Supreme Court of Canada Confirms in Douez V. Facebook That a Business Cannot Contract Out of Local Privacy Law

June 28, 2017

On June 23, 2017, the Supreme Court of Canada issued a decision on the enforceability of forum selection clauses in online contracts which will significantly affect the legal risks of businesses employing the Business to Consumer revenue model. In *Douez v. Facebook*, the divided Court rejected Facebook's effort to block a privacy class action lawsuit in British Columbia because its own terms of use specified that legal actions must be brought in California. The majority ruled that the clause should not be enforced considering the unequal bargaining power between consumers and Facebook, combined with the importance of privacy rights.

Background

Facebook, an American corporation headquartered in California, operates one of the world's leading social networks and generates most of its revenues from advertising. The plaintiff, Douez, is a resident of British Columbia (B.C.). In 2011, Facebook created a new advertising product called "Sponsored Stories" which used the name and picture of Facebook members to advertise companies and products to other members. Douez brought an action in B.C. against Facebook alleging that it used her name and likeness without consent for the purposes of advertising, in violation of B.C.'s *Privacy Act*. The plaintiff also sought certification of her action as a class proceeding. The proposed class action includes all B.C. residents who had their name or picture used in Sponsored Stories: approximately 1.8 million people. Facebook brought a preliminary motion to stay the action based on a forum selection and choice of law clause requiring that disputes be resolved in California. This clause is contained in Facebook's terms of use agreed upon by the users as part of the registration process. The chambers judge declined to enforce the clause and certified the class action. The B.C. Court of Appeal reversed this decision on the basis that Facebook's forum selection clause was enforceable and that Douez failed to show strong cause not to enforce it. This rendered the certification issue moot.

The Supreme Court of Canada overruled the B.C. Court of Appeal, holding that the forum selection clause was not enforceable. The majority ruling comes from two written decisions, as discussed below.

Reasons of Justices Karakatsanis, Wagner and Gascon

Writing for the majority, Justices Karakatsanis, Wagner and Gascon begin their reasons by admitting that forum selection clauses serve a valuable purpose, are commonly used and regularly enforced because they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law. This echoes the dissent from Chief Justice McLachlin and Justices Moldaver and Côté. However, the judges within the majority ruling stated that Canadian courts do not simply enforce this clause like any other since forum selection clauses effectively encroach on the public sphere of adjudication. Indeed, they took into account that such clauses divert public adjudication of matters out of the provinces while court adjudication in each province is a public good since everyone has a right to bring claims before the courts, and these courts have an obligation to hear and determine these matters. Therefore, where no legislation overrides the forum selection clause, a two-step approach set out in *Z.I. Pompey Industrie v. ECU-Line N.V.*applies to determine whether to enforce such a clause and stay an action brought contrary to it.

The first step of the test requires the party seeking a stay to establish that the clause is valid, clear and enforceable and that it applies to the cause of action before the court. According to the three justices, the forum selection clause contained in Facebook's terms of use is enforceable.

The plaintiff must then show strong cause why the court should not enforce the forum selection clause and stay the action. At this second step of the test, a court must consider all the circumstances including the convenience of the parties, fairness between the parties, the interests of justice, as well as public policy. While these factors have been interpreted and applied restrictively in the commercial context, Justices Karakatsanis, Wagner and Gascon considered that the consumer context requires a modification of these factors. They based their reasoning on several judgments rendered by Canadian, English and Australian Courts which have recognized that the enforceability of the forum selection clause may differ depending on the contractual context. Consequently, they determined that courts should take into account public policy considerations relating to the gross inequality of bargaining power between the parties, and the nature of the rights at stake when examining the enforceability of a forum selection clause in a consumer contract.

They found that Douez had met her burden of establishing that there is strong cause not to enforce the forum selection clause, basing their decision on public policy considerations and on secondary factors.

In fact, they stated that a court has discretion to deny the enforcement of a contract for reasons of public policy in order to protect a weaker party or to protect the social, economic or political policies of the enacting state in the collective interest. Despite Facebook's claim otherwise, Justices Karakatsanis, Wagner and Gascon came to the conclusion that there was gross inequality of bargaining power between the parties, considering (i) the online contract of adhesion between an individual consumer and a large corporation presented to consumers on a "take it or leave it" basis, with the choice to remain "offline" not being a real choice in the Internet era, and (ii) the greater interest of Canadian courts in adjudicating cases involving constitutional and quasi-

constitutional rights such as the privacy rights of British Columbians, taking into account that it is only a local court's interpretation of privacy rights under the *Privacy Act* that can provide clarity and certainty about the scope of the rights to others in the province.

In addition to the public policy reasons, the three judges stated that two other secondary factors also suggest that the forum selection clause should not be enforced. The first one is interest of justice: the B.C. Supreme Court is better placed to assess the purpose and intent of the legislation and to decide whether public policy or legislative intent prevents parties from opting out of rights created by the *Privacy Act* through a choice of law clause in favour of a foreign jurisdiction. The second one implies an analysis of the convenience and expense of litigating in the alternate forum: the expense and inconvenience of requiring British Columbians to litigate in California, compared to the expense and inconvenience to Facebook, make it more convenient to have Facebook's books and records made available for inspection in B.C. rather than requiring Douez to travel to California to advance her claim.

Reasons of Justice Abella

Justice Abella joined the majority with reasons that adopted an even stronger position against the enforceability of the forum selection clause in the Facebook contract. She concluded that the said clause was failing the first step of the Pompey test, emphasizing the non-negotiated nature of online contracts and questioning the validity of the consent given by the consumer. In her opinion, the forum selection clause in the Facebook terms of use is a "classic case of unconscionability" and therefore unenforceable.

Business Takeaways

The consequences of this judgment go beyond the scope of consumer contracts. In fact, the Supreme Court of Canada implied that the interest of Canadian courts in adjudicating cases involving constitutional and quasi-constitutional rights such as the privacy rights could be enough to allow the court to use its discretion to deny the enforcement of a contract for reasons of public policy. The enforceability of a forum selection clause in other types of contract could therefore be challenged when constitutional and quasi-constitutional rights are at stake.

A handful of provinces have a statutory tort (private right of action for a civil wrong) for invasion of privacy similar to the B.C. *Privacy Act*. For now, only the statutes of Newfoundland and Labrador and Saskatchewan include provisions conferring exclusive jurisdiction on a local court. In Quebec, the *Civil Code of Quebec* provides a similar legal framework and the Quebec *Charter of Human Rights and Freedoms* confers a quasi-constitutional status to privacy rights. Considering that the Supreme Court of Canada stated that forum selection clauses would not be enforceable if the statute clearly confers exclusive jurisdiction on a local court, we should remain on the lookout for potential legislative amendments reflecting this decision.

In terms of business takeaways, this decision will have potentially broad implications for all online consumer transactions considering that its reasoning may likely apply in any other consumer protection contexts. The Supreme Court of Canada has demonstrated its reluctance to enforce non-negotiated online terms that place consumers at a significant disadvantage and may result in a loss of rights. While the decision

emphasized on forum selection clauses, its reasoning might also be applied to other online contractual terms that seek to override important laws and protections (i.e. terms of use that seek to override copyright user rights or local consumer safeguards).

Although several provincial statutes, such as the Quebec *Consumer Protection Act*, were already restricting the enforceability of certain clauses in consumer contracts, businesses employing the Business to Consumer revenue model should now consider that certain clauses of their contracts with Canadian consumers might not be enforceable at the expense of privacy rights. Quebec readers should also note that the Supreme Court of Canada held that the contract between Facebook and its users was a consumer contract despite involving a free service, setting aside the 2011 decision of the Superior Court of Quebec which had ruled that such a contract was not a consumer contract.

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 may not be fully enforceable in Canada, especially when privacy rights are at stake. The best approach would be to assess the legality of their business models before launching a new online product or service in Canada, given their increased legal exposure and associated risks and the fact that they could be subject to privacy class action lawsuits in Canada.

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