Posted on: July 26, 2017

SUPREME COURT OF CANADA CONSIDERS JURISDICTIONAL ISSUES AND THE INTERNET IN CASES INVOLVING FACEBOOK AND GOOGLE

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The Supreme Court of Canada recently issued judgments in two cases originating from British Columbia, involving tech giants Facebook and Google. The decisions involved important advances in the law relating to the internet and the jurisdiction of local Canadian courts.

In *Douez v. Facebook, Inc.*, 2017 SCC 33, the Supreme Court of Canada refused to enforce a clause in Facebook's terms of use that required all disputes between Facebook and its users to be decided in California. A week later, in *Google Inc. v. Equustek*, 2017 SCC 34, the Court upheld an injunction requiring Google to globally de-index the websites of a company that was said to be unlawfully selling the intellectual property of another company.

Douez v. Facebook

In *Douez* v. *Facebook*, the plaintiff, Ms. Douez, was a British Columbia resident and a member of the Facebook.com social network. She claimed that Facebook had infringed her privacy rights, contrary to British Columbia's *Privacy Act*, when it used her name and profile picture in connection with its "Sponsored Stories" advertising product. "Sponsored Stories" used the names and photographs of Facebook members to advertise companies and products. Ms. Douez sought to certify the proceeding as a class action, which would have included all British Columbia residents who had their name or picture used in Sponsored Stories.

Like all Facebook users, Ms. Douez had been required to agree to Facebook's terms of use as part of the registration process. Those terms included a "forum selection" and "choice of law" clause, which required that disputes be resolved in the courts of California according to California law.

Ms. Douez had brought her privacy claim against Facebook in BC Supreme Court. Facebook brought a preliminary motion to stay the action (*i.e.* to halt the legal process) on the basis that Ms. Douez had breached the forum selection clause by commencing her action in BC, rather than California. A judge of the BC Supreme Court refused to enforce the forum selection clause and certified the class action. The British Columbia Court of Appeal disagreed, finding that the forum selection clause was enforceable and issuing a

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stay of proceedings as a result.

By a narrow 4:3 majority, the Supreme Court of Canada found that the forum selection clause was unenforceable.

In its decision, the majority of the Supreme Court acknowledged the valuable purpose served by forum selection clauses, which are commonly used and regularly enforced, particularly in commercial transactions involving sophisticated parties with similar bargaining power. However, the majority of the Supreme Court of Canada found that different considerations arise in *consumer* relationships – the consumer context may provide strong reasons *not* to enforce a forum selection clause, particularly when there is unequal bargaining power between the parties, and the contract is presented to the consumer as a "take it or leave it" proposition.

In the case of Facebook's terms of use, the majority found that a number of different factors, considered cumulatively, supported a finding that there was "strong cause" to not enforce the forum selection clause. The majority noted the gross inequality of bargaining power between Facebook and its users, and the fact that individual consumers are faced with little choice but to accept Facebook's terms of use, a practice not uncommon in the digital marketplace. Moreover, the majority held that Canadian courts have an interest in deciding cases that involve constitutional and quasi-constitutional rights (such as Ms. Douez's privacy claim) because those rights play an essential role in a free and democratic society and embody key Canadian values.

In the result, Facebook's forum selection clause was not enforced, and Ms. Douez's privacy claim was allowed to continue in the B.C. court.

Google Inc. v. Equustek Solutions Inc.

Equustek Solutions Inc. is a small technology in British Columbia engaged in an ongoing intellectual property dispute with its former distributor, known as "Datalink". Equustek claimed that Datalink, while acting as a distributor of its products, had relabelled one of the products and passed it off as its own, and had used Equustek's confidential information and trade secrets to design and manufacture a competing product that it sold to customers.

Datalink eventually left the jurisdiction without complying with various court orders against it. It continued doing business over the internet, allegedly in breach of Equustek's intellectual property rights. Equustek was unable to locate Datalink, or have its websites removed by the site's hosting companies.

After Equustek obtained an order against Datalink that it "cease operating or carrying on business through

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any website", Google voluntarily agreed to de-index 345 specific webpages associated with Datalink. However, it did not de-index all of Datalink's websites. Equustek soon discovered that this was ineffective, because Datalink was able to circumvent court orders by simply moving content to new pages within its websites. Moreover, Google had limited the de-indexing to those searches that were conducted on Google.ca. Datalink's webpages could still be searched through other Google sites. Because the majority of Datalink's customers were outside of Canada, de-indexing on Google.ca only was largely ineffective at stopping Datalink's alleged breaches of Equustek's IP.

Faced with this situation, Equustek applied for an order barring Google from displaying *any part* of the Datalink websites on any of its search results *worldwide*. The British Columbia Supreme Court granted that injunction against Google, and the British Columbia Court of Appeal affirmed the Supreme Court's decision. Google appealed to the Supreme Court of Canada.

By a 7:2 majority, the Supreme Court of Canada dismissed Google's appeal and upheld the worldwide injunction.

Writing for the majority, Madam Justice Abella held that non-parties (*i.e.* those who are neither a plaintiff nor a defendant in a lawsuit) could be the subject of an interim injunction if necessary. In this case, Datalink was unable to carry on business online in a commercially viable way unless its websites were included in Google's search results. Google was thereby facilitating Datalink's breach of the court order by enabling it to continue carrying on business through the internet. The injunction against Google was necessary in order to prevent the facilitation of Datalink's ability to defy court orders and do irreparable harm to Equustek.

The majority also concluded that the British Columbia court could grant an injunction against Google that had worldwide effect. Because Google carried on business in British Columbia through its advertising and search operations, the British Columbia courts had jurisdiction over Google. When a court has that jurisdiction, and where it is necessary to ensure the injunction's effectiveness, the court can grant an injunction relating to that person's conduct anywhere in the world. The Supreme Court noted that the problem in this case was occurring online and globally. Therefore, the only way to ensure that the injunction would attain its objective was to have it apply where Google operates, *i.e.* globally.

Practical Considerations

Both the *Douez and Google* decisions revealed a divided Supreme Court, with a majority of judges in each case prepared to show less restraint and apply the law in new ways to the online economy. The decisions raise different practical considerations for businesses and consumers.

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The *Douez* decision will result in courts giving greater scrutiny to forum selection clauses in consumer contracts, particularly in the context of non-negotiated, standard-form online agreements. Because of the certainty and security they give to a business operating across borders, forum selection clauses will continue to be used, and will often be enforced by the courts. However, if a consumer had no real opportunity to negotiate the contract terms, then the courts will take a closer look. In the case of claims involving privacy rights, or other constitutional or quasi-constitutional rights, Canadian courts will be more likely to find "strong cause" to not enforce a forum selection clause.

Companies that do business online, and across borders, should therefore be alive to the risk of forum selection clauses not being enforced in Canada. It remains to be seen whether the majority's reasoning in the *Douez* decision will lead Canadian courts to give greater scrutiny to the enforceability of other terms in non-negotiated online consumer contracts, beyond just forum selection clauses.

The *Google* decision demonstrates that Canadian courts may intervene in online commerce, with orders having global reach. The decision recognizes the importance of parties like Google to online commerce, and how a search engine can facilitate unlawful conduct.

Victims of IP infringement can look to the courts for remedies against third party search engines who are the "determinative player" in allowing IP infringement and the resulting harm to occur. In some cases, an injunction with worldwide effect will be the only effective way to protect a plaintiff's legal rights. The Supreme Court of Canada has recognized this reality and confirmed that Canadian courts have the ability to issue strong injunctions with broad reach, in appropriate circumstances.

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