Supreme Court of Canada finds Facebook’s Forum Selection Clause is Unenforceable; Privacy Class Action Can Proceed in Canadian Court

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Facebook’s forum selection clause was today held unenforceable by the Supreme Court of Canada, which permits a class action brought under British Columbia’s Privacy Act to move forward in BC court. The forum selection clause at issue, part of Facebook’s terms of use, requires all disputes with the social media platform to be brought in California. As discussed in our prior article, the British Columbia Court of Appeal (BCCA) upheld the forum selection clause. In a split decision, the majority of the Supreme Court of Canada in Douez v Facebook, Inc., 2017 SCC 33 ruled the clause unenforceable in this case.

This decision is significant. Consumer facing agreements tend to be contracts of adhesion, with consumers generally having no option but to agree should they wish to use the services. Such agreements allow businesses to manage and allocate risks, and to limit the jurisdictions where they’ll defend legal proceedings. The result in Douez may be perceived as a win for Canadian consumers; however, it lends considerable uncertainty to businesses that rely on similar forum selection clauses in consumer facing agreements.

The majority of the Supreme Court held that forum selection clauses in consumer agreements—while important for business certainty—require stricter scrutiny by the courts compared to other contractual terms and other contexts (e.g. commercial agreements). The Court reasoned that in the consumer context, there is “gross inequality of bargaining power” between consumers and service providers, and forum selection clauses “encroach on the public sphere of adjudication”. Much of the majority’s analysis turned on the implicated privacy rights at issue, recognized as having quasi-constitutional status. While the majority found consumer interests were paramount, the dissent gave greater weight to the commercial public policy considerations and to certainty and predictability in cross-border transactions.

It remains to be seen whether or not the decision will be followed generally with respect to forum selection clauses in any consumer contract, or will be limited to the facts of this case, and for example, only be followed if quasi-constitutional consumer rights are being asserted in a Canadian court, like privacy.

The decision is likely to be significant to legal areas where a Canadian forum is not mandated by law, but where a consumer complaint is likely, particularly where the type of complaint implicates rights that are afforded constitutional or quasi-constitutional status in Canada. Practically speaking, companies operating in Canada have always had exposure to the risk of a Canadian court refusing to enforce forum selection clauses in certain contexts—there are many consumer protection and other laws in Canada that require a Canadian forum and cannot be contracted out of. In that sense, Douez may serve to add privacy claims generally to this list.

Douez

The matter involved certification of a class action against Facebook seeking damages under the private right of action set out in the BC Privacy Act. The underlying claim was based on unauthorized use of Facebook users’ names and images as part of Facebook’s “Sponsored Stories” feature. The feature resulted in advertisements featuring a user’s name and image appearing on the user’s friends’ newsfeed when the user pressed the “like” button for a business. The BC Privacy Act prohibits “use [off] the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in,
property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose”. Violation of this provision gives rise to a private cause of action in tort, and is actionable without proof of damage.

At issue was whether Facebook’s forum selection clause was enforceable, which would require a class action under the BC Privacy Act’s private right of action be brought in California court—the jurisdiction identified in the Terms of Use—rather than in BC, where the plaintiff lived, and the relevant statute was enacted.

The majority of the Supreme Court found that Facebook’s forum selection clause was valid, clear and enforceable, but that there was strong cause not to enforce the clause. In other words, while the forum selection clause could be enforced, it should not be enforced. In ZI Pompey Industries v ECU-Line NV, 2003 SCC 27, the Supreme Court set the test for the enforceability of forum selection clauses in contracts. Under the Pompey test, first, a court considers whether the forum selection clause could be enforced. This requires the party seeking to enforce the clause to show that it is valid, clear, and enforceable, and that it applies to the matter before the court. If this is demonstrated, the court will then consider whether the clause should be enforced. This requires the other party to show “strong cause” why the clause should not be enforced.

The majority confirmed that Canadian courts should consider public policy considerations when considering whether or not a forum selection clause in a consumer agreement should be enforced. In particular, such considerations should be weighed when assessing whether or not there is strong cause not to enforce forum selection clauses given the “gross inequality of bargaining power between the parties and the rights at stake”, especially in the internet context, where there may be no alternatives to the services sought: “having the choice to remain “offline” may not be a real choice in the Internet area”.

In this case, the majority considered that:

1. the consumer contract is a contract of adhesion between a consumer and a large corporation;
2. the claim involves a statutory cause of action implicating quasi-constitutional privacy rights;
3. there is gross inequality of bargaining power between the parties (since consumers had little choice but to acquiesce to Facebook’s terms to use their services, and there are no comparable alternative services available);
4. this particular case involved the interpretation of a particular provincial law;
5. Canadian Courts have greater interest in adjudicating cases involving constitutional or quasi-constitutional rights, as such rights play “an essential role in a free and democratic society and embody key Canadian values”;
6. the California court, where the case would be held if the forum selection clause were upheld, would not necessarily have the expertise or experience to apply the BC Privacy Act, especially in respect of public policy or legislative intent matters; and,
7. there would be considerable expense of forcing British Columbians to litigate in California.

Notably, the concurring opinion found that Facebook’s clause did not even meet the first prong of the Pompey test, and that the clause could not be enforced. The clause was also found to be unconscionable and unfair since the inequality of bargaining power allowed Facebook the unilateral power to affect where users could bring their claims. Facebook’s terms were viewed as “a contract of adhesion … No bargaining, no choice, no adjustments”, which “unduly impede[d] the ability of consumers to vindicate their rights in domestic courts, particularly their quasi-constitutional or constitutional rights”.

The dissent, on the other hand, found no “strong cause” to render the forum selection clause unenforceable, given that the parties, by entering into a contract, agreed to the terms thereunder, including the forum selection clause. In particular, the dissent found forum selection clauses are supported by strong public policy considerations, namely, they serve an important role by increasing certainty and predictability in cross-border transactions, stating:

To reverse the burden [to the party seeking to enforce the clause] would undermine the general rule that forum selection clauses apply and introduce uncertainty and expense into commercial transactions that span international borders. It would detract from the “certainty and security in transaction” that is critical to private international law Pompey, at paras. 20 and 25). For many businesses, having to prove in a foreign country why there is not strong cause would render the contract costly and in many cases, practically unenforceable.

The dissent did not agree there would be any particular burden on the plaintiff in bringing the case in California, nor did they agree that the California courts lacked expertise to consider and apply the BC Privacy Act.

The decision will give pause to many businesses contracting with Canadian consumers. Many companies are now likely to
revisit their forum selection clauses, consider strategies to mitigate the risk of having to defend in Canada, and ultimately, brace for having to defend in Canada being more probable.

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