decision was rendered in English but referenced the French language version of the TOS. The current language of the English version is available here (accessed on October 17, 2017), but it reflects the French language version cited in the decision.

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