FORUM SELECTION

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 Google3. In November, it heard the Haaretz.com, et al. v. Mitchell Goldhar4 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 Act5 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 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.” Therefore, where no legislation overrides the forum selection clause, a two-step approach set out in Z.I. Pompey Industrie v. ECU-Line NV7 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 “[e]xcept anything contained in another Act, an action under this Act must be heard and determined by the [British Columbia first instance court].” However, the statute does not address the situation where a

Uncertainty following two Canadian rulings on forum selection clauses

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.

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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. 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.”

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.”

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. 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.”

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.”

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 and Québec’s Consumer Protection Act.

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.”
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