

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

DEBORAH LOUISE DOUEZ

APPELLANT
(Respondent)

and

FACEBOOK, INC.

RESPONDENT
(Appellant)

FACTUM OF THE INTERVENER
INTERACTIVE ADVERTISING BUREAU OF CANADA
(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Interactive Advertising Bureau of Canada ("**IAB Canada**") submits that this Honourable Court should apply a new legal test when determining whether to enforce a forum selection clause in an online consumer contract. This test incorporates and applies the "strong cause" test from *Z.I. Pompey Industrie v. ECU-Line N.V.*¹ ("**Pompey**"), which IAB Canada believes provides necessary certainty and predictability to all contracts involving forum selection clauses, and also satisfies policy considerations unique to online consumer contracts.

2. When considering the application of a forum selection clause in an online consumer contract, IAB Canada submits a court should apply the following test:

- (a) Is the online consumer contract an enforceable contract on its face? This involves two considerations:
 - (i) Did the consumer agree to the terms by indicating his or her acceptance (i.e. is it an enforceable "clickwrap" agreement)?
 - (ii) If no, was the consumer otherwise provided adequate notice of the terms such that he or she should be held to them (i.e. is it an enforceable "browsewrap" agreement)?
- (b) If the online contract is an enforceable contract on its face, the second step is to determine whether there is an equitable or express legislative basis on which to deny the enforcement of the contract as a whole or the forum selection clause. In particular, the court would consider whether the contract terms are unconscionable and/or if there is any applicable legislation that explicitly overrides the forum selection clause.

¹ 2003 SCC 27 [*Pompey*], Book of Authorities of IAB Canada ("**BA**"), Tab 1.

- (c) If there is no unconscionable or legislative basis on which to deny enforcement, the court should then apply the "strong cause" test from *Pompey* to determine if the forum selection clause should be enforced.

3. Courts and legislatures have struck an appropriate balance between the policy of consumer protection and the policy of certainty in online contractual relations. IAB Canada's proposed test maintains that balance, providing certainty and predictability to online vendors and consumers, while integrating consumer protection considerations in all stages of the analysis, including within the strong cause test itself.

B. Statement of Facts

4. IAB Canada accepts the facts as stated in paragraphs 17 to 27 of the Respondent's factum.

PART II - STATEMENT OF POSITION

5. IAB Canada's position is that the strong cause test should continue to apply to online consumer contracts within the framework of the new test that it is proposing when considering a forum selection clause in an online consumer contract. IAB Canada takes no position on the other issues in this appeal.

PART III - STATEMENT OF ARGUMENT

6. The Appellant's position is that the strong cause test as articulated in *Pompey* should not apply to consumer contracts. Instead, the Appellant proposes that the strong cause test be reversed so as to place the onus on the party with the stronger bargaining position to justify why the forum selection clause should be enforced.² IAB Canada believes that this would undermine the balance that courts and legislatures have achieved between the need to protect consumers from unfair contractual provisions with the need for commercial certainty in online contracts. IAB Canada submits that a more appropriate and effective solution is the following new test:

- (a) Is the online consumer contract an enforceable contract on its face? This involves two considerations:

² Appellant's Factum (SCC Court File No. 36616) at para. 72.

- (i) Did the consumer agree to the terms by indicating his or her acceptance (i.e. is it an enforceable "clickwrap" agreement)?
 - (ii) If no, was the consumer otherwise provided adequate notice of the terms such that he or she should be held to them (i.e. is it an enforceable "browsewrap" agreement)?
- (b) If the online contract is enforceable on its face, the second step is to determine whether the terms of the contract are unconscionable and/or whether there is applicable legislation that explicitly overrides the forum selection clause.
- (c) If no, the court should then apply the "strong cause" test from *Pompey* to determine if the forum selection clause should be enforced.

7. Consumer protection is integrated into each step of the analysis: (a) determining whether the consumer agreed to the terms or had adequate notice; (b) determining whether the contract is otherwise unconscionable or whether the legislature has determined that the forum selection clause (or potentially the contract in its entirety) should not be enforced; and (c) applying the strong cause test which requires a consideration of all relevant circumstances, including potential prejudices to the plaintiff. This new test addresses the Appellant's consumer protection concerns while maintaining predictability and certainty in the application of forum selection clauses in online contracts.

8. Each element of this new test is discussed in further detail below.

A. The Enforcement of Online Contracts

1. Balancing Consumer Protection and Commercial Certainty

9. Canadian courts, foreign courts and commentators have recognized the importance of balancing consumer protection with commercial certainty in online consumer contracts.³ The

³ See e.g. *Kanitz v. Rogers Cable Inc.*, [2002] O.J. No. 665 at para. 32 (Sup. Ct.) (QL) [*Kanitz*], BA, Tab 2; *Rudder v. Microsoft Corp.*, [1999] O.J. No. 3778 at para. 16 (Sup. Ct.) (QL) [*Rudder*], BA, Tab 3; *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1011 (D.C. 2002), BA, Tab 4; Carina Neumueller, "Are We 'There' Yet? An Analysis of Canadian and European Adjudicatory Jurisdiction Principles in the Context of Electronic Commerce Consumer Protection and Policy Issues", (2006) 3:2 UOLTJ 421 at para. 3, BA, Tab 5 [Neumueller].

British Columbia Supreme Court explained in *Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.*⁴ that:

[A] publicly available website does not necessarily give a right of access free of any contractual terms. Depending on the circumstances, a contract may be formed. It is important for commercial efficacy that contract terms can be agreed upon as easily in the electronic world as in the world of paper.⁵

10. Canadian legislatures have also voiced support for the enforcement of online contracts. Most provinces, including British Columbia, have enacted versions of the United Nations Commission on International Trade Law's Model Law on Electronic Commerce (the "**Model Law**") that expressly permit and endorse the formation of electronic contracts.⁶

11. In today's digital world, it is not commercially reasonable to hold that merely because a contract is formed electronically or online, it is inherently unenforceable. Rather, there must be a balance between enforcing such contracts and ensuring consumer protection.

2. Clickwrap and Browsewrap Agreements

12. Canadian and foreign courts have generally categorized online consumer contracts into two broad categories: "clickwrap" agreements and "browsewrap" agreements.⁷

⁴ *Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 [*Century 21*], BA, Tab 6.

⁵ *Ibid* at paras. 116-117, BA, Tab 6.

⁶ *Electronic Transactions Act*, S.A. 2001, c. E-5.5, s. 27; *Electronic Transactions Act*, S.B.C. 2001, c. 10, s. 15; *The Electronic Commerce and Information Act*, S.M. 2000, c. 32, s. 19; *Electronic Commerce Act*, S.N. 2001, c.E-5.2, s. 20; *Electronic Commerce Act*, S.N.S. 2000, c 26, s. 21; *Electronic Commerce Act*, S. Nu. 2004, c. 7, s. 16; *Electronic Commerce Act*, 2000, S.O. 2000, c. 17, s. 19; *Electronic Commerce Act*, S.P.E.I. 2001, c. 31, s. 19; *The Electronic Information and Documents Act*, 2000, S.S. 2000, c. E-7.22, s. 18; *Electronic Commerce Act*, R.S.Y. 2002, c. 66, s. 20.

⁷ *Century 21*, *supra* note 4 at para. 83, BA, Tab 6; *Nicosia v. Amazon.com, Inc.*, 2016 U.S. App. LEXIS 15656 at 19 (E.D.N.Y., 2016) [*Nicosia*], BA, Tab 7.

(a) Clickwrap Agreements

13. A clickwrap agreement allows the consumer to assent to the terms of an online contract by clicking on an "acceptance" button on the website. If the consumer does not agree to the contract terms by clicking on the acceptance button, the website will not permit the consumer to continue.⁸

14. Courts have generally treated clickwrap agreements as being enforceable. In *Rudder v. Microsoft*,⁹ an Ontario court held that a clickwrap agreement became enforceable against the consumer once the consumer had clicked an "I agree" button on the website.¹⁰ A Quebec Court similarly found Facebook's Terms of Use to be enforceable as a clickwrap agreement, although the term "clickwrap" was not explicitly used.¹¹ U.S. courts have also generally found clickwrap agreements to be enforceable.¹²

15. Most provinces that have enacted a version of the Model Law have included a clause providing that an agreement may be formed by an act such as clicking on an icon on a computer screen.¹³ Accordingly, clickwrap agreements should generally be enforced in those provinces.¹⁴

16. Online vendors and consumers both benefit from the certainty that stems from the general enforcement of clickwrap agreements.¹⁵ As explained by the Ontario Superior Court in *Rudder v. Microsoft*, failing to enforce the clickwrap agreement in that case "would lead to chaos in the marketplace, render ineffectual electronic commerce and undermine the integrity of any agreement

⁸ *Century 21*, *supra* note 4 at para. 89, BA, Tab 6; *Nicosia*, *supra* note 7 at 19, BA, Tab 7; Barry B. Sookman, *Computer, Internet and Electronic Commerce Law*, loose-leaf (consulted on October 15, 2016), (Toronto: Carswell, 1989) at 10-18.6 – 10-18.7 [Sookman], BA, Tab 8.

⁹ *Rudder*, *supra* note 3, BA, Tab 3.

¹⁰ *Ibid* at paras. 15-18, BA, Tab 3.

¹¹ *St.-Arnaud v. Facebook Inc.*, 2011 QCCS 1506 at paras. 35-48 (S.C.), BA, Tab 9.

¹² See e.g. *Berkson v. Gogo, LLC*, 97 F. Supp. 3d 359 at 69 (E.D.N.Y., 2015) [*Berkson*], BA, Tab 10.

¹³ See footnote 6. However, the New Brunswick Act does not contain a similar provision as the New Brunswick government's view is that the provision does not say "anything that is not in the law already": New Brunswick, *Electronic Transactions Legislation* (Consultation Document) Legislative Services Branch, December 2000, p. 35, BA, Tab 11.

¹⁴ Sookman, *supra* note 8 at 10-18.16, BA, Tab 8.

¹⁵ William J. Condon, Jr, "Electronic Assent To Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?" 16 *Regent U. L. Rev.* 433 2003-2004 at 456 [Condon], BA, Tab 12.

entered into [over the Internet]."¹⁶ As explained by one U.S. commentator, "clickwrap agreements are prima facie valid when the user clicks 'I agree'. This general enforceability fosters online commerce by allowing both parties to properly arrange their online business affairs."¹⁷

(b) Browsewrap Agreements

17. The other common form of online consumer agreement is a browsewrap agreement. A browsewrap agreement does not require that the consumer indicate his or her agreement by clicking on an acceptance button. Instead, all that is required is that the consumer use the website after being made aware of the website's terms.¹⁸

18. Canadian courts have held that browsewrap agreements are enforceable when the consumer had adequate notice of the website's terms.¹⁹ Similarly, U.S. courts have held that browsewrap agreements are enforceable when the consumer had actual or constructive notice of the website's terms. Whether there was notice depends heavily on whether the design and content of the website resulted in the terms being reasonably conspicuous.²⁰ As a result, U.S. courts have been more inclined to enforce browsewrap terms against knowledgeable accessors, such as corporations, rather than individual consumers.²¹

19. Consumer protection considerations are present in the distinction between clickwrap and browsewrap agreements:

- (a) In the context of clickwrap agreements, clicking the acceptance button provides the consumer with the opportunity to determine whether or not to proceed with the transaction and accept the governing terms. Clicking the acceptance button also provides an objective way to determine whether the consumer assented to those terms. The element of certainty is present.

¹⁶ *Rudder, supra* note 3 at para. 16, BA, Tab 3.

¹⁷ *Condon, supra* note 15 at 454, BA, Tab 12.

¹⁸ *Century 21, supra* note 4 at para. 92, BA, Tab 6.

¹⁹ *Ibid* at para. 108, BA, Tab 6; *Kanitz, supra* note 3 at paras. 32-33, BA, Tab 2.

²⁰ *Nicosia, supra* note 7 at 20-21, BA, Tab 7.

²¹ *Berkson, supra* note 12 at 68-69, BA, Tab 10.

- (b) In the context of browsewrap agreements, the element of certainty is less explicit. Further, websites might hide terms of use within hyperlinks that might never be brought to the attention of the consumer. It may not be consistent with the policy of consumer protection to enforce such terms. However, it would not be consistent with the principles of contract law and would impede commerce on the internet to strike down website terms of which the consumer had adequate notice.

20. In consideration of the above, IAB Canada submits that the first step in determining whether to enforce an online consumer contract is to determine whether it satisfies the requirements of a clickwrap agreement or a browsewrap agreement. Consumer protection considerations are inherent in determining whether the consumer properly accepted the terms, or had adequate notice of the terms.

B. The Doctrine of Unconscionability

21. An agreement will be found to be unconscionable if the following three elements are present: (a) inequality of bargaining power; (b) some taking advantage of, or preying upon, the weaker party by the stronger party; and (c) a resulting improvident agreement.²²

22. The doctrine of unconscionability further engrains the policy of consumer protection into the enforcement of online consumer contracts. As aptly noted by one U.S. commentator, the doctrine of unconscionability can mitigate the harshness of unfair terms contained in an otherwise enforceable clickwrap agreement. The same commentator further noted that the doctrine provides "an acceptable way of adjudicating the enforceability of these terms while allowing the realization of the recognized benefits of standard form contracting in the electronic environment."²³

23. Therefore, the second step of IAB Canada's proposed test involves an overriding equitable consideration of unconscionability in determining whether the online consumer contract is otherwise enforceable against the consumer. The unconscionability doctrine also allows for a fact-

²² *Kanitz*, *supra* note 3 at para. 37, BA, Tab 2.

²³ Nathan J. Davis, "Presumed Assent: The Judicial Acceptance of Clickwrap", 22 *Berkley Tech. L.J.* 577 2007 at 579-580, BA, Tab 13.

based enquiry that properly places the onus on the party alleging the agreement to be unenforceable.

C. Applicable Legislation that Overrides the Forum Selection Clause

24. The second step of the test also involves a consideration of whether there is applicable legislation that explicitly overrides the forum selection clause. There is an abundance of federal and provincial legislation that expressly overrides forum selection and arbitration clauses²⁴ to, among other things, protect the party with weaker bargaining power. However, to override a forum selection clause, legislation should explicitly do so; online vendors should not be required to guess which statutes may or may not override contractual terms by implication. To hold otherwise detracts from the important objective of certainty in online contractual relations.

D. The Strong Cause Test

25. If the contract is enforceable and there is no applicable overriding legislation, the court should then consider the strong cause test as the third step in the analysis. Under the strong cause test, the forum selection clause will be upheld unless there is strong cause as to why a domestic court should exercise jurisdiction.²⁵

26. In *Pompey*, this Court explained the important policy reasons for upholding the strong cause test. Among other reasons, the strong cause test:

²⁴ See e.g. *Franchises Act*, R.S.A. 2000, c. F-23, s. 17; *The Franchises Act*, S.M. 2010, c. 13, s. 10(1); *Franchises Act*, S.N.B. 2014, c. 111, s. 11(1); *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3, s. 10; *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1, s. 11; *The Consumer Protection Act*, R.S.M. 1987, c. C200, s. 209; *Payday Loans Regulation*, Man. Reg. 99/2007, s. 14(2); *Civil Code of Quebec*, C.Q.L.R., c. CCQ-1991, art. 3149; *Marine Liability Act*, S.C. 2001, c. 6, s. 46; *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, ss. 7 & 100; *Fair Trading Act*, R.S.A. 2000, c. F-2, ss. 2(1) & 13; *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, ss. 3 & 172; *The Business Practices Act*, C.C.S.M. c. B 120, ss. 1, 23 & 28; *Collection and Debt Settlement Services Act*, R.S.O. 1990, c. C.14, ss. 16.10 & 22.1; *Residential Tenancies Act*, S.A. 2004, c. R-17.1, ss. 1(l)(c), 3 & 37; *Mobile Home Sites Tenancies Act*, R.S.A. 2000, c. M-20, ss. 1(l)(c), 4(3) & 39; *The Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2, ss. 2(c), 91 & 101; *Franchises Act*, S.B.C. 2015, c. 35, s. 12; *Carriage by Air Act*, R.S.C. 1985, c. C-26 (SCHEDULE VI: Convention for the Unification of Certain Rules for International Carriage by Air), art. 49; *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, s. 7(2); *Consumer Protection Act*, C.Q.L.R., c. P-40.1, s. 11.1.

²⁵ *Pompey*, *supra* note 1 at para. 39, BA, Tab 1; *Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd.*, 2012 SCC 9 at para. 9, BA, Tab 14.

- (a) rightly places the onus on the plaintiff who commences suit contrary to the terms of a forum selection clause;
- (b) reflects the desirability that parties honour their contractual commitments and is consistent with the principles of order and fairness at the heart of private international law, as well as those of certainty and security of transaction; and
- (c) provides sufficient leeway for judges to take improper motives into consideration and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.²⁶ It is in this reason that consumer protection considerations are most apparent.

27. As noted by this Court in *Pompey*, if the strong cause test was struck down, "most forum selection clauses would be rendered unenforceable, creating commercial uncertainty by unduly minimizing the importance of contractual undertakings."²⁷ These concerns are amplified in the context of the internet. Canadian commentators have expressed concern over the uncertainty that arises from subjecting businesses to litigation across numerous jurisdictions and have recognized that "[t]he discomfort which arises out of this legal uncertainty undermines the confidence in the internet as a new and efficient mode of conducting business for both parties."²⁸

28. As set out above, the legislature has also expressed support for the enforceability of online contracts. If, as a matter of policy, forum selection clauses in online consumer contracts are to be deemed *prima facie* unenforceable (by shifting the burden on the party seeking to enforce the clause, as suggested by the Appellant), this should come from the legislature – not the courts. In fact, a joint working group of the inter-governmental Consumer Measures Committee and the Uniform Law Conference of Canada issued a consultation paper that proposed an approach to be

²⁶ *Pompey*, *supra* note 1 at paras. 20-27, BA, Tab 1.

²⁷ *Ibid* at para. 25, BA, Tab 1.

²⁸ Neumueller, *supra* note 3 at para. 3, BA, Tab 5.

employed when determining which court should have jurisdiction over consumer contracts.²⁹ However, the approach set out in the consultation paper has not been adopted as law.

29. Application of the strong cause test to online consumer contracts is not inherently unfair when the first two steps of IAB Canada's proposed test are considered, and where the strong cause test itself requires a consideration of all the circumstances of the particular case, which includes prejudices potentially suffered by the plaintiff.³⁰

PART IV - SUBMISSIONS CONCERNING COSTS

30. IAB Canada does not seek its costs of this appeal. IAB Canada should not be ordered to pay the whole or any part of the costs of this appeal.

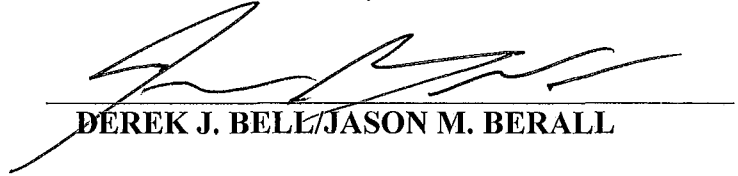
PART V - ORDER REQUESTED

31. IAB Canada respectfully requests permission to present oral argument at the hearing of this appeal.

²⁹ Consumer Measures Committee & Uniform Law Conference of Canada, "The Determination of Jurisdiction in Cross-Border Business-to-Consumer Transactions: A Consultation Paper" (2001), <http://www.strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca01862e.html>, BA, Tab 15.

³⁰ *Pompey*, *supra* note 1 at para. 19, BA, Tab 1.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of October, 2016.



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PART VI - TABLE OF AUTHORITIES

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PART VII - STATUTES, REGULATIONS AND RULES

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IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH
COLUMBIA)

BETWEEN:

DEBORAH LOUISE DOUEZ

APPELLANT
(Respondent)

and

FACEBOOK, INC.

RESPONDENT
(Appellant)

**FACTUM OF INTERACTIVE ADVERTISING BUREAU
OF CANADA**
MOTION FOR INTERVENTION
(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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