

# **PUBLIC POLICY IS AN UNRULY HORSE AND THE LAW OF CONTRACT IS AN ASS: A COMMENT ON *DOUEZ V FACEBOOK, INC***

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*Online boilerplate contracts pose fundamental challenges to the traditional principles of contract law. Can a contract characterized by the complete absence of bargaining, choice, and the possibility of amendment be meaningfully characterized as a contract? Do consumers have a real choice as to the non-negotiable terms and conditions (including litigation avoidance clauses) presented by powerful digital platform firms like Google, Twitter, and Facebook? How far should the courts go in regulating these boilerplate arrangements, particularly in the abiding absence of legislative direction or reform? In *Douez v Facebook, Inc*, the Supreme Court of Canada considered for the first time the enforceability of a forum selection clause in an online boilerplate consumer contract. The Court's answers—rendered in three sets of reasons—illustrate the tension between not only legal doctrine and public policy, but also between the courts and legislatures as sites of public norm generation and legitimation. The Court's reasoning in *Facebook* continues a recent trend in its jurisprudence of blurring the lines between the application of doctrine and public policymaking. The result, quite apart from the equities or merits of the Court's decision, furnishes further proof that public policy is not only an unruly horse, but that it is also capable of making an ass out of the law of contract.*

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*Les contrats types en ligne posent des défis fondamentaux aux principes traditionnels du droit des contrats. Un contrat caractérisé par l'absence complète de négociations, de choix et de possibilité de modification peut être véritablement qualifié de contrat? Les consommateurs disposent-ils d'un véritable choix quant aux conditions non négociables (y compris les clauses de règlement des différends) présentées par de puissantes sociétés de plateformes numériques comme Google, Twitter et Facebook? Jusqu'où les tribunaux devraient-ils aller pour réglementer ces contrats types, particulièrement en l'absence de directives ou de réformes législatives? Dans l'arrêt *Douez c Facebook Inc*, la Cour suprême du Canada a examiné pour la première fois le caractère exécutoire d'une clause d'élection de for dans un contrat de consommation standard en ligne. Les réponses formulées par la Cour—énoncées dans trois opinions distinctes—illustrent la tension non seulement entre la doctrine juridique et l'ordre public, mais aussi entre les tribunaux et*

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*les législatures comme lieu de création et de légitimation des normes publiques. Le raisonnement suivi par la Cour dans l'affaire Facebook s'inscrit dans sa récente tendance jurisprudentielle consistant à obscurcir la démarcation entre l'application de la doctrine et l'établissement des politiques d'ordre public. Indépendamment du caractère équitable ou du bien-fondé de la décision de la Cour, le résultat démontre une fois de plus que l'ordre public est non seulement difficile à cerner, mais peut aussi rendre inintelligible le droit des contrats.*

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## 1. Introduction

Online contracts such as the one in this case put traditional contract principles to the test.<sup>1</sup>

Anyone who wants to join 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*, 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.<sup>2</sup> The Court's answers—rendered in three sets of reasons—illustrate the tension between legal doctrine and public policy (i.e., courts as *policymakers*)<sup>3</sup> with respect to contract enforceability and, more generally, between the courts and legislatures as institutions of “public norm generation and legitimation,

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<sup>1</sup> *Douez v Facebook, Inc*, 2017 SCC 33 at para 99, [2017] 1 SCR 751, Abella J [Facebook] [emphasis added].

<sup>2</sup> *Ibid.*

<sup>3</sup> “Public policy” admits of a number of meanings, and multiple meanings of the term are at work in the Court's decision in *Facebook*. There are different but closely related judicial doctrines of public policy that are part of contract law (e.g., a stand-alone doctrine used to invalidate contracts on grounds of illegality, rendering contracts void and unenforceable as a matter of public policy, as well as the use of “public policy” to protect weaker parties). Public policy can also refer to broader, often implicit, considerations underlying a court's decision. Perhaps the most contested referent, and the one intended in this commentary, is to the role that courts play, self-consciously or not, in effectively *making* public policy through their

which guide the formation and understanding of relationships in pluralistic and democratic societies.”<sup>4</sup> The Court’s decision in *Facebook* continues a recent trend in its contract law jurisprudence of mixing—and blurring the lines between—public policymaking and doctrinal considerations. The result, quite apart from the equities or merits of any given decision, furnishes further proof that not only is public policy “an unruly horse,”<sup>5</sup> but also that it is one capable of making “an ass”<sup>6</sup> out of the law of contract.

## 2. Facebook, Preferences, and Privacy

Facebook, not unlike Google, Twitter, and Instagram (which is owned by Facebook), is a pervasive advertisement-financed Internet platform.<sup>7</sup> Contrary, however, to the dissenting opinion in *Facebook*, these platforms are far from free.<sup>8</sup> Zeynep Tufekci, a prominent platform and social media scholar, argues that “the price they extract in terms of privacy and control is getting only costlier.”<sup>9</sup> As a Facebook user, Tufekci explains that she 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

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decisions. The literature on this latter meaning of public policy is itself vast and varied. For an excellent introduction, see Lawrence Baum, “Review Essay: Understanding Courts as Policy Makers” (1983) 8:1 *American Bar Foundation Research J* 241.

<sup>4</sup> *Facebook*, *supra* note 1 at para 25, citing Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) at 41 [Farrow].

<sup>5</sup> *Richardson v Mellish* (1824), 2 Bing 229 at 252, 130 ER 294 (CP) Burrough J, observing that public policy “is a very unruly horse, and when once you get astride it you never know where it will carry you.” See also John Shand, “Unblinking the Unruly Horse: Public Policy in the Law of Contract” (1972) 30:1 *Cambridge LJ* 144; Sacha Judd, “The Unruly Horse Put Out to Pasture: The Doctrine of Public Policy in the Modern Law of Contract” (1996) 8:3 *Auckland UL Rev* 686 (“[f]or the doctrine of public policy to survive intellectually, the underlying reasoning behind the choice of contracts the courts refus[e] to enforce should be made explicit” at 705). I take a rather different angle on this issue. I argue that for contract law to survive intellectually, courts must be explicit about their use of public policy in interpreting and enforcing contracts.

<sup>6</sup> Charles Dickens, *Oliver Twist; Or, The Parish Boy’s Progress* (Paris: Baudry’s European Library, 1839) at 350: “‘If the law supposes that,’ said Mr. Bumble, squeezing his hat emphatically in both hands, ‘the law is a ass—a idiot’ [Dickens].

<sup>7</sup> See e.g. Kashmir Hill, “[10 Reasons Why Facebook Bought Instagram](#)”, *Forbes* (11 April 2012), online: <[www.forbes.com/sites/kashmirhill/2012/04/11/ten-reasons-why-facebook-bought-instagram/#5344ec65d1b1](http://www.forbes.com/sites/kashmirhill/2012/04/11/ten-reasons-why-facebook-bought-instagram/#5344ec65d1b1)>.

<sup>8</sup> *Facebook*, *supra* note 1 at para 173.

<sup>9</sup> Zeynep Tufekci, “[Mark Zuckerberg, Let Me Pay for Facebook](#)”, Opinion, *The New York Times* (4 June 2015), online: <[www.nytimes.com/2015/06/04/opinion/zeynep-tufekci-mark-zuckerberg-let-me-pay-for-facebook.html?mcubz=0&r=0](http://www.nytimes.com/2015/06/04/opinion/zeynep-tufekci-mark-zuckerberg-let-me-pay-for-facebook.html?mcubz=0&r=0)> [Tufekci]. See also Orly Lobel, “The Law of the Platform” (2016) 101:1 *Minn L Rev* 87 at 155 [Lobel].

whose preferences and privacy matter.”<sup>10</sup> In 2014, Facebook was valued at US\$270 billion, and recorded profits of US\$3 billion.<sup>11</sup> Private, personal information is inherently valuable: “[w]hen billions of people hand data over to just a few companies, the effect is a giant wealth transfer from the many to the few.”<sup>12</sup>

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.”<sup>13</sup> Facebook is thus a powerful part of what legal scholars are calling the emerging platform economy, also known as the digital platform technology revolution, which is rapidly and

[R]adically changing the traditional equilibria of supply and demand, blurring the lines between owners and users, producers and consumers, workers and contractors, and transcending the spatial divides of personal and professional, business and home, market and leisure, friend and client, acquaintance and stranger, public and private.”<sup>14</sup> As such, Facebook is much more than “a successful global corporation based in California” that “operates a social media website (www.facebook.com) used by millions of users throughout the world.”<sup>15</sup>

Not only does the digital platform economy defy conventional regulatory theory, but it also poses a further challenge to conventional contract theory.<sup>16</sup> Platform firms such as Facebook, for example, routinely incorporate “litigation avoidance provisions”<sup>17</sup> in their terms of service. Questions posed to Facebook’s CEO, Mark Zuckerberg, during a US Congressional

<sup>10</sup> Tufekci, *supra* note 9. Facebook claims that its profits amount to approximately 20 cents per user per month.

<sup>11</sup> Tim Wu, “[Facebook Should Pay All of Us](#)”, *The New Yorker* (14 August 2015), online: <www.newyorker.com/business/currency/facebook-should-pay-all-of-us>.

<sup>12</sup> *Ibid.* This is relevant, not only to help clarify the broader context of the Court’s decision, but also because it bears directly on the dissenting Justices’ conclusion that Douez’s contention of unequal bargaining power was tenuous because she (and all other Facebook users) “received the Facebook services she wanted, *for free and without any compulsion, practical or otherwise*”: *Facebook*, *supra* note 1 at para 173 [emphasis added]. Facebook is in fact neither free nor free of compulsion.

<sup>13</sup> Cheryl Preston, “‘Please Note: You Have Waived Everything’: Can Notice Redeem Online Contracts?” (2015) 64:3 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: <www.nytimes.com/2017/05/10/technology/techs-frightful-five-theyve-got-us.html?mcubz=0>. This point is expressed more broadly still in terms of full participation in a democracy in the reasons of Karakatsanis, Wagner, and Gascon JJ in *Facebook*, *supra* note 1 at para 56.

<sup>14</sup> Lobel, *supra* note 9 at 90. See also Julie E Cohen, “Law for the Platform Economy” 51:1 UC Davis L Rev 133 [Cohen].

<sup>15</sup> *Facebook*, *supra* note 1 at para 119.

<sup>16</sup> Lobel, *supra* note 9 at 90.

<sup>17</sup> Cohen, *supra* note 14 at 179.

hearing in early 2018 concerning Facebook's data privacy policies bring the controversial nature of these provisions into clear relief. Senator John Kennedy, for example, began his questioning of Zuckerberg thus: "Everybody has been trying to tell you today, and I say this gently: Your user agreement sucks."<sup>18</sup> Senator Kennedy continued, putting it to Zuckerberg that "the purpose of that agreement is to protect Facebook's rear-end. It's not to inform your users about their rights."<sup>19</sup>

As platform firms increasingly intermediate their users' networked lives, such litigation-avoidance provisions have become far-reaching and unavoidable.<sup>20</sup> While nominally contractual, these terms are mandatory in substance and effect, and as such are a powerful tool both for the private ordering of behaviour as well as the private *reordering* of even the most fundamental *public* legal rights and obligations.<sup>21</sup> Accordingly, platform firms' use of litigation avoidance provisions in their terms of use exacerbates the already challenging difficulties that online boilerplate consumer contracts pose to the normative foundation of contract law: judicial enforceability based on parties' *consent*.<sup>22</sup>

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".<sup>23</sup> This occurred pursuant to an advertisement program Facebook calls "Sponsored Stories".<sup>24</sup> 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 BC *Privacy Act* ("Act").<sup>25</sup> Ms Douez also commenced a class action proceeding under the province's class proceedings legislation. The proposed class consisted of approximately 1.8 million BC

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<sup>18</sup> Sheera Frenkel & Tiffany Hsu, "[Mark Zuckerberg Has a Lot of Homework to Do](https://www.nytimes.com/2018/04/11/technology/zuckerberg-congress-promises-facebook.html)," *The New York Times* (11 April 2018), online: <[www.nytimes.com/2018/04/11/technology/zuckerberg-congress-promises-facebook.html](https://www.nytimes.com/2018/04/11/technology/zuckerberg-congress-promises-facebook.html)>.

<sup>19</sup> *Ibid.*

<sup>20</sup> Cohen, *supra* note 14 at 179.

<sup>21</sup> *Ibid* at 155. See also Stephanie Strom, "[When 'Liking' a Brand Online Voids the Right to Sue](https://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html?_r=0)," *The New York Times* (16 April 2014), online: <[www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html?\\_r=0](https://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html?_r=0)>.

<sup>22</sup> 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) [Radin]. For an application of basic contract principles to boilerplate under Canadian contract law, see e.g. Jason MacLean, "The Death of Contract, Redux: Boilerplate and the End of Interpretation" (2016) 58:3 *Can Bus LJ* 289 [MacLean].

<sup>23</sup> *Facebook*, *supra* note 1 at para 81; *Privacy Act*, RSBC 1996, c 373.

<sup>24</sup> *Facebook*, *supra* note 1.

<sup>25</sup> *Ibid* at para 82.

residents whose names and/or portraits had been used by Facebook—for free—in a Sponsored Story without their consent.<sup>26</sup> The class size amounts to approximately 40% of British Columbia’s population.<sup>27</sup>

Facebook, notwithstanding its contractual aspiration to “strive to respect local laws” (essentially, “Don’t be evil”),<sup>28</sup> 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.*<sup>29</sup>

Justice Griffin of the Supreme Court of British Columbia certified the class action.<sup>30</sup> She found in particular that section 4 of the *Act* granted exclusive jurisdiction to the BC Supreme Court to hear Ms Douez’s claims under the *Act*, effectively overriding any contractual forum selection clause, including Facebook’s, which she accepted on a *prima facie* basis to be valid, clear, and enforceable.<sup>31</sup> She did not decide, however, whether the clause applied; she assumed *arguendo* that it did.<sup>32</sup> Her analysis rested entirely on her interpretation of section 4 of the *Act*.<sup>33</sup> 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.”<sup>34</sup> The motions judge concluded that this statutory provision confers exclusive jurisdiction on the BC Supreme Court, to the exclusion of other courts worldwide.<sup>35</sup> She further concluded that “the legislative conferral of exclusive jurisdiction on

<sup>26</sup> *Ibid* at para 54.

<sup>27</sup> *Ibid*.

<sup>28</sup> 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?](#)”, Opinion, *The New York Times* (23 September 2017), online: <[www.nytimes.com/2017/09/23/opinion/sunday/facebook-zuckerberg-dowd.html?mcubz=0](http://www.nytimes.com/2017/09/23/opinion/sunday/facebook-zuckerberg-dowd.html?mcubz=0)>.

<sup>29</sup> *Facebook*, *supra* note 1 at para 85 [emphasis in original].

<sup>30</sup> *Douez v Facebook, Inc*, 2014 BCSC 953 at para 365, 242 ACWS (3d) 774 [*Facebook Trial Court Decision*].

<sup>31</sup> *Ibid* at para 48.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid* at para 78.

<sup>34</sup> *Privacy Act*, *supra* note 23 at s 4.

<sup>35</sup> *Facebook Trial Court Decision*, *supra* note 30 at para 105.

this Court for claims under the *Act* evidences both a legislative intention to override any forum selection clause to the contrary, and a strong public policy reason for not enforcing the Forum Selection Clause [in Facebook's terms of use]."<sup>36</sup>

The Court of Appeal for British Columbia allowed Facebook's appeal and granted it a stay of proceedings based on the forum selection clause included in its terms of use. Section 4 of the *Act*, in the Court's view, must be interpreted to mean that the BC Supreme Court has jurisdiction to the exclusion only of other courts in British Columbia, not other courts worldwide.<sup>37</sup> The Court concluded that the Santa Clara courts may determine for themselves, using California law, whether they have territorial competence over any given proceeding, including Ms Douez's claim: "Santa Clara courts would presumably consider B.C. law and have due regard to comity, but nothing enacted by the B.C. Legislature can bind the courts of Santa Clara unless California so chooses."<sup>38</sup> On this basis the Court held that Facebook's forum selection clause is enforceable.<sup>39</sup>

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

### 3. 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.*"<sup>40</sup>

Thus, Justice Abella asserts that "[o]nline contracts such as the one in this case put traditional contract principles to the test."<sup>41</sup> 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

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Douez v Facebook, Inc*, 2015 BCCA 279 at para 65, 77 BCLR (5th) 116.

<sup>38</sup> *Ibid* at para 64.

<sup>39</sup> *Ibid* at para 85.

<sup>40</sup> *Facebook*, supra note 1 at para 98, Abella J [emphasis added].

<sup>41</sup> *Ibid* at para 99.

or her mind to all the terms and gave meaningful consent.”<sup>42</sup> In this initial framing of the problem, Abella 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.”<sup>43</sup>

However, Justice Abella proceeds to frame the problem posed by online boilerplate consumer contracts for basic contractual principles in terms of the “grossly uneven bargaining power” of the parties.<sup>44</sup> Facebook, Abella 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.”<sup>45</sup>

Justice Abella adds that “[t]he doctrine of unconscionability, a close jurisprudential cousin to both public policy and gross bargaining power disparity, also applies to render the forum selection clause unenforceable in this case.”<sup>46</sup> Indeed, Abella concludes that “[t]his, to me, *is a classic case of unconscionability.*”<sup>47</sup>

Abella’s argument is compelling. So compelling that it proves too much. To see how, it is important to consider how the joint reasons for judgment of Justices Karakatsanis, Wagner, and Gascon treat the issue of uneven bargaining power.

By way of background, the Supreme Court of Canada established the doctrinal test for the enforceability of contractual forum selection clauses in *ZI Pompey Industrie v ECU-Line NV*, a case involving a bill of lading disputed by two sophisticated commercial parties.<sup>48</sup> *Pompey* established 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

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<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid* [emphasis added]. Why “at the very least”? It is important to pause here and acknowledge that this analytic choice, to *restrict* the examination of consent in the context of an online boilerplate contract to certain clauses (thus leaving unexamined the validity of the contract itself), finds no authority in legal precedent. Nor is it a product of doctrinal reasoning—it neither stems from doctrine nor purports to modify doctrine. Rather, it is an example of judicial policymaking.

<sup>44</sup> *Ibid* at para 111.

<sup>45</sup> *Ibid*, Abella J.

<sup>46</sup> *Ibid* at para 112.

<sup>47</sup> *Ibid* at para 116 [emphasis added].

<sup>48</sup> *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27, [2003] 1 SCR 450 [*Pompey*].



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.<sup>49</sup>

In *Facebook*, Justices Karakatsanis, Wagner, and Gascon 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”<sup>50</sup> warrant a modified approach, “even if the circumstances of the bargain do not render the contract unconscionable at the first step.”<sup>51</sup>

This raises an important question of contract law: how can a gross inequality of bargaining power between the parties—e.g., the absence of any actual bargaining, the lack of any realistic choice on the part of consumers, and the complete evacuation of a party’s quasi-constitutional rights—render a forum selection clause unenforceable on public policy grounds at step two of the *Pompey* test but have no effect on the *legal* validity and enforceability of the clause in question and the contract as a whole on contract law grounds at step one of the test? After all, Justices Karakatsanis, Wagner, and Gascon conclude that “[n]othing suggests in this case that Ms. Douez could have similarly negotiated the terms of use,” which include not only the forum selection clause at issue but also the core constitutive obligations of the entire contract.<sup>52</sup>

The Justices’ only answer to this question is that they “prefer to address these considerations at the ‘strong cause’ step of the test.”<sup>53</sup> With respect, this is no answer at all. Rather, the Justices have decided to transform what is ordinarily a matter of legal doctrine—the inequality-of-bargaining-power prong of the legal test for unconscionability—into a highly discretionary public policy consideration.<sup>54</sup> This is tantamount to suggesting that it is unconscionability’s potential as a legal doctrine to render a great swath

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<sup>49</sup> *Ibid* at paras 31, 39.

<sup>50</sup> *Facebook*, *supra* note 1 at para 38.

<sup>51</sup> *Ibid* at para 39. Once again, it is important to pause here and observe that the Justices have provided no *legal*, *doctrinal* reasoning to justify why—given the absence of bargaining, the lack of consent, and the unfair advantages secured by Facebook as a result—these defects do not render the contract unconscionable and therefore unenforceable at the first step of the *Pompey* analysis. This too is an example of judicial policymaking.

<sup>52</sup> *Ibid* at para 57.

<sup>53</sup> *Ibid* at para 47 [emphasis added].

<sup>54</sup> The other prong being an unfair advantage or benefit secured as a result of that inequality. The leading case on unconscionability remains *Morrison v Coast Finance Ltd* (1965), 55 DLR (2d) 710, 54 WWR 257 (BCCA). See also John D McCamus, *The Law of Contracts*, 2nd ed (Toronto: Irwin Law, 2012) at 424. As noted above, this element is also clearly established in *Facebook*—Facebook’s ability to consolidate the resolution of any and

of online boilerplate consumer contracts unenforceable, not public policymaking, that is the unruly horse in need of stabling.

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 contract principles*,”<sup>55</sup> it becomes clear that there is no legal 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 from the legal test in *Pompey*, 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”<sup>56</sup> is barely recognizable as a contract at all.<sup>57</sup> Virtually every normative justification for the judicial enforcement of contracts is premised on the free and voluntary nature of the underlying transactions.<sup>58</sup> As a matter of coherent contract law doctrine, it is simply not tenable to examine—as Abella attempts—the invalidating effects of no bargaining, no choice, and *no consent* only in relation to the forum selection clause, and “not for the purpose of invalidating the contract itself.”<sup>59</sup> This move is as artificial and inconsistent with basic contract law principles as is Justices Karakatsanis, Wagner, and Gascon's “preference” to deal with the elements of unconscionability as a matter of public policy at stage two of the *Pompey* test. Both approaches reinforce Mary Jane 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*

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all litigation commenced against it arising out of its terms of use in its own jurisdiction and under that jurisdiction's law, thereby effectively erasing its users' own rights, including rights of a quasi-constitutional nature, easily meets the doctrinal standard for an unfair advantage secured as the result of uneven bargaining power.

<sup>55</sup> *Facebook*, *supra* note 1 at para 94 [emphasis added].

<sup>56</sup> *Ibid* at para 98.

<sup>57</sup> Radin, *supra* note 22 at 3.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Facebook*, *supra* note 1 at para 99.

becomes contract mythology.”<sup>60</sup> Both approaches raise anew the question—“[i]s still such a thing as contract law?”<sup>61</sup>

#### 4. 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 contract law doctrine of unconscionability, “[i]n Canada, an approach to this issue based on the unconscionability doctrine has not been adopted ... and this Court has accepted the reality of standard form contracts in the consumer context.”<sup>62</sup> 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.”<sup>63</sup> The Court in *Seidel* sent a clear message to the legislature—boilerplate is your bailiwick, not ours. Boilerplate, in other words, is a matter of policy, not law.

A direct line can be drawn from the Supreme Court’s message in *Seidel* to the dissent in *Facebook*, in which the Court states: “[t]he issue assumes great importance in a world where millions of people routinely enter into online contracts with corporations, large and small, located in other countries.”<sup>64</sup> Once again, this is a matter for the legislature, not the courts. The dissent adds that the BC legislature has not adopted the “protective model” approach to forum selection clauses, and “[c]ourts are obliged to respect this choice,”<sup>65</sup> no matter the impliedly less-significant consequences for basic contractual principles.<sup>66</sup>

<sup>60</sup> Radin, *supra* note 22 at 12 [emphasis added]. In Radin’s latest work on this topic she coins the phrase “pseudo contract”: Robin Bradley Kar & Margaret Jane Radin, “[Pseudo-Contract & Shared Meaning Analysis](#)”, 132 Harv L Rev [forthcoming in 2019], online: <papers.ssrn.com/sol3/papers.cfm?abstract\_id=3124018>.

<sup>61</sup> MacLean, *supra* note 22 at 289. For a related analysis of the doctrine of consideration, see Jason MacLean, “The Zombie Theory of Contractual Consideration: *Richcraft Homes Ltd. v Urbandale Corporation*” (2018) 60:2 Can Bus LJ 260.

<sup>62</sup> *Seidel v Telus Communications Inc*, 2011 SCC 15 at para 172, [2011] 1 SCR 531 [*Seidel*] [emphasis added]. That said, the predominant trend in the United States favours the enforceability of such clauses. See e.g. *DIRECTTV, Inc v Imburgia*, 136 S Ct 463 at 469–71, 193 L Ed (2d) 365 (2015); *Am Express Co v Italian Colours Rest*, 570 US 228, 133 S Ct 2304 at 2309 (2013); *Nitro-Lift Techs, LLC v Howard*, 568 US 17 at 20–21, 133 S Ct 533 (2012); *AT&T Mobility LLC v Concepcion*, 563 US 333 at 352, 131 S Ct 1740 (2011). See generally J Maria Glover, “Disappearing Claims and the Erosion of Substantive Law” (2015) 124:8 Yale LJ 3052.

<sup>63</sup> *Seidel*, *supra* note 62 at para 173.

<sup>64</sup> *Facebook*, *supra* note 1 at para 123.

<sup>65</sup> *Ibid* at para 144.

<sup>66</sup> This line also runs through the Supreme Court of Canada’s decision in *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37, [2016] 2 SCR 23. As I

This, of course, forces the dissenting justices to make awkward—and untenable—accommodations to the common law of contract. In response, for example, to Justice Abella’s compelling argument that consent in the context of online boilerplate consumer contracts is little more than a chimera, the dissenting justices rely on the BC *Electronic Transactions Act*.<sup>67</sup> The *Act* codifies the highly questionable common law rule set out by the Ontario Superior Court of Justice in *Rudder v Microsoft Corp*<sup>68</sup> “that an enforceable contract may be formed by clicking an appropriately designated online icon,”<sup>69</sup> as if the act of clicking captures what is at issue in this case and, more absurd still, that the act of clicking absolves online boilerplate consumer contracts of all their sins of omission (of informed and voluntary consent). To once again adopt Charles Dickens’ felicitous phraseology, “[i]f the law supposes that ... the law is a ass.”<sup>70</sup>

The absence of a legislative response—*in loco legis lator*—to the problems posed by online 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 perfectly content to do in *Seidel*, a majority of the Court in *Facebook* decided to transform contract law doctrine into public policy, albeit in slightly different ways, to begin to address these policy problems. What unites the approach of Justices Karakatsanis, Wagner, and Gascon with the approach of Justice Abella is the nature of the transformation undertaken: in both approaches, the transformation is a matter of judicial policymaking, not lawmaking.

The joint reasons for the decision of Justices Karakatsanis, Wagner, and Gascon come the closest to explicitly acknowledging their decision to effectively *make* public policy in the abiding absence of legislative action, and in so doing prioritize policy considerations over the elements—mere niceties, perhaps—of legal doctrine. In justifying the BC courts’ jurisdiction to adjudicate privacy issues, the Justices may have been speaking just as much for themselves when they asserted that courts “are not merely ‘law-making and applying venues’; they are institutions of ‘public norm generation and

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have argued elsewhere regarding the Court’s decision in *Ledcor*, “[b]y empowering appellate courts to review standard form contracts for correctness, appellate courts can exercise sorely needed judicial oversight over these potentially harmful products in lieu both of a wholesale judicial declaration of invalidity and a comprehensive legislative response”: MacLean, *supra* note 22 at 309.

<sup>67</sup> *Electronic Transactions Act*, SBC 2001, c 10, s 15(1)(b).

<sup>68</sup> *Rudder v Microsoft Corp* (1999), 2 CPR (4th) 474, 91 ACWS (3d) 745 (Ont Sup Ct J).

<sup>69</sup> *Facebook*, *supra* note 1 para 137, McLachlin CJ and Côté J (Moldaver J concurring).

<sup>70</sup> Dickens, *supra* note 6.

legitimation, which guide the formation and understanding of relationships in pluralistic and democratic societies.”<sup>71</sup>

Justice Abella’s prioritization of policy over law is subtler. Abella begins, rightly, as a matter of contract law doctrine, by insisting that considerations of unequal bargaining power and unfair advantages secured as a result must be considered at the *first, legal* step of the *Pompey* test. As a matter of contract law doctrine, Abella argued, there is no justification for shifting this examination to the second, *public policy* step of the test. But Abella’s decision to restrict the doctrinal unconscionability inquiry to certain clauses of the contract and not consider whether the contract as a whole is unconscionable and therefore unenforceable is just as much a matter of judicial policymaking, not doctrinal lawmaking. The defects rendering Facebook’s forum selection clause unconscionable apply perforce to the remainder of Facebook’s terms of use; even the reasons of Justices Karakatsanis, Wagner, and Gascon acknowledge this: “[n]othing suggests in this case that Ms. Douez could have similarly negotiated the terms of use.”<sup>72</sup> This is no doubt true. But how then can the Justices at the same time conclude that Facebook’s terms and conditions are on the whole enforceable? As a matter of contract law doctrine, their reasoning is utterly untenable.

Doubtless, the result on the *merits* reached by the majority of the Court in *Facebook* is correct—it would hardly serve the overarching public interests in privacy protection and access to justice to require Ms Douez, a BC resident, to seek legal redress from Facebook in Santa Clara County under California law. But the judicial policymaking means deployed to reach this end may ultimately do more harm than good by rendering contract law doctrine more unsettled and more piecemeal, less coherent and less just.<sup>73</sup> Such is the nature of the unruly horse of public policy—you never quite know where it is going to take you.

Accordingly, Radin’s call for law reform grows increasing urgent: “[w]e—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.”<sup>74</sup> Otherwise, the Supreme Court of Canada’s tendency of late to employ public policy in place of doctrinal principles risks making an ass out of contract law.

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<sup>71</sup> *Facebook*, *supra* note 1 at para 25, citing Farrow, *supra* note 4 at 41.

<sup>72</sup> *Facebook*, *supra* note 1 at para 57.

<sup>73</sup> MacLean, *supra* note 22 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 SCC 71 at para 33, [2014] 3 SCR 494.

<sup>74</sup> Radin, *supra* note 22 at 248.