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Douez v Facebook, Inc.: Public Policy and Broad Strokes

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On its face, *Douez v Facebook, Inc*. decides the enforceability of a forum selection clause. But the *Douez* case also addresses public policy issues arising from consumer contracts of adhesion and the Internet era. A majority of the Supreme Court of Canada used public policy principles to find the clause unenforceable.

In British Columbia, a class action was brought against Facebook, Inc. on behalf of 8.1 million people. They alleged Facebook used the names and pictures of certain members for advertising without their consent, contrary to the *Privacy Act*, RSBC 1996, c 373. Facebook sought to stay the proceedings on the basis of a forum selection clause contained in its terms of use, terms to which all Facebook members must agree before they access the site. The clause requires all disputes be resolved in California, according to California law.

At trial, the judge determined that privacy law overrides the clause. This was reversed on appeal, and the clause was found to be enforceable. At the Supreme Court, a majority found the clause unenforceable. The Karakatsanis judgment (written jointly with Justices Wagner and Gascon) determined the clause to be unenforceable on public policy grounds. Justice Abella, concurring, also determined the clause could not be enforced, on public policy and unconscionability grounds. The dissent (written by McLachlin CJ and Justice Côté, with Moldaver J concurring) would have enforced the clause.

The Karakatsanis judgment determined that since the *Privacy Act* did not override the forum selection clause, the common law test, established by the Supreme Court in *Z.I. Pompey Industrie v ECU-Line N.V.*, 2003 SCC 27 (CanLII) (the *Pompey* test), which determines the enforceability of forum selection clauses, would need to be applied. The *Pompey* test has two steps. Under the first step, the party seeking to stay the proceeding based on the forum selection clause must establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court" (para 28, quoting *Preymann v Ayus Technology Corp*., 2012 BCCA 30 (CanLII) at para 43). Basic principles of contract law apply to the first step of the test, to determine the enforceability and applicability of the clause, and as with any contract claim, a plaintiff may use doctrines such as mistake, unconscionability, undue influence, etc., to argue that the clause is unenforceable. Once the defending party establishes that the clause is enforceable under step one, the court moves on to the second step and the onus shifts to the plaintiff, to show reasons the court should nonetheless not enforce the clause. This part of the test, adopted from *The "Eleftheria"*, [1969] 1 Lloyd's Rep 237 (Adm Div), is referred to as the "strong cause" part. Under the strong cause test, the court exercises its discretion to consider

"'all the circumstances', including the 'convenience of the parties, fairness between the parties and the interests of justice'" (para 29, relying on *Pompey* at paras 19, 30 and 31).

The Karakatsanis judgment found the clause enforceable under the first step, but not under the second. Under the second part, the judges expanded the test to account for the consumer context before them, recognizing this expansion would be "an appropriate incremental response of the common law to a different context" (para 36). Under this modification, they considered the public policy "relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake" (para 38).

There were two aspects to the public policy considerations. First, there is an inequality of bargaining power between the parties, as determined by Facebook's profits, and by consumers' inability to reject Facebook's terms of use. Facebook's argument that customers could simply remain offline if they chose, was rejected, as Karakatsanis et al found that "there are few comparable alternatives to Facebook, a social networking platform with extensive reach" (para 56). Second, it is important to adjudicate these matters in Canadian courts: "There is an inherent public good in Canadian courts deciding these types of claims. Through adjudication, courts establish norms and interpret the rights enjoyed by all Canadians" (para 58). Given that privacy legislation is quasi-constitutional, "only a local court's interpretation of privacy rights under the *Privacy Act* will provide clarity and certainty about the scope of the rights to others in the province" (para 59). In sum, the public policy concerns provided a strong cause to not enforce the clause.

The Karakatsanis judgment also considered two secondary factors, in addition to public policy, that support not enforcing the clause. First, the interests of justice support hearing the matter in British Columbia: "This factor is concerned not only with whether enforcement of the forum selection clause would unfairly cause the loss of a procedural advantage, but also with which forum is best positioned to hear the case on its merits" (para 65). Second, the expense and inconvenience to the plaintiffs if they were required to litigate in California were significant compared to the expense and inconvenience Facebook would suffer if it had to litigate in British Columbia.

Justice Abella, concurring, found in favour of not enforcing the forum selection clause. Unlike her colleagues, she found the clause unenforceable under the first part of the *Pompey* test. Like her colleagues, however, she based her reasons, in part, on the doctrine of public policy. She also found the clause unenforceable on the basis of unconscionability, even though unconscionability was not argued before the Court (para 173).

Abella J. found it would be contrary to public policy for consumers to be unable, as a result of an online contract of adhesion, to adjudicate matters affecting them in domestic courts. It is particularly egregious when those matters are constitutional and quasi-constitutional, like privacy. Determining that the *Privacy Act* gives exclusive jurisdiction to British Columbia courts to deal with the torts in question, she concluded that it would be "contrary to public policy to enforce a forum selection clause in a consumer contract that has the effect of depriving a party of access to a statutorily mandated court" (para 108). Additionally, relying on *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4 (CanLII), she found the doctrine of unconscionability could be applied to render the clause unenforceable, as both inequality of bargaining power between the parties as well as unfairness, were present. She

concluded, "[t]he inequality of bargaining power between Facebook and Ms. Douez in an online contract of adhesion gave Facebook the unilateral ability to require that any legal grievances Ms. Douez had, could not be vindicated in British Columbia where the contract was made, but only in California where Facebook has its head office. This gave Facebook an unfair and overwhelming procedural – and potentially substantive – benefit" (para 116).

According to the dissent, the forum selection clause was enforceable and there was no strong cause for not enforcing it.

Analysis

The Karakatsanis Judgment

The debate between the freedom to contract and to have those contracts enforced, and the need to curtail that freedom to protect the public interest, is not a new one. Buttough J. famously cautioned against reliance on public policy in *Richardson v Mellish* (1824), 2 Bing 229 at 252 (CP), saying, "Public policy… is a very unruly horse, and when once you get astride it you never know where it will carry you". But Lord Denning directly countered Buttough J.'s concerns: "I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice." (*Enderby Town Football Club Ltd v The Football Association Ltd*, [1971] Ch 591 at 606)

Although the debate continues, no one disagrees with the importance of both sides. Examples on either end of the spectrum are easy to concede. Contracts, voluntarily entered into, and subsequently relied upon by the contracting parties, must be enforced. Commercial relations require stability and predictability. At the same time, one cannot argue that freedom to contract should be limitless. Protecting the public interest sometimes justifies overriding the freedom to contract. Some examples of what Péter Cserne called "paternalistic intervention" are obvious ("Paternalism and Contract Law" (May 5, 2017), *The Routledge Handbook of the Philosophy of Paternalism*, ed Kalle Grill and Jason Hanna (Abingdon: Routledge, forthcoming)). Contracts to commit murder, to sell people, to create monopolies, and to sell or buy body parts, are all examples of the circumstances under which the freedom to contract must be curtailed. Essentially, contracts in furtherance of illegal purposes cannot be upheld, for public policy reasons. The problem arises, though, in the messy middle, where both freedom to contract and public policy seem to be on equal footing.

The doctrine of public policy evolves and reflects current societal views, such that it is hard to pin down specifics. Its vagueness and its changing nature give courts the flexibility and discretion to apply it; at the same time, these elements invoke fear that this doctrine is unmoored from any concrete principles, and can be abused to override contractual freedoms at will. One only needs to consider what now seem to be antiquated examples of immoral contracts that used to be unenforceable on public policy grounds to realize how these norms can change over time. Agreements by married persons to live separate and apart were considered unenforceable (*Brodie v Brodie*, [1917] P 271), as were agreements made by married persons in contemplation of separating (*Harrison v Harrison*, [1910] 1 KB 35). Although legislation still reflects the importance of marriage, no one today would view public policy as appropriately preventing these types of contracts.

The shifts in public perception of acceptable behaviour, and of societal norms, support judicial caution about applying the doctrine of public policy. In 1938, the Supreme Court of Canada articulated two conditions that must be fulfilled before the courts applied the doctrine of public policy. First, "such prohibition is imposed in the interest of the safety of the state, or the economic or social well-being of the state and its people as a whole…[and second], the doctrine should be invoked only in clear cases, in which harm to the public is substantially uncontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (*Miller Estate, Re*, [1938] SCR 1 at paras 5 and 15). The message was just as firm in a recent pronouncement by the Supreme Court, when it maintained, "[t]he residual power of a court to decline enforcement exists but, in the interests of certainty and stability of contractual relations, it will rarely be exercised" (*Tercon* at para 117). The *Tercon* Court did go on to state, however, that "[t]here are cases where the exercise of what Professor Waddams calls the 'ultimate power' to refuse to enforce a contract may be justified, even in the commercial context. Freedom of contract, like any freedom, may be abused" (para 118). The question before the Court in *Douez* is whether the Facebook contract fits into these very precise circumstances, so as to justify invoking the doctrine of public policy. The Karakatsanis judgment found that it did.

The Karakatsanis judgment has unquestionable merits but also potentially gives rise to far reaching effects on all consumer contracts. The judgment is about Facebook, and the issues raised by this particular contract, but it deals with larger problems, and uses Facebook as the launching pad to highlight them. The judges noted that transactions between businesses and consumers largely now take place on a "take-it-or-leave-it" basis, and in particular, for social networking, "there are few comparable alternatives to Facebook, a social networking platform with extensive reach… Having the choice to remain 'offline' may not be a real choice in the Internet era" (para 56). By equating "remain[ing] offline" to not signing on to Facebook, as they rejected Facebook's argument that Ms. Douez could have simply refrained from using Facebook by rejecting its terms, the judges are elevating Facebook to a necessity or a utility in today's society. And while Facebook has millions of users around the world (myself included), it is simply *not* a utility, certainly not in the way that electricity or water are. Utilities are necessary for day-to-day existence, which is, in part, why they are regulated. Facebook is neither necessary nor is it regulated. But there is a reason their argument took this form.

Facebook is a part, and a glaring example, of the inequality of bargaining power and the inability to negotiate in consumer contracts, along with the privacy rights that are potentially infringed as a result. These contracts are not simply about exchanging money for tangible goods; they also involve handing over access to personal information. This is not limited to contracts with social networking sites; it extends to contracts with any corporation which allows the corporation access to the consumer's personal information, whether that access is the subject of the transaction or is tangential to it. And when companies infringe consumers' privacy by using that personal information in ways to which consumers did not consent, that inequality of bargaining power leaves consumers without much recourse. Those effects concerned the judges. The judges saw the expansion of the *Pompey* test to include public policy as important since, "[t]he global reach of the Internet allows for instantaneous cross-border consumer transactions. It is necessary to keep private international law 'in step with the dynamic and evolving fabric of our society'" (para 36). But I would argue that the problem is much more far-reaching than that.

The Court needs a way to deal with these consumer contracts, not simply because of the cross-border contracts arising from the global reach of the Internet, but because of the immense

amount of critical information these contracts hand over to corporations. A contract with Apple Inc. for an iPhone is not simply a contract for the purchase of a phone. The phone contains information about every aspect of a person's life, birthday and address, banking and credit card information, information about family and friends, photos, emails, text messages, music, internet searches, subscriptions, articles read, food preferences, political views, etc. The extent to which Apple can access that information and use it, will be determined in significant part by the contract we sign. The same analysis applies with Google and Yahoo. And Facebook.

The Karakatsanis decision concluded (at para 52):

> There are generally strong public policy reasons to hold parties to their bargain and it is clear that forum selection clauses are not inherently contrary to public policy. But freedom of contract is not unfettered. A court has discretion under the strong cause test to deny the enforcement of a contract for reasons of public policy in appropriate circumstances. Generally, such limitations fall into two broad categories: those intended to protect a weaker party or those intended to protect 'the social, economic, or political policies of the enacting state in the collective interest'... In this case, both of these categories are implicated. It raises both the reality of unequal bargaining power in consumer contracts of adhesion and the local court's interest in adjudicating claims involving constitutional or quasi-constitutional rights.

This statement discusses why forum selection clauses should sometimes be struck down in consumer contracts. The problem is that the reasons articulated could apply to any important clause in a consumer contract when constitutional or quasi-constitutional rights are engaged. Our personal information and its use, which trigger privacy issues, are typically at issue in contracts today. Inherent in that issue is an inequality of bargaining power and an inability to negotiate. Given these premises, arguably, any clause in a consumer contract would raise these issues. Could the intent of the Karakatsanis decision have been to give courts the power to strike down any provision in a consumer contract?

As with any argument pitting public policy against freedom of contract, there are principles worthy of protection on both sides of the debate. The sanctity of freedom of contract needs to be protected. Accordingly, the broad statement giving courts this type of power is problematic. But the Internet has brought significant changes to the way we contract. Consumers are vulnerable against corporations. The same corporations are an integral part in all aspects of our lives, and refusing to click on the "I agree" icon for one product can have far reaching consequences on our ability to function, as any Apple user (again, myself included) will tell you. This places corporations in the ultimate power position, as consumers who want access to the product must agree to any term of use, regardless of whether or not it is grossly unfair. And these terms of service engage personal information, and therefore, privacy rights. Arguably, the provincial legislation we have is not enough to protect consumers when they hand over copious amounts of their personal information to corporations. In short, there is a problem here. As Karakatsanis et al noted, "[g]iven the importance of constitutional and quasi-constitutional rights, it is even more important that reverence to freedom of contract and party autonomy does not mean that such rights routinely go without remedy" (at para 62).

The Abella Judgment

Abella J.'s reliance on the doctrine of unconscionability creates two challenges, both arising from basing her decision on a doctrine that was not argued before the court. As Professor Woolley has noted, in our adversarial system, decisions should be based on the arguments made and evidence presented by the parties. An analysis without argument and evidence cannot be given its full weight, and it is arguably unfair to subject parties to a doctrine they did not have a chance to argue.

In this case, it is also problematic because the doctrine of unconscionability, which can be used to render a contract clause unenforceable (*Tercon* at para 122) might very well be able to resolve this issue with consumer contracts in the Internet age. As quoted by Abella J., "… the doctrine of the unconscionable term may provide a common law device, long awaited by some, that can ameliorate the harsh impact of unfair terms in boilerplate or 'adhesion' contracts, offered particularly in the context of consumer transactions on a take-it-or-leave-it basis" (para 114, quoting John D. McCamus, *The Law of Contracts*, 2nd ed (Canada: Irwin Law Inc, 2012) at 144). However, if the doctrine is in fact going to be applied to this expanding area of law, then it deserved to be argued by the parties before the Court, and the Court needed to provide a full and thorough consideration of the issue. Neither occurred.

Conclusion

The doctrine of public policy may be too broad to invoke here, and its effects, too far-reaching. Addressing this problem requires a doctrine applicable more on a case-by-case basis, a doctrine that can maneuver the nuances of individual circumstances to consider the context of the transaction. The doctrine of unconscionability may provide the means to address this problem. But that awaits a future case where unconscionability is argued by the parties and fully considered by the Court.

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