Business Law

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Technology and the Law: Noteworthy Developments

Introduction

The borderless reach of the Internet allows entities to interact with largely unfettered scope, facilitating trade, commerce and creativity. But it can also lead to confusion when a dispute arises between businesses based in different countries.

In two recent cases, the Supreme Court of Canada (the "**SCC**" or the "**Court**") grappled with International technology law issues and delivered rulings that could significantly alter the legal landscape, both within Canada and around the world. These cases will require Canadian businesses to reassess their ecommerce risk management strategies in certain respects.

Let's start with the primarily Canadian content.

Douez v. Facebook, Inc., 2017 SCC 33 ("*Douez*")

Understanding the Facts

In 2011, Facebook launched an advertising product called "Sponsored Stories". Deborah Douez, a user of Facebook, noticed that her likeness was being used by Facebook in its Sponsored Stories without her permission.

She brought an action in British Columbia against Facebook, alleging that the company had used her likeness without permission in association with advertising, contravening British Columbia's *Privacy Act.*

Facebook sought a stay against the proceedings, arguing that by becoming a Facebook user, Ms. Douez had agreed to Facebook's Terms of Use, which included a "forum selection" and "choice of law" clause, which clearly stated that any dispute against Facebook must be brought in California, and be determined in accordance with California law.

Identifying the Issue & the Court's Decision

The SCC was asked to rule on whether the clauses should be enforced. The Court ultimately ruled (by way of a 4:3 majority) in favour of Ms. Douez, meaning that the clauses were unenforceable, and the proceeding could continue in British Columbia, under BC laws.

The Court outlined the test established in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 ("*Pompey*") to evaluate whether to stay an action brought contrary to a "forum selection" clause:

(i) Can the party seeking the stay prove that the language at issue is clear, valid and enforceable, bearing in mind defences such as unconscionability, undue influence and fraud?

(ii) If so, the onus shifts to the responding party who must demonstrate "strong cause" for the court to refuse to apply the forum selection clause in the normal course.

The majority of the Court ruled that the first step of the test was met – i.e., Facebook's Terms of Use were clear, valid and enforceable. However, the majority held that Ms. Douez had established the "strong cause" required by the second step of the test, ruling that due to the nature of online consumer contracts, greater scrutiny is required than in the context of typical commercial contracts, particularly with respect to clauses that have the effect of impairing a party's access to possible remedies.

In doing so, the SCC effectively modified the second branch of the analysis, which traditionally revolves around jurisdictional considerations, to include **broad public policy considerations** related to inequality of bargaining power between contracting parties and the nature of the rights at issue.

Analyzing the Potential Fallout and Effect on Your Business

Douez represents a significant divergence from the manner in which online contracts have been viewed by Canadian courts, and casts uncertainty over the future interpretation and enforceability of online terms of service, particularly with respect to forum selection and choice of law clauses. Online contracts typically involve little to no negotiation between the parties prior to the

consumer accepting the terms and conditions through the simple click of a button. The terms and conditions are almost always starkly one sided in favour of the party providing the services. These contracts, when properly drafted, optimize a business's risk management from the outset, providing certainty in a number of ways, such as limiting liability, requiring arbitration before litigation, or setting the legal jurisdiction and place of adjudication to the business's home turf (as Facebook, and most businesses, try to do).

If nothing else, *Douez* represents a cautionary tale for businesses that offer online services. *Douez* creates a crack in the traditional e-commerce structure through which potential consumers may seek relief from prejudicial provisions. Only time will tell how this case will influence e-commerce consumer law (and beyond). For now, when drafting consumer contracts (especially those that involve little in the way of bargaining), businesses should be mindful to avoid imposing all-encompassing and draconian language, or risk such language being deemed unenforceable in the event of a subsequent dispute. In terms of choice of law and forum selection in particular, care should be taken to direct the reader's attention to such clauses prior to acceptance, if practicable.

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The Court acknowledged the importance of holding contracting parties to their agreements, which stands as a foundational principle of contract law in Canada. However, due to the gross inequality of bargaining power between the parties in online contracts, the Court ruled that blindly upholding each and every clause contained in an online consumer contract would be, depending on the circumstances, inequitable at best and unconscionable at worst.

Going forward, the context within which a particular dispute unfolds (and around which a consumer contract is entered) must now necessarily inform the determination of any one clause's potential enforceability. It is because of this need to adopt a contextual approach that it is difficult to predict how this case will influence future disputes involving such e-contracts. First and foremost, *Douez* focused heavily on the fact that, if upheld, the clauses would impact the consumer's access to potential remedies, which could result in a great deal of prejudice and inconvenience. Second, *Douez* also involved a quasi-constitutional dimension, namely the possible infringement of Ms. Douez's privacy rights. Thus, while it may seem as though the general principle concerning inequality of bargaining power that underlies the decision could be applied to other fact scenarios, this notion should be reined in given the particular context of the case and the peculiarities inherent in the contractual language at issue.

Still, the underlying rationale in *Douez* has the potential to extend beyond the online consumer context. Employees typically have little to no leverage in negotiating the terms of their employment with their prospective employers. The unequal footing that separates the parties is largely analogous to the situation in *Douez*, and perhaps even amplified based on the employee's vested interest in a positive outcome; therefore, it may be possible for an employee to argue that a forum selection and choice of law clause contained within their employment contract should be deemed unenforceable on the same grounds as those put forward by the plaintiff in *Douez*.

Now that we've covered off the primarily Canadian content, it's time to switch gears and consider a case with truly global ramifications.

Google Inc. v. Equustek Solutions Inc., 2017 SCC 34 ("*Solutions*")

Understanding the Facts

In *Solutions*, the plaintiff, Equustek Solutions Inc. ("**Equustek**"), launched an action in British Columbia against Datalink Technology Gateways ("**Datalink**"), a former distributor of Equustek's products, alleging that Datalink had begun to relabel Equustek's products and sell them as their own.

Although Datalink originally defended the claim, the company eventually abandoned the proceedings and absconded. Court orders were obtained by Equustek prohibiting the sale of inventory and the use of Equustek's products. However, due to the virtual nature of international e-commerce, Datalink continued to carry on business from an unknown location, selling its impugned products via its websites to consumers the world over.

Unable to physically chase Datalink, Equustek approached Google to de-index Datalink's websites in the hopes of cutting off digital access for global consumers.

Although Google initially resisted, Equustek eventually obtained a court order prohibiting Datalink from operating or carrying on business through any website. Google then proceeded to de-index specific webpages associated with Datalink, but confined this process to the Canadian version of its search engine (www.google.ca). Predictably, this proved insufficient and ineffective, as prospective consumers were able to access the objectionable content on Google's non-Canadian domains (including www.google.com).

In response, Equustek pursued and was granted an interlocutory order to enjoin Google from displaying any part of Datalink's websites on any of Google's search results **worldwide**, which Google opposed. The injunction order was granted at trial and upheld on appeal, eventually making its way to the SCC for final consideration.

Identifying the Issue & the Court's Decision

The issue before the Court was unprecedented: whether an injunction that is international in scope and effect should be upheld. Ultimately, the Court ruled (by way of a 7:2 majority) in the affirmative, holding that that the injunction must extend to the international arena in order to ensure the injunction's efficacy.

In strictly legal terms, the three-step test to be applied to applications for an interim injunction requires an applicant to establish that:

(i) there is a serious issue to be tried;

(ii) the alleged actions are causing irreparable harm; and

(iii) the balance of convenience favours the granting of the injunction.

The majority ruling held that each step outlined above was met. Crucially, the fact that the injunction was lodged against a non-party could not impede its imposition, as the Court found that Google played a determinative role in facilitating (even if passively) the harm visited upon Equustek. Google's cooperation on an international scale was deemed necessary in order to mitigate the damage to Equustek.

Analyzing the Potential Fallout and Effect on Your Business

Viewing the results in *Douez* and *Solutions* together, the trend is clear: the SCC appears ready and willing to side with real world Davids in the face of virtual Goliaths. What is unclear is what ramifications the ruling in *Solutions* may trigger. And it is this uncertainty that has generated swift and impassioned backlash from the online community.

Solutions is a landmark ruling in that it constitutes the first time a domestic court has crafted an order that is meant to be immediately global in application. While the facts underlying the case (fraudulent free-riding) may support the final outcome, the lines begin to blur when one considers the potential international fallout. What if a nation's courts impose a global takedown order prohibiting Google (or any Internet intermediary) from displaying search results linking to certain content they deem lewd or inappropriate – content which, in Canada, would merely constitute the by-product of our constitutionally protected freedom of expression? What if a Chinese court prohibits content pertaining to the Dalai Lama?

Admittedly, these examples are, perhaps, extreme. Or perhaps they aren't. Regardless, they highlight the fact that, based on the precedent set by *Solutions,* courts from halfway around the world may attempt to exert influence over Canadian search results using the same legal rationale applied by the SCC. Indeed, *Solutions* renders this possibility all the more palpable.

Viewing the results in *Douez* and *Solutions* together, the trend is clear: the SCC appears ready and willing to side with real world Davids in the face of virtual Goliaths. What is unclear is what ramifications the ruling in *Solutions* may trigger. And it is this uncertainty that has generated swift and impassioned backlash from the online community.

Practically speaking, if Google refuses to abide by the order derived from *Solutions*, the company faces the prospect of being found in contempt for non-compliance, which would bring with it certain penalties. However, Google's main incentive for abiding by such an order will likely be premised on its business interests within Canada – something that has little to no nexus to the legal rationale underpinning the order itself. In this way, if and when other nations follow suit and attempt to impose restrictions informed by local laws through global takedown orders, there is a real possibility that these orders, in aggregate, will confer upon Google (and similar or subsequent virtual intermediaries) a substantial degree of power to function as the ultimate arbiters of virtual content. Where conflicts arise by virtue of the differentiating wrinkles between the legal, ethical and social values of two or more nations, Google will be faced with a decision: abide by the resulting order or ignore it. In all likelihood, Google's decision will be contingent on its investments within each competing jurisdiction, meaning Google may, for better or worse, become capable of using its discretion to dictate which laws to follow online.

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In any event, the legal struggle is far from over; in fact, these wrinkles are already causing discord. Since the ruling in *Solutions* was released towards the end of June 2017, Google shifted venues from the great white north to sunny California in order to challenge the outcome, filing a 13-page application to block the Canadian order as it relates to the domain of the United States. Google's arguments, which rested primarily on freedom of expression and international comity, were accepted by the California federal court, which issued a preliminary injunction against the SCC ruling as it relates to the United States. According to the U.S. federal court judge who presided over the hearing, the SCC ruling undermines certain policy objectives of American legislation and, in a broader sense, "threatens free speech on the global Internet." Now that a preliminary injunction has been granted, Google can seek a permanent one which, if obtained, will enable Google to ask the SCC to modify its original order. Google's American motion was unopposed by Equustek, meaning this may very well come to fruition; however, at this time (and in terms of the bigger picture), the only guarantee that can be drawn from the webs of the *Solutions* case is that no "one size fits all" solution appears to exist.

Concluding Thoughts

Technological innovations necessitate corresponding shifts in the legal landscape. With *Douez*, we can see how such change has altered aspects of the legal makeup within Canada. With *Solutions*, we have witnessed the first instance in which the change stands to alter the manner in which distinct actors operate on a global scale within the limitless confines of the Internet. Businesses should be mindful of these cases and consider the potential impacts on their risk management strategies going forward.

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