

“Don’t Be Evil”: Boilerplate Contract Theory and Public Policy *Douez v Facebook, Inc.*

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*Online contracts such as the one in this case put traditional contract principles to the test.*¹

Anyone who wants to join the Facebook must register and accept its terms of use, which include a forum selection clause requiring all disputes between Facebook and its registered users be litigated in Santa Clara County, California. In *Douez v Facebook, Inc.*,² the Supreme Court of Canada considered for the first time the question of the enforceability of a forum selection clause occurring in an online boilerplate consumer contract. The Court’s answers - rendered in three sets of reasons - illustrate the tension between legal doctrine and public policy with respect to contract enforceability, and, more generally, between the courts and legislatures as institutions of “public norm generation and legitimation, which guide the formation and understanding of relationships in pluralistic and democratic societies.”³

Facebook, Preferences, and Privacy

Facebook, not unlike Google, Twitter, and Instagram (which is owned by Facebook) is a pervasive advertisement-financed Internet platform. Contrary, however, to the dissenting opinion in *Facebook*,⁴ these platforms are far from free. As Tufekci argues, “the price they extract in terms of privacy and control is getting only costlier.”⁵ As a Facebook user, Tufekci would “happily pay more than 20 cents per month for a Facebook or a Google that did not track me, upgraded its encryption and treated me as a customer whose preferences and privacy matter.”⁶ In 2014, Facebook was valued at US\$270 billion, and recorded profits of US\$3 billion.⁷ Private, personal information is inherently valuable. “When billions of people hand data over to just a few companies, the effect is a giant wealth transfer from the many to the few.”⁸

¹ *Douez v Facebook, Inc.*, 2017 SCC 33 per Abella J at para 99, concurring in the result [emphasis added] [Facebook].

² *Ibid.*

³ *Ibid per Karakatsanis, Wagner, and Gascon JJ* at para 25, citing approvingly Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) at 41.

⁴ *Ibid per McLachlin CJ & Côté J (Moldaver J concurring)* at para 173.

⁵ Zeynep Tufekci, “Mark Zuckerberg, Let Me Pay for Facebook”, *The New York Times* (4 June 2015), online: <https://www.nytimes.com/2015/06/04/opinion/zeynep-tufekci-mark-zuckerberg-let-me-pay-for-facebook.html?mcubz=0&_r=0>.

⁶ *Ibid.* Facebook claims that its profits amount to approximately 20 cents per user per month.

⁷ Tim Wu, “Facebook should pay all of us”, *The New Yorker* (14 August 2015), online: <<https://www.newyorker.com/business/currency/facebook-should-pay-all-of-us>>.

⁸ *Ibid.*

Moreover, as another commentator observes, “if one’s family, friends, and business associates are on Facebook ... using a competitor’s service is not a reasonable choice.”⁹

In Ms. Douez’s case, when a Facebook user “liked” a post associated with a business, Facebook displayed her name and portrait in an advertisement appearing in the newsfeed of her “friends.” This occurred pursuant to an advertisement program Facebook calls “Sponsored Stories.” But Facebook did not, according to Ms. Douez, obtain her consent to include her name or portrait in any such Sponsored Story. Ms. Douez commenced proceedings in the Supreme Court of British Columbia alleging that Facebook violated her privacy rights under the B.C. *Privacy Act*. Ms. Douez also commenced a class action proceeding under the province’s class proceedings legislation. The proposed class consisted of approximately 1.8 million B.C. residents whose names and/or portraits had been used by Facebook - for free - in a Sponsored Story without their consent. The class size amounts to approximately 40% of British Columbia’s population.

Facebook, notwithstanding its contractual aspiration to “strive to respect local laws” (“Don’t be evil”),¹⁰ applied for a stay of proceedings based on the following forum selection clause in its contractual terms of use, which provides in relevant part as follows:

*You will resolve any claim, cause of action or dispute (claim) you have with us arising out or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the state of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for [the] purpose of litigating all such claims.*¹¹

Griffin J of the Supreme Court of British Columbia found the forum selection clause unenforceable, and certified the class action. She found in particular that section 4 of the B.C. *Privacy Act* granted exclusive jurisdiction to the B.C. Supreme Court to hear Ms. Douez’s claims under the *Act*, effectively overriding any contractual forum selection clause. Section 4 of the *Act* provides that “[d]espite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court.”¹²

⁹ Cheryl Preston, “‘Please Note: You Have Waived Everything’: Can Notice Redeem Online Contracts?” (2015) 64 Am U L Rev 535 at 554. See also Farhad Manjoo, “Tech’s Frightful Five: They’ve Got Us”, *The New York Times* (10 May 2017), online: <<https://www.nytimes.com/2017/05/10/technology/techs-frightful-five-theyve-got-us.html?mcubz=0>>.

¹⁰ While the mantra “Don’t be evil” originated with Google, it has increasingly been associated with other powerful Internet platforms, including Facebook. See e.g. Maureen Dowd, “Will Mark Zuckerberg ‘Like’ This Column?”, *The New York Times* (23 September 2017), online: <<https://www.nytimes.com/2017/09/23/opinion/sunday/facebook-zuckerberg-dowd.html?mcubz=0>>.

¹¹ *Facebook*, *supra* note 1 *per* Abella J at para 85 [emphasis original].

¹² Quoted in *ibid per* Abella J at para 83.

The Court of Appeal for British Columbia allowed Facebook's appeal and granted it a stay of proceedings based on the forum selection clause.¹³

Ms. Douez appealed to the Supreme Court of Canada. A majority of the Court allowed her appeal; Justice Abella provided reasons concurring in the result reached by Karakatsanis, Wagner, and Gascon JJ; McLachlin CJ and Côté and Moldaver JJ dissented.

Once More Unto the Breach (of Boilerplate)

Facebook raised a matter of first impression before the Supreme Court of Canada: how to apply the test for the enforceability of forum selection clauses in the context of an online consumer contract of adhesion. In other words, a boilerplate contract, in respect of which "there is virtually no opportunity on the part of the consumer to negotiate the terms of the clause. To become a member of Facebook, one must accept all the terms stipulated in the terms of use. *No bargaining, no choice, no adjustments.*"¹⁴

Thus does Abella J assert that "[o]nline contracts such as the one in this case put traditional contract principles to the test."¹⁵

Justice Abella frames this test of contractual principles in two ways. First, she asks what "consent" means when the agreement is said to be made by a keystroke, and further questions whether it realistically can be said "that the consumer turned his or her mind to all the terms and gave meaningful consent?"¹⁶ In this initial framing of the problem, Abella J suggests that "some legal acknowledgement 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."¹⁷

But Abella J proceeds to frame the problem posed by online boilerplate consumer contracts for basic contractual principles in terms of the "grossly uneven bargaining power"¹⁸ of the parties. Facebook, Abella J notes, is a multinational company that operates in dozens of countries. Ms Douez, by contrast, is a videographer, and private citizen who "*had no input into the terms of the contract and, in reality, no meaningful choice as to whether to accept them given Facebook's undisputed indispensability to online conversations.*"¹⁹

Justice Abella adds that "[t]he doctrine of unconscionability, a close jurisprudential cousin to both public policy and gross bargaining disparity, also applies to render the forum selection

¹³ *Ibid per* Abella J at para 87.

¹⁴ *Ibid per* Abella J at para 98 [emphasis added].

¹⁵ *Ibid per* Abella J at para 99.

¹⁶ *Ibid per* Abella J.

¹⁷ *Ibid per* Abella J.

¹⁸ *Ibid per* Abella J at para 111.

¹⁹ *Ibid per* Abella J [emphasis added].

clause unenforceable in this case.”²⁰ Indeed, Justice Abella concluded that “[t]his, to me, is a classic case of unconscionability.”²¹

Justice Abella’s argument is compelling. So compelling that it proves too much.

To see how, it is important to pause and consider how the joint reasons for judgment of Justices Karakatsanis, Wagner, and Gascon treat the issue of unconscionability.

The doctrinal test for the enforceability of contractual forum selection clauses was set out by the Court in a case - *ZI Pompey Industrie v ECU-Line NV*²² - involving a bill of lading disputed by two sophisticated commercial parties. *Pompey* establishes a two-step test. At step one the Court determines whether a valid contract - including a valid forum selection clause - binds the parties as a matter of settled contract law doctrine. At step two the Court determines whether there is a “strong cause” as to why the clause should not be enforced, based primarily on *forum non conveniens* factors.²³

Justices Karakatsanis, Wagner, and Gascon have modified the “strong cause” prong of the *Pompey* test in the consumer context. They argue that “public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake”²⁴ warrant a modified approach, “even if the circumstances of the bargain do no render the contract unconscionable at the first step.”²⁵

This raises an important question of contract law - how can a gross inequality of bargaining power between the parties, the absence of any actual bargaining, and the absence of any realistic choice on the part of consumers, render a forum selection clause unenforceable on public policy grounds at step two of the *Pompey* test but have no effect at all on the validity and enforceability of not only the clause but also the contract as a whole at step one of the test? After all, Justices Karakatsanis, Wagner, and Gascon concluded that “[n]othing suggests in this case that Ms. Douez could have similarly negotiated the terms of use”,²⁶ which include not only the forum selection clause but also the core constitutive obligations of the contract as a whole.

The Justices’ only answer to this question is that “[w]e prefer to address these considerations at the ‘strong cause’ step of the test.”²⁷ Which, with great respect, is no answer at all.

Returning now to Justice Abella’s concurring reasons, and her insistence - which is correct, as far as it goes - on first determining “whether the *contract or clause itself satisfies basic*

²⁰ *Ibid per* Abella J at para 113.

²¹ *Ibid per* Abella J at para 116 [emphasis added].

²² *ZI Pompey Industrie v ECU-Line NV*, [2003] 1 SCR 450 [*Pompey*].

²³ *Ibid* at paras 31, 39.

²⁴ *Facebook*, *supra* note 1 *per* Karakatsanis, Wagner, and Gascon JJ at para 38.

²⁵ *Ibid per* Karakatsanis, Wagner, and Gascon JJ at para 39.

²⁶ *Ibid per* Karakatsanis, Wagner, and Gascon JJ at para 57.

²⁷ *Ibid per* Karakatsanis, Wagner, and Gascon JJ at para 47.

contract principles”,²⁸ it becomes clear that there is no warrant for converting a doctrinal question into a question of public policy. To do so in this particular instance is to hollow-out if not entirely oust the doctrinal analysis altogether, effectively leaving only the more discretionary issue of public policy.

The problem with Justice Abella’s insistence on prioritizing basic contractual principles, however, is that, as far as *basic contractual principles* are concerned, a purported contract characterized by “[n]o bargaining, no choice, no adjustments”²⁹ is barely recognizable as a contract at all.³⁰ Virtually every normative justification for the judicial enforcement of contracts is premised on the free and voluntary nature of the underlying transactions. As a matter of coherent contract law doctrine, it is simply not tenable to confine - as Justice Abella attempts - the invalidating effects of no bargaining, no choice, and *no consent* to only the forum selection clause, and “not for the purpose of invalidating the contract itself.”³¹ This move is as artificial and inconsistent with basic contract law principles as is Justice Karakatsanis, Wagner, and Gascon’s “preference” to deal with unconscionability as a matter of public policy at stage two of the *Pompey* test. Both approaches reinforce Radin’s leading analysis of boilerplate contracts whereby “[c]ontract reality belies contract theory in many situations where consumers receive paperwork [boilerplate] that purports to alter their legal rights. In these situations, *contract theory becomes contract mythology*.”³² Both approaches raise the question of whether there “[i]s still such a thing as contract law?”³³

Conclusion: Courts *In Loco Legis Lator*?

In the Supreme Court of Canada’s decision in *Seidel v Telus Communications Inc.*, the Court acknowledged that while other courts - e.g. the 9th Circuit Court of Appeals in the United States - have held that boilerplate provisions are void by virtue of the doctrine of unconscionability, “[i]n Canada, an approach to this issue based on the unconscionability doctrine has not been adopted, however, *and this Court has accepted the reality of standard form contracts in the consumer context*.”³⁴ The Court added that the “legislature remains free to address any unfairness or harshness that might be perceived to be the result of the inclusion of arbitration clauses in consumer contracts.”³⁵ The Court in *Seidel* sent a clear message to the legislature - boilerplate is your bailiwick, not ours.

A straight line can be drawn from the Court’s message in *Seidel* to the dissent in *Facebook*. “The issue assumes great importance in a world where millions of people routinely enter into

²⁸ *Ibid per* Abella J at para 94 [emphasis added].

²⁹ *Ibid per* Abella J at para 98.

³⁰ The canonical analysis of the invalidity of boilerplate contracts is Mary Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton, NJ: Princeton University Press, 2013). For an application of basic contract principles to boilerplate under Canadian law, see e.g. Jason MacLean, “The Death of Contract, Redux: Boilerplate and the End of Interpretation” (2016) 58 Can Bus LJ 289.

³¹ *Facebook*, *supra* note 1 *per* Abella J at para 99.

³² Radin, *supra* note 30 at 12 [emphasis added].

³³ MacLean, “The Death of Contract, Redux”, *supra* note 30 at 289.

³⁴ *Seidel v Telus Communications Inc.*, [2011] 1 SCR 531 at para 172 [*Seidel*] [emphasis added].

³⁵ *Ibid* at para 173.

online contracts with corporations, large and small, located in other countries.”³⁶ In other words, this is a matter for the legislature, not the courts. Just so there is no misunderstanding, the dissent adds that the B.C. legislature has not adopted the “protective model” approach to forum selection clauses, and “[c]ourts are obliged to respect this choice”,³⁷ no matter the impliedly less significant consequences for basic contractual principles.

The absence of a legislative response - *in loco legis lator* - to the problems posed by boilerplate consumer contracts figures in each of the three sets of reasons in *Facebook*. Rather than continuing to defer to this void, as the Court was content to do in *Seidel*, a majority of the Court in *Facebook* decided to modify contract law doctrine, albeit in slightly different ways, to begin to address these problems. The joint reasons for decision of Justices Karakatsanis, Wagner, and Gascon come the closest to explicitly acknowledging their decision to make public policy, and in so doing prioritize policy considerations over the niceties of legal doctrine. In justifying B.C. courts’ jurisdiction to adjudicate privacy issues, the Justices may have been speaking for themselves as well when they asserted that courts “are not merely ‘law-making and applying venues’; they are institutions of ‘public norm generation and legitimation, which guide the formation and understanding of relationships in pluralistic and democratic societies.’”³⁸

The result reached by the majority in *Facebook* is undoubtedly correct - it would hardly serve the overarching public interests in privacy protection and access to justice to require Ms. Douez, a B.C. resident, to seek legal redress from Facebook in Santa Clara County, California. But the means deployed to reach this end may yet do more harm than good by rendering contract law doctrine yet more unsettled and more piecemeal, less coherent and less just.³⁹

Instead, Radin’s call for law reform grows increasingly urgent: “We - the legal community - should stop trying to shoehorn all varieties of boilerplate into the categories of contract law. We must find other ways to characterize the phenomenon and to analyze various instances of its occurrence in order to separate what is justified from what is not.”⁴⁰

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³⁶ *Facebook*, *supra* note 1 *per* McLachlin CJ and Côté J (Moldaver J concurring) at para 123.

³⁷ *Ibid per* McLachlin CJ and Côté J (Moldaver J concurring) at para 144.

³⁸ *Ibid per* Karakatsanis, Wagner, and Gascon JJ at para 25.

³⁹ MacLean, “The Death of Contract, Redux”, *supra* note 30 at 310, adapting the rationale for recognizing the general principle of good faith enunciated by the Supreme Court of Canada in *Bhasin v Hrynew*, [2014] 3 SCR 494 at para 33.

⁴⁰ Radin, *supra* note 30 at 248.