SUPREME COURT OF CANADA TURNS THE OTHER CHEEK: FACEBOOK'S "TERMS AND CONDITIONS" – FORUM SELECTION CLAUSE UNENFORCEABLE

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The Supreme Court of Canada's ("**SCC**") recent decision in *Douez v Facebook, Inc.*[1] is an important decision on whether companies can select the location for any lawsuits against them by disgruntled customers. The SCC confronted the challenge of weighing the benefits of contractual freedom versus the negative public policy impact of enforcing forum selection clauses in consumer contracts.

The main issue before the SCC was whether to stay a British Columbia class action in favour of requiring Facebook users to file claim in California on the basis of a forum selection clause in Facebook's terms of use. In a divided decision, the SCC ultimately refused to enforce the Facebook's choice of California as the forum for any lawsuits against it, and paved the way for the British Columbia case to proceed.

Background

In 2011, Facebook created a new advertising product called "Sponsored Stories", which used the names and pictures of Facebook users to advertise companies and products to other users, allegedly without the knowledge or consent of the user featured in the ad.

Ms. Douez alleged that she was one of roughly 1.8 million Facebook users in B.C. whose name and likeness were used by Facebook without consent. She sought to certify a class action lawsuit against Facebook for contravening subsection 3(2) of the B.C. *Privacy Act*.[2] That subsection provides that it is an actionable tort for a person to use the name or portrait of another person without their consent for advertising or promotional purposes.

Facebook brought a motion to stay Ms. Douez's proceeding on the basis that the B.C. court was not the correct venue because of a term in Facebook's contract with its user that required claims to be filed in California. In response, Ms. Douez argued that the B.C. court has sole jurisdiction to decide claims brought pursuant to the B.C. *Privacy Act* citing section 4 of the B.C. *Privacy Act*, which provides that "[d]espite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court [of British

Columbia]". On this basis, the British Columbia Supreme Court agreed with Ms. Douez and refused to apply the forum selection clause. The court then certified Ms. Douez's class proceeding in B.C.

Facebook successfully appealed to the British Columbia Court of Appeal, which found that section 4 of the B.C. *Privacy Act* does not override Facebook's forum selection clause. Ms. Douez's class proceeding was de-certified in the face of this hurdle requiring all lawsuits to be filed in California.

Ms. Douez appealed to the SCC.

Supreme Court of Canada Decision

The main issue before the SCC on appeal was whether Ms. Douez's action should be stayed on the basis of the forum selection clause. The SCC also considered whether the analysis of forum selection clauses should be subsumed under section 11 of the B.C. *Court Jurisdiction and Proceedings Transfer Act* ("***CJPTA***").[3]

In a 3-1-3 split decision, the SCC concluded that the forum selection clause was unenforceable, allowed the appeal and restored the chambers judge's order dismissing Facebook's motion to stay the action.

While the SCC was split on the outcome of the appeal, it unanimously agreed on the interaction between the *CJPTA* and the common law test for refusing to enforce a forum selection clause. The SCC agreed that the *forum non conveniens* test set out in section 11 the *CJPTA* was not intended to replace the common law test to determine if a forum selection clause is enforceable, which was earlier set out by the SCC in *Z.I. Pompey Industrie* [4] (the "**Pompey Test**").

Under the Pompey Test, a court assessing the enforceability of a forum selection clause must consider whether:

1. the forum selection clause is valid, clear, enforceable and applicable to the action before the court; and,
2. if so, the plaintiff can show a "strong cause" why the forum selection clause should not be enforced.

The Pompey Test requires a court to consider all of the circumstances, including convenience, fairness between the parties, and the interests of justice.

The majority accepted that the first step of the Pompey Test was satisfied. It found that section 4 of the B.C. *Privacy Act* lacked the clear and specific language that legislatures normally use to override forum selection clauses.

In applying the second step, however, the majority held that Ms. Douez had successfully demonstrated that the forum selection clause should not be enforced because while "strong cause" factors have been interpreted and applied restrictively in the commercial context, the substantial inequality of bargaining power in consumer

contracts justified a modified application. They held that when determining whether to enforce an otherwise binding forum selection clause in a consumer contract, "courts should take account of all circumstances of the particular case, including public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake".[5]

In this case, the SCC considered the inequality of bargaining power between Facebook and its users to be persuasive. Specifically, the SCC noted that Facebook's terms of use are mandatory on all Facebook users. Moreover, the SCC also noted that even though users choose to join Facebook voluntarily, freedom of contract should not deprive them of a remedy when claims arise and that it would be more convenient for Facebook to appear in B.C. than for Ms. Douez to travel to California to advance her claim.

In a concurring judgment, Justice Abella held that the forum selection clause did not even pass the first step of the Pompey Test on the basis that it is unconscionable. Justice Abella reached this finding because of the inequality of bargaining power between Facebook and its users and that the forum selection clause gave Facebook an unfair procedural benefit in the proceedings.

The Dissent

The minority found that the forum selection clause was enforceable and that Ms. Douez failed to show strong cause as to why the clause should not be given effect. They held that forum selection clauses generally serve an important role of increasing certainty and predictability in transactions that take place across borders. Furthermore, the minority disagreed with the decision to modify the Pompey Test in the context of consumer contracts.

Conclusion

The SCC's decision in *Douez v Facebook* has a potentially significant impact on consumer contracts. Although this case removed a legal hurdle for Ms. Douez and the Facebook users that are class members in the class action, the divided outcome may create challenges for many companies who rely on the certainty, order and predictability of forum selection clauses to manage the costs and risks associated with providing internet-based services on a national or global scale. In a borderless virtual world, companies providing internet services may think twice about whether they "like" this legal status update.

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[1] *Douez v Facebook Inc.*, 2017 SCC 33.[ps2id id='1' target='/]
[2] *Privacy Act*, R.S.B.C. 1996, c 373.[ps2id id='2' target='/]
[3] *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28.[ps2id id='3' target='/]

[4] *Z.I. Pompey Industrie v ECU-Line N.V.*, 2003 SCC 27.[ps2id id='4' target='/]
[5] *Douez v Facebook Inc.*, 2017 SCC 33 at para. 38.[ps2id id='5' target='/]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.