Law on Jurisdiction Clauses Changes in Canada

In 2011 Facebook, Inc. used the name and picture of certain Facebook.com members as part of an advertising product. In response, a class action was started in British Columbia on behalf of roughly 1.8 million British Columbia residents whose name and picture had been used. The claim was based on section 3(2) of the province's *Privacy Act*. In response, Facebook, Inc. sought a stay of proceedings based on an exclusive jurisdiction clause in favour of California contained in the contracts of use for all Facebook.com members.

Canadian courts had repeatedly held that "strong cause" must be shown to displace an exclusive jurisdiction clause. In addition, while there was some ambiguity, the leading view had become that the analysis about whether to stay proceedings due to such a clause is separate and distinct from the general *forum non conveniens* analysis (para 18). The clause is not simply an important part of the *forum non conveniens* analysis – rather, it triggers a separate analysis.

In *Douez v Facebook, Inc*., 2017 SCC 33 (available here) the Supreme Court of Canada confirms the second of these points: the analysis is indeed separate. However, by a slim majority of 4-3 the court holds that the "strong cause" test operates differently in a consumer context than in the commercial context in which it was originally formulated. The court overturns the decision of the British Columbia Court of Appeal and rejects a stay of proceedings, paving the way for the class action to proceed in British Columbia.

The Separate Analysis

All of the judges support the separation from *forum non conveniens* (paras 17, 20 and 131). I have found this approach troubling as it has developed and so, while not a surprise, I am disappointed to see it confirmed by the court. As I understand it, the core reason for the separate analysis is to make sure that the clause is not overcome by a series of less important factors aggregated under the *forum non conveniens* analysis. So the separate analysis requires that the "strong cause" to overcome the clause has to involve something closely related or intrinsic to the clause itself. The best explanation of this view is in *Expedition*

Helicopters Inc. v Honeywell Inc., 2010 ONCA 351 (available here; see in particular para 24). The problem is that courts, in their search for strong cause, frequently go beyond this and refer to factors that are well established under the *forum non conveniens* approach.

In its analysis, the court puts almost no emphasis on (and does not really even explain, in the way *Expedition Helicopters* does) how the separate approach differs from *forum non conveniens* in terms of how the clause gets displaced. In places, it appears to actually be discussing *forum non conveniens* (see paras 29-30 and 155), in part perhaps due to its quite direct reliance on *The Eleftheria,* an English decision I think is more consistent with a unitary framework rather than a separate approach (a point noted in *Expedition Helicopters* at para 11). In *Douez*, the plurality finds strong cause for two reasons: public policy and secondary factors (para 64). Leaving public policy aside for the moment, it is telling that the secondary factors are "the interests of justice" and "comparative convenience and expense". These are the most conventional of *forum non conveniens* factors. If this analysis is followed by lower courts, rather than that as explained in *Expedition Helicopters*, the separate analysis might end up not being very separate.

The Consumer Context

The majority (which is comprised of two decisions: a plurality by three judges and a separate solo concurrence) considers the unequal bargaining power and potential for the relinquishing of rights in the consumer context to warrant a different approach to the "strong cause" test (para 33). In part, public policy must be considered to determine whether the clause is to be given effect. As a matter of law, this may well be acceptable. But one of the key features of the plurality decision is the basis on which it concludes that strong cause has been shown on the facts. It reaches this conclusion because the contract is one of adhesion with notable inequality of bargaining power and because the claim being brought relates to "quasi-constitutional rights" (para 58), namely privacy. If these factors are sufficient, then a great many exclusive jurisdiction clauses in standard form contracts with consumers are subject to being defeated on a similar basis. Lots of consumer contracts involve unequal bargaining strength and are in essence "take it or leave it" contracts. And it may well not be that difficult for claims to be advanced, alongside other claims, that involve some form of quasi-constitutional rights (the breadth of this is untested). This possibility that many

other clauses do not provide the protection once thought is likely the most notable dimension of the decision.

The Dissent

The dissent would not modify the "strong cause" test (paras 125 and 171). It stresses the need for certainty and predictability, which are furthered by exclusive jurisdiction clauses (paras 124 and 159). The dissent concludes the clause became part of the contract, is clear and is not unconscionable. It reviews possible factors which could amount to strong cause and finds none of them present. It is critical of the majority for its use of public policy as a factor in the strong cause analysis. If the clause is enforceable – and in its view it is, even with the inequality of bargaining power – then it is wrong to rely on the factors used by the plurality to find strong cause (para 173). In the immediate aftermath of the decision I think the dissent has the better of the argument on whether strong cause has been shown in this particular case.

Territorial versus Subject Matter Jurisdiction

The proposed class action relies on a statutory provision. That statute contains a provision (section 4) that provides that the British Columbia Supreme Court must hear and determine claims under the statute. The British Columbia Court of Appeal concluded that this provision addresses subject matter jurisdiction and not territorial jurisdiction (para 14). The dissent agrees with that view (para 142). In contrast, the plurality conflates the two types of jurisdiction. While it accepts that the provision is not one which overrides jurisdiction clauses (para 41), in the public policy analysis it is concerned that in litigation in California the plaintiff class would have no claim (para 59). But as the dissent points out, it is open to the California courts to apply the statute under its choice of law analysis (paras 165-66). No evidence was adduced to the contrary. Section 4, properly interpreted, does not prevent that. Even more worrying is the analysis of Justice Abella in her solo concurring decision. She concludes that section 4 deals with territorial jurisdiction and so overrides any jurisdiction clause to the contrary (paras 107-08). This is a remarkable interpretation of section 4, one which would see many other provisions about subject matter jurisdiction instead read as though they addressed territorial jurisdiction (which she does in footnote 1 in para 109).

Conclusion

The split between the judges as to what amounts to strong cause sufficient to set aside an exclusive jurisdiction clause is the most dramatic aspect of the decision. They see what is at stake very differently. On one view, this is a case in which consumers should not be deprived of important statutory rights by a clause to which they did not truly agree. On another view, this is a case in which contracting parties should be held to their agreement as to the forum in which any disputes which arise should be resolved because, even though the contract involves consumers, the agreement is not unfair and has not been shown to deprive them of any substantive rights. This debate will now play out across a wide range of consumer contracts.