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Éloïse Gratton, Ad. E. Partner, National Co-Leader of the Privacy and Data Protection Practice Group
egratton@blg.com

François Joli-Coeur Senior Associate
fjolicoeur@blg.com

Borden Ladner Gervais LLP, Toronto & Montreal

Uncertainty following two Canadian rulings on forum selection clauses

Douez v. Facebook, Inc, Supreme Court of Canada, 2017 SCC 33, 23 June 2017; *Demers v. Yahoo! Inc*, Québec Superior Court, 2017 QCCS 4154, 19 September 2017

Two cases - one at the Supreme Court of Canada, and another at a lower court but following similar reasoning as the Supreme Court in the earlier case - involving the right of a plaintiff to launch a privacy class action in the plaintiff's province appear to indicate a trend of Canadian courts refusing to enforce forum selection clauses in the terms of use of free online services in Canada. One result of these decisions is increased uncertainty for foreign businesses looking to offer their online services in Canada.

The Supreme Court of Canada ('SCC') has been busy this year dealing with jurisdictional issues in an internet context. In June, it issued a decision on the enforceability of forum selection clauses in online contracts in *Douez v. Facebook, Inc.*[1], (hereinafter '*Douez*') which we discuss in this article. The following week, in *Google Inc. v. Equustek Solutions Inc.*[2], the Court issued a worldwide order for the removal of search results against Google[3]. In November, it heard the *Haaretz.com, et al. v. Mitchell Goldhar*[4] case, where a Canadian businessman is suing an Israeli newspaper for publishing a news article, in print and online, that he deems to be defamatory and where the Israeli newspaper is arguing that Canadian courts lack jurisdiction. Internet jurisdiction is now getting the attention of the SCC, but businesses and technology lawyers have been grappling with these issues for years. We will focus here on the *Douez* case, where the SCC gave some clear indications that when dealing with privacy rights or other quasi-constitutional rights, Canadian courts will be favourable to allowing their residents the ability to sue in their jurisdiction.

Douez v. Facebook, Inc. - background

Douez is a resident of British Columbia and a member of the social network Facebook.com, owned by Facebook, Inc. ('Facebook'), a corporation based in California, in the United States. She brought an application for a class action on a claim that Facebook infringed her privacy rights and those of more than 1.8 million British Columbians, contrary to the Privacy Act[5] of that province, when it launched a new advertising product called 'Sponsored Stories,' which used the name and picture of Facebook members to advertise companies and products to other members.

Facebook moved to have the action stayed on the basis of the forum selection clause in favour of the courts of California contained in its terms of use, which every user must accept through a 'click' prior to using Facebook.com. The first instance Judge concluded that the Privacy Act overrides the forum selection clause, and that this statute provides strong reasons not to enforce it. The Appellate Court reversed her decision, concluding that the clause was enforceable and that the plaintiff had failed to show strong cause not to enforce it. The SCC overruled the Court of Appeals in a decision with a majority opinion of three justices, one justice concurring, and a dissent by three justices.

While acknowledging that forum selection clauses serve a valid purpose of ensuring certainty for parties, the majority justices stated that "because forum selection clauses encroach on the public sphere of adjudication, Canadian courts do not simply enforce them like any other[6]." 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.*[7] applies to determine whether to enforce such a clause and stay an action brought contrary to it. In this case, there was no legislation overriding the clause, as the Privacy Act only provides that '[d]espite anything contained in another Act, an action under this Act must be heard and determined by the [British Columbia first instance court].[8]' However, the statute does not address the situation where a

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contract excludes the jurisdiction of a Canadian court, like in the present case.

Under the first step of the *Pompey* test, the majority found that the forum selection clause was valid, clear and enforceable and that it applies to the cause of action before the Court. However, under the second step of this test, it found that there was a strong cause why the Court should not enforce the clause and stay the action. They concluded that in a consumer context, courts must 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.

Here, the majority concluded that the evidence was clear that there was gross inequality of bargaining power between the parties since Ms Douez's claim involved an online contract of adhesion formed between an individual and a multi-billion dollar corporation that is in a contractual relationship with approximately 40% of the population of British Columbia[9].

It also found that "Canadian courts have a greater interest in adjudicating cases impinging on constitutional and quasi-constitutional rights." Noting that "Privacy legislation has been accorded quasi-constitutional status," the Court concluded that "since Ms. Douez's matter requires an interpretation of a statutory privacy tort, only a local court's interpretation of privacy rights under the Privacy Act will provide clarity and certainty about the scope of the rights to others in the province[10]."

In a concurring opinion, Justice Abella adopted an even stronger position against the enforceability of the forum selection clause. She was of the view that this clause failed the first step of the *Pompey* test. She wrote: "I accept that certainty and predictability generally favour the enforcement at common law of contractual terms, but it is important to put this forum selection clause in its contractual context. We are dealing here with an online consumer contract of adhesion. Unlike *Pompey*, there is virtually no opportunity on the part of the consumer to negotiate the terms of the clause. To become a member of Facebook, one must accept all the terms stipulated in the terms of use. No bargaining, no choice, no adjustments[11]."

She also believed that the British Columbia legislature had granted exclusive jurisdiction to its courts to hear claims involving the Privacy Act by the introductory words in Section 4 of this statute, 'Despite anything contained in another Act [...].' In her opinion, such a grant of exclusive jurisdiction overrides forum selection clauses that may direct parties to another forum[12]. Justice Abella than wrote that "[i]t would defy logic to think that the legislature sought to protect the British Columbia Supreme Court's exclusivity from the reach of other statutes, but not from the reach of forum selection clauses in private contracts[13]." In conclusion, she wrote: "The inequality of bargaining power between Facebook and Ms. Douez in an online contract of adhesion gave Facebook the unilateral ability to require that any legal grievances Ms. Douez had, could not be vindicated in British Columbia where the contract was made, but only in California where Facebook has its head office. This gave Facebook an unfair and overwhelming procedural - and potentially substantive - benefit. This, to me, is a classic case of unconscionability[14]."

Shortly after *Douez*, other courts have issued decisions in which they have considered the SCC's position in this recent case, more specifically when asked to enforce forum selection clauses between online businesses and Canadian consumers.

The Québec Civil Code and Consumer Protection Act - *Demers v. Yahoo! Inc.*

The Québec Superior Court has very recently rendered a decision involving Yahoo! which, to some extent, illustrates the influence of the *Douez* case on lower courts across Canada. Unlike British Columbia, the province of Québec has specific provisions dealing with forum selection clauses in the context of consumer contracts in the Québec Civil Code[15] and Québec's Consumer Protection Act[16].

The Québec Civil Code states: '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.'

1. 2017 SCC 33.
2. 2017 SCC 34.
3. Google attacked this order in California. On 16 November 2017, the United States District Court for the Northern District of California ruled that Google did not have to comply with this order in the United States (case no. 5:17-cv-04207-EJD).
4. Information about the case is available on the Supreme Court of Canada's website: http://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=37202
5. [RSBC 1996] Chapter 373.
6. Douez, para. 27
7. 2003 SCC 27.
8. Section 4.
9. Douez, para. 54.
10. Ibid., para. 59.
11. Ibid., para. 98.
12. Ibid., para. 108.
13. Ibid., para. 110.
14. Ibid., para. 116.
15. Chapter CCQ-1991.
16. Chapter P-40.1.
17. 2011 QCCS 1506.
18. 2017 QCCS 4154. Yahoo! did not appeal this case and the delays for doing so have now expired.
19. Ibid., paras. 29-30.
20. Ibid., para. 34.

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The Québec Consumer Protection Act states: '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.'

Until September 2017, following a 2011 case, *St-Arnaud v. Facebook inc*[17], terms of use of free online platforms like Facebook were not considered 'consumer contracts' in Québec. In this Québec Superior Court (first instance) case, the judge enforced the forum selection clause of Facebook's terms of use, ruling that the fact that Facebook users did not pay for the use of the service provided precluded the possible existence of a consumer relationship.

However, in September 2017, the same Court decided the opposite in the context of a motion for an authorisation to bring a class action against Yahoo! for a number of security breaches. In *Demers v. Yahoo! Inc.*[18], the Court refused to enforce Yahoo's Choice of Law and Forum Clause, providing that "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." In coming to this conclusion, the Court ruled that the contract between Québec users and Yahoo! was a consumer contract, noting that there are a growing number of free internet based applications, products and services that generate revenues through advertising[19]. These activities are therefore conducted with a view to making a profit and Yahoo! receives an advantage in terms of ad revenues from users' traffic on its website. The Court therefore concluded that each party draws an advantage from the contract.

Interestingly, the Québec Superior Court also relied on the *Douez* case. While it recognised that "many distinctions can be made between the present case and the *Facebook* Decision, namely, that in the *Facebook* decision, the SCC applied the common law test for forum selection clauses set out in *Z.I. Pompey Industrie v. ECU-Line N.V.*, which does not apply in this case[20]," it noted that the SCC stated that the contract between Facebook, Inc. and its users was a consumer contract of adhesion.

Implications

While *Demers v. Yahoo!* is only a Superior Court decision, it follows the same kind of reasoning as the SCC in *Douez* and seems to indicate a starting trend of Canadian courts refusing to enforce forum selection clauses in the terms of use of free online services in Canada. It is noteworthy that both cases involved the right to launch a privacy class action in the plaintiff's province.

One of the results of the *Douez* and *Demers* cases is more uncertainty for foreign businesses wanting to offer their online services in Canada. This may prove especially challenging for organisations that, as opposed to multi-nationals like Facebook or Yahoo!, do not have any physical presence in Canada and lack the resources of well-established internet companies to litigate cases all around the world. These businesses will have an extra effort to make when deciding to target the Canadian market and compliance with local laws, especially in terms of privacy law, will be the best way to avoid litigation and especially class actions. Assessing the legality of their business models under Canadian law before launching their services in Canada will be essential to reduce the risks.

Furthermore, at least in Québec, the qualification of free online services as consumer contracts not only renders forum selection and choice of law clauses unenforceable, it also affects many other clauses usually included in these services' terms of use, since the Consumer Protection Act 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.

The *Douez* case, however, also shows the Court's reluctance to set aside valid, clear and enforceable contract terms without strong public policy not to enforce them. Such contracts should therefore continue to be enforced by Canadian courts absent a context of protection of consumer or constitutional or quasi-constitutional rights, such as privacy rights.