Goodmans LLP Update

Technology

July 4, 2017

Douez v. Facebook: SCC Provides Further Guidance on the Enforceability of Online Consumer Contracts

The Supreme Court of Canada's recent decision in *Douez v. Facebook* provides further insights into the enforceability of online consumer contracts, and the perennial tension between the strong public interest in the enforcement of contracts, on the one hand, and consumer protection, on the other.

In this case, Facebook was asserting a provision in its contract with users which designated the courts in California as the exclusive venue in which a user could sue Facebook (i.e., its forum selection clause) in an effort to block a British Columbia class action. In a split decision, a four-to-three majority of the Supreme Court of Canada ruled that the public policy factors at issue in this case justified overriding the forum selection clause in the Facebook user agreement. More specifically, the majority of the Supreme Court justices found that there was strong cause to not enforce the forum selection clause that referred disputes to California, due to (i) the gross inequality of bargaining power between Facebook and the user, and (ii) the public interest in having quasi-constitutional rights to privacy under Canadian law determined by Canadian courts. The three dissenting justices at the Supreme Court, and the three justices on the British Columbia Court of Appeal who had earlier heard the case, disagreed and would have enforced the forum selection clause as requested by Facebook.

The *Douez* case confirms the deep-seated reluctance of Canadian courts to create uncertainty for online businesses by overriding valid, clear and enforceable terms contained in online contracts, absent strong cause to do so. However, the majority decision gave overriding effect to consumers' interests in the protection of their privacy. Those doing business online with Canadian consumers will need to carefully consider the compliance of their services with applicable Canadian laws which expressly override contractual terms (as provided for in the Ontario *Consumer Protection Act*), as well as laws protecting other important consumer interests, such as privacy. For their part, Canadian legislators may wish to clarify, in the applicable legislation, which consumer "rights" are intended to override the terms of consumer agreements.

Background

Deborah Louise Douez was a B.C. resident and a Facebook user. In 2011, Facebook introduced a new feature known as "Sponsored Stories". If a Facebook user "liked" a post associated with a business, Facebook periodically displayed the user's name and profile photo in an advertisement on the timelines of the user's Facebook friends.

Douez alleged that Facebook's Sponsored Stories contravened section 3(2) of the *Privacy Act* (British Columbia), which creates a statutory tort when a name or a portrait of a person is used for an advertisement or a sale of product without the person's consent for such use. Douez also sought to certify her action as a class proceeding, where the proposed class consisted of approximately 1.8 million B.C. residents whose names or photos had been used by Facebook in Sponsored Stories without their consent.

Facebook brought a preliminary motion to stay the proceeding, based on the forum selection clause in its terms of use, which stated:

> *You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the*

personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims.

In the initial judgment, the British Columbia Supreme Court found the forum selection clause to be unenforceable because the *Privacy Act* provided that despite anything contained in another statute, an action under the *Privacy Act* must be heard and determined by the Supreme Court of British Columbia.

The British Columbia Court of Appeal reversed the trial decision and ordered the action to be stayed based on Facebook's forum selection clause. The Court of Appeal found that if the legislature intended to override forum selection clauses, it would have done so explicitly in the *Privacy Act*.

The Supreme Court of Canada Decision

In a split ruling, the majority led by Justices Karakatsanis, Wagner, and Gascon of the Supreme Court (with Justice Abella concurring in the result but for different reasons) reversed the Court of Appeal's decision and found the forum selection clause to be unenforceable. In applying the two-step test established by the Supreme Court in *Pompey Industries v. ECU-Line N.V.*,[1] Justices Karakatsanis, Wagner, and Gascon found that there was a "strong cause" to not enforce the forum selection clause, under the second step of the test.

a. The Pompey Test

When there exists no legislation overriding a forum selection clause, courts apply the two-step approach to determining the enforceability of a forum selection clause outlined by the Supreme Court in Pompey:

1) The party seeking to stay a proceeding by relying on a forum selection clause (the defendant) must prove that the forum selection clause is valid, based on the principles of contract law.
2) If the clause is found to be valid under contract law, the onus shifts to the plaintiff to demonstrate a "strong cause" why the court should not enforce the forum selection clause. At this stage of the test, the court must consider all circumstances, including the convenience of the parties and the interests of justice.

b. The Majority Decision

Although the majority overturned the Court of Appeal's decision, it agreed with the Court of Appeal that the *Privacy Act* does not in itself override all forum selection clauses, because it lacks clear and specific language doing so.

In its decision, the majority modified the "strong cause" factors considered in the second step of the *Pompey* test to include the following factors when reviewing forum selection clauses in consumer contracts of adhesion:

a) the gross inequality of bargaining power that exists between the parties; and
b) the nature of the rights at stake.

The majority focused on the unequal bargaining power of the parties—where the consumer relinquishes her rights without having any opportunity to negotiate—as the justification for modifying the *Pompey* test in the consumer context.

Applying the modified *Pompey* test, the majority found that there were two compelling public policy considerations in the second step to find "strong cause" not to enforce the forum selection clause:

a) The gross inequality of bargaining power in consumer contracts of adhesion (where the consumer must agree to non-negotiable standard forms on a "take it or leave it" basis). The majority also remarked that the ubiquity of social media could mean that "having the choice to remain 'offline' may not be a real choice in the Internet era".
b) The quasi-constitutional right of privacy provides strong policy considerations for a local court to adjudicate the matter. Because Douez's claim involved interpreting a statutory privacy tort, only a local court's interpretation would provide clarity

[1] 2003 SCC 27, [2003] 1 S.C.R. 450 [*Pompey*]

and certainty of the scope and rights in the province.

The majority also found that the "secondary factors" such as interests of justice, as well as the comparative convenience of litigating in the alternate forum, supported the B.C. court hearing the case.

c. Abella's Concurring Opinion

In a concurring opinion, Justice Abella agreed with the result of the majority, but found that the *Privacy Act* provided exclusive jurisdiction to the B.C. courts to hear all cases brought under the *Privacy Act*, rendering the forum selection clause invalid. She also found that the forum selection clause would fail at the first step of the *Pompey* test as being invalid, for being unconscionable due to the inequality of bargaining power between the parties and unfairness.

Consistent with the majority view, Justice Abella focused on the "automatic nature of the commitments" made with the type of contracts signed with Facebook, which should intensify the scrutiny given to clauses that may impair the consumer's access to possible remedies. Justice Abella also identified additional factors such as added costs, logistical delays provided by the "burdens of geography" brought on by forum selection clauses that would invite additional scrutiny from a court.

The Dissent

Justices McLachlin, Côté and Moldaver wrote a strong dissenting opinion, finding that the forum selection clause was valid and enforceable under the *Pompey* test. In considering the first step of the *Pompey* test, they found the forum selection clause was valid and enforceable under principles of contract law for four reasons:

a) The act of giving a click to consent to a forum selection clause (without necessarily having the specific forum selection clause brought to the user's attention) was an accepted practice in common law, which had already been codified by the *Electronic Transactions Act* in B.C.

b) The B.C. legislature had not adopted a protective approach to jurisdiction in the *Privacy Act*, as there was no clear language that ousted forum selection clauses specifically in the *Privacy Act*.

c) Inequality of bargaining power does not in itself create unconscionability, as there needs to be inequality and undue influence, as well as an actual bad bargain in the form of substantive unfairness for unconscionability to exist.

d) There are strong public policy considerations for enforcing forum selection clauses, as forum selection clauses ensure the certainty and predictability in cross-border transactions.

In their analysis of the second step of the *Pompey* test, the dissent found that forum selection clauses are not contrary to public policy, since they are vital to international order and comity by mitigating uncertainty and unpredictability in determining jurisdiction for online companies.

The dissent also disagreed with how the majority focused on the inequality of bargaining power in the second step of the *Pompey* test, because this conflates the first step of the *Pompey* test with the second; inequality of bargaining power should be considered at the first step of the *Pompey* analysis in determining the enforceability of the clause, not with the "strong cause" considerations.

Implications

The decisions of the justices in the *Douez* case (with the possible exception of that written by Justice Abella) confirm the respect accorded by Canadian courts to the terms of valid online agreements, and the very strong public interest in the enforcement of such contracts. However, the *Douez* case also reinforces that courts will consider important public policy considerations when determining whether to uphold provisions in online consumer contracts of adhesion, and the split decision provides arguments for use from all sides.

While the justices (again, with the exception of Justice Abella) found the Facebook agreement to have been validly entered into by the parties, the case reminds us of the need to clearly and unambiguously present the relevant terms and conditions and to document the agreement of the consumers with such terms. Even though such measures will not preclude an adverse ruling on policy grounds, online companies may wish

to draw the attention of consumers to key clauses (such as forum selection clauses) by highlighting such clauses in larger fonts, by placing them at the beginning of the agreement, or by requesting express consents to such clauses.

The case also serves to remind those doing business online with Canadian consumers to carefully consider the compliance of their products and services with applicable Canadian laws (and to obtain the advice of Canadian counsel on such matters). The result in this case is consistent with the provisions of certain Canadian consumer protection laws, for example, the *Consumer Protection Act* in each of Ontario and Quebec, which expressly override any contractual terms that could be construed as purporting to prevent consumers from commencing or becoming a member of a class proceeding. The case also reiterates the Supreme Court's characterization of privacy as a quasi-constitutional right, which merits a higher level of protection than is afforded to mere commercial interests. Stay tuned for further developments in this case (as the class action has yet to be certified) and to see whether forum selection clauses, or other clauses, will be overridden on policy grounds in subsequent cases.

Finally, Canadian legislators who want legislation to trump contracts should make it expressly clear, in the applicable legislation, which provisions are intended to override the terms of consumer agreements and to provide Canadian consumers with the right to bring cases in Canadian courts.

Goodmans Tech Group

To assist clients in the technology sector, Goodmans brings together our acknowledged expertise in corporate/commercial, private equity, corporate finance, mergers and acquisitions, outsourcing, licensing, intellectual property, privacy, regulatory and media, tax, litigation, human resources, corporate restructuring and administrative law. We do so both for innovative businesses in their start-up phase and for well established businesses of all types. Goodmans continues to lead in the technology sector and is partnered with the DMZ at Ryerson University. The DMZ is a leading business incubator (selected by UBI as the top-ranked university incubator in North America, and third in the world), which connects its startups with resources, customers, advisors, invertors, and other entrepreneurs. Goodmans is also a proud partner of IDEABoost, an initiative of the Canadian Film Centre's Media Lab; building the next generation of technology-based media entertainment products, services and brands. Through these partnerships, Goodmans provides legal advice, mentorship and networking opportunities to assist startups in maximizing their potential. Outsourcing technology functions and technology procurement is also a major strength of Goodmans, where we have assisted technology users to transform their businesses. Finally, Goodmans has represented in court and in arbitrations major technology providers, and users of technology, in ground-breaking cases that have made important contributions to the development of technology law. Members of our Technology Group teach internet and communications law at Canada's largest law schools, are regular lecturers at technology industry events and legal conferences, and have published articles in the technology law field.