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Enforceability of forum selection clauses in doubt following Supreme Court of Canada decision

Douez v. Facebook Inc., 2017 SCC 33, Supreme Court of Canada, 23 June 2017

In a landmark ruling a sharply divided Supreme Court of Canada declined to enforce the forum selection clause in Facebook's website terms of use. In the course of its decision, a majority of the court called into question the routine enforcement of forum selection clauses in consumer contracts, especially where privacy issues are at stake, but differed sharply over the grounds which justified this refusal to enforce. In this article, we review the ruling in the Douez case and its significant implications for organisations that intend to rely on forum selection clauses in their Canadian business operations.

In the *Douez* case, the plaintiff commenced a class action proceeding in British Columbia ('BC') alleging that Facebook's use of users' names and pictures in its 'sponsored stories' programme violated the BC Privacy Act. Facebook moved to stay the litigation based on the choice of forum clause, failing before the BC Supreme Court, but succeeding in the Court of Appeal. This set the stage for the Supreme Court's consideration of the issue.

The Supreme Court's decision

The seven judges who heard the case agreed that the enforceability test for forum selection continued to be the one adopted in the Court's earlier judgment in *ZI Pompey Industrie v. ECU-Line NV*, the so-called 'Pompey test[1].' Under this test, a forum selection clause will be enforced if it satisfies a two-step test: (1) As a matter of contract law, is the forum selection clause valid and applicable to the dispute at hand? and (2) Even if the clause is valid and applicable, is there nonetheless a 'strong cause' to refuse enforcement?

Although there was agreement about the applicable test, when it came to applying the Pompey test, the court split 3-1-3. Three judges held that Facebook's forum selection clause was valid as a matter of contract law, thereby satisfying the first step, but went on to hold that it failed the second step[2]. These judges found a "strong cause" to refuse enforcement through the combined effect of two factors. First, the forum selection clause was found in a consumer contract of adhesion. This meant that the clause was not negotiated, and thus the usual policy reasons for holding parties to their bargains were less compelling: "we would modify the Pompey strong cause factors in the consumer context[3]." Second, Douez was asserting quasi-constitutional privacy rights. According to these judges, there is a strong public interest in having constitutional and quasi-constitutional claims adjudicated in local courts. This favoured allowing the class action to proceed in BC, since "only a local court's interpretation of the privacy rights under the Privacy Act will provide clarity and certainty about the scope of the rights to others in the province[4]."

Writing alone, Justice Abella concurred that Facebook's forum selection clause was unenforceable, but gave different reasons for doing so. In her opinion, the clause did not pass the first step in the Pompey test, since it was unenforceable at common law on grounds of unconscionability and violation of public policy. Justice Abella also relied on the consumer context and quasi-constitutional nature of the privacy rights at stake to justify these conclusions[5]. Interestingly, Justice Abella raised these contractual validity issues of her own motion, since neither unconscionability nor public policy had been pleaded. She expressly declined to comment on the second step of the Pompey test. Finally, three justices would have found the clause valid and enforceable[6]. According to these justices, there was no unconscionability or breach of public policy, so the clause passed the first step of the Pompey test. Turning to the second step, these judges refused to treat consumer and commercial contracts differently, ruling that certainty and predictability in private international law required that forum selection clauses be enforced in all but exceptional circumstances. The appeal was allowed and the forum selection clause was held to be invalid. The class action proceedings will continue before the British Columbia Superior Court.

General implications

The *Douez* case creates considerable uncertainty about the enforcement of forum selection clauses in Canada, especially since there was no majority position on the 'strong cause' step of the Pompey test. Traditionally, an evenly-divided Supreme Court is considered to affirm the decision below, but the affirmation is not precedential[7]. Here however, the 3-3 split was on a sub-issue, while a 4-3 majority voted to allow the appeal, so the precedential status of *Douez* is murky. There are two points that provide important takeaways:

- A four-judge majority of the court, felt that the Pompey test requires different application in a consumer context, and showed themselves less willing to enforce forum selection clauses in consumer contracts. However, these justices gave different reasons for their conclusions, which makes it difficult to predict what precedential effect the case is likely to have on lower courts. Until this uncertainty is resolved,

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international entities doing business in Canada should be prepared to face increased challenges to the enforceability of their forum selection clauses in a consumer context.

- Six of seven justices ruled that statutory provisions conferring exclusive jurisdiction on a specific court to determine an issue will not, without more, preclude litigating that issue in a foreign court. Here, Justice Abella had agreed with the motion judge that Section 4 of the Privacy Act invalidated choice of forum clauses, because it gave exclusive jurisdiction to the BC Supreme Court to hear actions based on the Privacy Act. The other six judges rejected this contention, stating that clear language was required before courts will find a legislative intention to trump forum selection clauses[8].

Justice Abella's approach to online contracts, while a minority position, is also of interest. She explained that online consumer contracts of adhesion, such as 'click-wrap' or 'browse-wrap' agreements, "put traditional contract principles to the test" and as a result "some legal acknowledgment should be given to the automatic nature of the commitments made with this kind of contract, not for the purpose of invalidating the contract itself, but at the very least to intensify the scrutiny for clauses that have the effect of impairing a consumer's access to possible remedies[9]." This opinion was echoed by the other judges who refused to enforce the forum selection clause, who wrote that in the internet era, remaining "offline" may not be a real choice[10].

These opinions potentially illustrate the Court's willingness to apply contract law in new ways to online commerce, and could open the door to closer scrutiny of other types of clauses beyond forum selection clauses. Indeed, many online consumer contracts of adhesion have the effect of limiting users' remedies, such as limitations and exclusions of liability and indemnity provisions. Given the divisions in the Supreme Court, the enforceability of consumer forum selection clauses post-*Douez* may be in some doubt, absent a careful approach to the use of such clauses and a strategic approach to risk management, particularly in relation to privacy. Until this uncertainty is resolved, whether by additional judicial decisions or legislative reform[11], the enforceability of forum selection clauses in Canadian common law consumer contracts will be in flux. The *Douez* decision has the potential to encourage domestic class actions against foreign entities that would otherwise have to be sued in their home jurisdictions.

Privacy implications

The ongoing uncertainty arising from *Douez* is likely to be felt most strongly in privacy related matters, since four judges relied on the 'constitutional or quasi-constitutional' nature of Douez's claim to strike down the forum selection clause. Privacy is the most likely 'constitutional or quasi-constitutional right' whose violation could plausibly be alleged against a foreign commercial defendant. It is difficult to imagine how non-Canadian commercial entities could violate purely constitutional rights, given that constitutional rights are generally only enforceable against governments and governmental agents[12]. Quasi-constitutional rights are an evolving category of rights in Canada, but include privacy rights[13], language rights[14], an individual's reputation[15], as well as the rights protected by human rights legislation[16], the Canadian Bill of Rights[17], and the Quebec Charter of Human Rights and Freedoms[18]. Of these diverse rights, it is privacy that will likely provide the most promising avenue for plaintiffs seeking to apply *Douez* in practice. The *Douez* decision indicates a strong preference for having Canadian courts to determine privacy matters, with four judges ruling for the first time that Canadian privacy law should normally be interpreted by Canadian courts[19]. In contrast, the dissenting judges stated that the interpretation of the Privacy Act does not require special expertise and that a foreign court can interpret in the same manner as a Canadian court[20].

The potential privacy implications cannot be underestimated. Many organisations which operate outside of Canada collect, use, and disclose personal information about Canadians. Although Canada has a robust data protection regime and active regulators in the privacy arena, in recent years, Canada has witnessed an unprecedented increase in litigation and class action proceedings in relation to alleged privacy breaches and commercial uses of personal information. The class action initiated in *Douez* is a part of this trend[21].

Conclusions

The uncertainty resulting from the divided outcome in the *Douez* case creates challenges for consumer facing businesses online that rely on legal certainty and predictability in providing their services across borders. These businesses must be cautious in their reliance on forum selection clauses in their standard form user agreements, and may need to rely on other types of liability limitation strategies, and should take the added risk of Canadian litigation into account when assessing the cost of doing business in Canada. These considerations are of particular importance in the privacy and data protection arena, where careful risk mitigation strategies should be considered to offset the potential uncertainty surrounding the enforceability of forum selection clauses.

1. ZI Pompey Industrie v. ECU-Line NV, 2003 SCC 27.
2. Douez at paras 48-75 (Karakatsanis, Wagner, and Gascon JJ).
3. Douez at para 38.
4. Douez at para 59.
5. Douez at paras 98-105, 111-117.
6. Douez at para 133-177 (McLachlin CJ, Moldaver and Côté JJ).
7. Rider v. Snow (1891), 20 SCR 12 at 20, Tascherau J speaking for the court on this issue; MNR v. The Royal Trust Co, [1931] SCR 485 at 489.
8. Douez, at paras 41-44 (per Karakatsanis, Wagner, Gascon JJ), 141-144 (per McLachlin CJ, Moldaver and Côté JJ).
9. Douez, at paras 99 (Abella J, dissenting).
10. Douez at para 56.
11. In Quebec civil law, for example, choice of forum clauses are unenforceable and consumers retain the option of suing in Quebec: Civil Code of Québec, Article 3149.
12. Greater Vancouver Transportation Authority v. Canadian Federation of Students, 2009 SCC 31 at paras 13-16
13. Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, 2013 SCC 62 at para 19.
14. Thibodeau v. Air Canada, 2014 SCC 67 at para 12.
15. Éditions Écosociété v. Banro Corp, 2012 SCC 18 at para 57; Hill v. Church of Scientology of Toronto, [1995] 2 SCR 1130 at paras 120-121.
16. Canada (House of Commons) v. Vaid, 2005 SCC 30 at para 81.
17. Bell Canada v. Canadian Telephone Employees Association, 2003 SCC 36 at para 28.
18. De Montigny v. Brossard (Succession), 2010 SCC 51 at para 45.
19. Douez at para 58, 69, 72, 105.
20. Douez at para 165.
21. See Alex Cameron, Cybersecurity in Canada: Trends and Legal Risks 2017, https://www.oba.org/Sections/Privacy-Law/Articles/Articles-2017/February-2017/Cybersecurity-in-Canada-Trends-and-Legal-Risks-201