File No. 38534

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

UBER TECHNOLOGIES INC., UBER CANADA, INC., UBER B.V. and RASIER OPERATIONS B.V.

APPELLANTS
(RESPONDENTS)

AND:

DAVID HELLER

RESPONDENT
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AND:

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PART I: OVERVIEW

1. In this appeal, the Community Legal Assistance Society of British Columbia ("CLAS") submits that freedom of contract, while an important foundational principle of contract law, should not form the ideological justification for the deprivation of a contracting party's procedural and substantive rights, as well as statutory benefits to which that party may be entitled, through a lengthy, inequitable contract of adhesion.

2. CLAS argues that freedom of contract must be counterbalanced by the robust application of equitable doctrines such an unconscionability, particularly in the modern world where individuals' practical ability to refrain from entering into such problematic adhesion contracts continues to erode.

3. CLAS makes no submission with respect to the result of the case at bar.

PART II: STATEMENT OF POINTS IN ISSUE

4. What is the proper balance to be struck between freedom of contract and equitable doctrines such as unconscionability when the court is presented with a lengthy contract of adhesion between parties with unequal bargaining power, through which the more powerful party has contracted to limit the procedural and/or substantive rights of the weaker party?

PART III: STATEMENT OF ARGUMENT

Freedom of contract

5. The principle of freedom of contract arises out of the concept that parties to a contract are best situated to negotiate contractual terms that maximize their joint welfare. The *consensus ad idem* reached between contracting parties provides the normative basis for contractual enforcement by the courts – it is fair to hold a party to a bargain freely reached.

6. Any societal benefit created by the freedom to contract depends on contracts being reliably enforceable. Enforcement of contracts through the courts, in turn, lends certainty and predictability to the process of contracting, thereby further encouraging parties to contract with one another. The common law has developed in such a way as to promote the enforcement of

contracts, despite the potential for adverse or inequitable consequences for individual contracting parties. As one commentator has written:

> …the utility of "contract" on the whole provides the background moral justification for its existence as an institution and thus the potentially harsh outcomes created by rules necessary to protect the function of that institution.
>
> Krish Maharaj, "Limits on the Operation of Exclusion Clauses" (2012) 49:3 Alberta Law Review 635 at 637

7. These broader benefits of freedom of contract lose force where the contract does not, in any practical sense, reflect a bargain freely entered into by the parties.

8. The proliferation of "potentially harsh outcomes" from the straightforward enforcement of freedom of contract principles led to the development of numerous equitable doctrines through which parties can seek to avoid such outcomes. Freedom of contract is not sacrosanct – it can and does yield when its application results in substantial injustice.

Freedom of contract in modern society

9. Almost 40 years ago, Lord Denning expressly recognized that in the case of contracts of adhesion between parties with unequal bargaining power, the notion of "freedom" within freedom of contract accrues only to the larger, more powerful contracting party:

> None of you nowadaways will remember the trouble we had – when I was called to the Bar – with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of "freedom of contract". But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, "Take it or leave it". The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, "You must put it in clear words", the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clause or understand them.
>
> *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.*, [1983] All ER 108 at 112

10. Lord Denning's concern that a more powerful party may take advantage of a weaker party by manipulating the terms of a contract of adhesion is even more apposite today, when so much of society's business is transacted through the internet. The law's traditional understanding of contract, being an agreement freely negotiated and reached between two individuals with equal knowledge of the contractual terms, grafts poorly onto a modern world where the majority of contracts signed by any one individual in his or her daily life are lengthy contracts of adhesion which are entered into electronically, rarely read and even more rarely understood.

11. Critically, an individual living in today's society does not have the realistic ability to refrain from entering into such contracts. If that person wants to use a cellular phone, sign up for a credit card, open a social media account, make an online purchase or participate in any one of a number of quotidian activities, he or she must first agree to a lengthy contract of adhesion which is impractical to read and, for many, impossible to understand. Buried in these contracts of adhesion are often provisions which significantly restrict the substantive and procedural rights of the individual signatory.

12. As Professor Margaret Jane Radin has written at length, there are many reasons why individuals may choose not to read or make any meaningful effort to understand a lengthy contract of adhesion. Most individuals would not understand the terms even if they read the entirety of the contract, so it is rational to choose not to read the contract. Individuals may need the product, service or job in question, and likely do not have access to a substitute supplier who would not impose similar terms. Individuals may comfort themselves with the (erroneous) thought that any unfair terms in the contract would be ultimately unenforceable, or that the rights which they waive in the contract are unnecessary. In reality, contractual provisions limiting rights are rarely salient to individuals unless and until the individual attempts to exercise the rights that have been limited.

> Margaret Jane Radin, *Boilerplate: The fine print, vanishing rights and the rule of law* (Princeton: Princeton University Press, 2013) at p 12; Margaret Jane Radin, "From Baby-selling to Boilerplate: Reflections on the Limits of Infrastructures of the Market" (2017) 54 Osgoode Hall LJ 339 at 376

13. Professor Waddams describes the tension between the traditional emphasis on freedom of contract and the exigencies of the modern world as follows, with reference to Professor Radin's aforementioned text:

> The phrase "sanctity of contract", which still appears in modern judicial opinions, seems scarcely appropriate in a secular era in which practically nothing remains sacred, and seems particularly inappropriate in respect of computer agreements. Margaret Jane Radin, in a recent book, has rightly objected to a form of reasoning that leads judges to turn a blind eye to the realities of commercial practice in the computer age, where submission to standard form terms is often a practical necessity. Let us allow that enforcement of contracts is a highly beneficial principle; it does not follow that it must outweigh every other human value and every other consideration of justice.
>
> Stephen Waddams, "Unfairness and Good Faith in Contract Law: A New Approach" (2017), 80 SCLR 2d 309 at 331

14. In *Douez v Facebook Inc*, this Court wrestled with the question of how to apply freedom of contract principles to a lengthy online consumer contract of adhesion, which was unlikely to have been freely entered into by Ms Douez. Abella J, concurring in the result, suggested that increased scrutiny should be applied to rights-limiting provisions of the contract in question given the form of the contract and the manner through which it was entered into:

> [98] I accept that certainty and predictability generally favour the enforcement at common law of contractual terms, but it is important to put this forum selection clause in its contractual context. We are dealing here with an online *consumer* contract of adhesion. Unlike *Pompey*, 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.
>
> [99] …[I]t seems to me that some legal acknowledgment 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.
>
> [100] As Prof. Waddams has pointed out:
>
> > …there may be scope for application of the concept of public policy in respect of unfair clauses that oust the jurisdiction of the court. It would be open to a court to say that, although arbitration and choice of forum clauses are acceptable if freely agreed by parties of equal bargaining power, *there is reason for the court to scrutinize the reality of the*

> *agreement with special care in the context of consumer transactions and standard forms*, since these are clauses that, on their face, offend against one of the traditional heads of public policy. [Emphasis added.]
>
> (Waddams (2012), at p. 483; see also Judith Resnik, "Procedure as Contract" (2005), 80 *Notre Dame L. Rev.* 593; Woodward, at p. 46.)

Douez v Facebook Inc, 2017 SCC 33 [*Douez*] at paras 98-99

15. A similar approach was taken by Abella and Karakatsanis JJ writing for the minority in *Telus Communications Inc v Wellman*. As in *Douez*, the impugned contract in *Wellman* was a lengthy, inaccessible contract of adhesion which contained important rights-limiting provisions. Consistent with the aforementioned passage from *Douez*, the nature of the contract caused the minority to carefully scrutinize its arbitration clause, which prevented consumer signatories from seeking redress through the court.

16. Abella and Karakatsanis JJ noted that the principle of freedom of contract had little application in the situation of a lengthy, standard form contract of adhesion, as such a contract "hardly represents a bargain freely entered into". Rather, the mandatory, non-negotiable nature of the contract was evidence that "the animating rationales of party autonomy and freedom of contract are nowhere to be seen". The learned justices concluded as follows:

> [166] One cannot talk about "equal bargaining power" and "party autonomy" if the very nature of the contract reveals that one party has exclusive contractual authority. Parties to mandatory individual arbitration clauses cannot, therefore, reasonably be said to have "come to the table" and bargained, since there is no bargaining table. That individuals and companies sign these contracts is a function not of bargaining choice, but of an *absence* of choice.
>
> [Emphasis in original]

Telus Communications Inc v Wellman, 2019 SCC 19 [*Wellman*] at paras 160, 165-166

17. The operation of clauses which limit substantive and procedural rights of contracting parties, and purport to place contracting parties outside the scope of benefits-conferring legislation, has the result of privatizing rights that are otherwise publicly available to all citizens through the mechanism of the courts. This does not just turn the primacy of freedom of contract on its ear, it can also have a degrading effect on the rule of law:

> Rights deletion through the massive deployment of boilerplate undermines the rule of law because these "contracts" purport to privatize rights that must remain public. The enforcement of exchanges by private ordering (contract) is legitimate only within a state that underwrites a background legal infrastructure by which the state decides which contracts are enforceable. That is, the state (through the courts) must decide which contracts are legitimately made under the rules of this background infrastructure. Enforcement is state coercion, by means of which an unwilling party is deprived of an entitlement (usually damages) that is redistributed to the other party. The rules of the background infrastructure exist to justify that coercion. Factions or powerful firms should not be able to change the rules to redistribute entitlements to themselves whenever they wish by a simple expedient such as the deployment of boilerplate. The rules of the background legal infrastructure must remain substantially within the care of the polity.
>
> …
>
> …[B]y saying that the firm may modify the "contract" however and whenever it wants, or that the recipients' only remedy is arbitration, or in a faraway place, or sooner than the statute of limitation would have allowed, firms…are using boilerplate to engage in privatization of the legal infrastructure of contracts. By undermining the feasibility of the remedy, firms that deploy boilerplate rights deletions are undermining the infrastructure of private law.
>
> Margaret Jane Radin, "Access to Justice and Abuses of Contract" (2016) 33:2 Windsor Yearbook on Access to Justice 177 at 185-186

Arbitration clauses

18. Standard form arbitration clauses in contracts of adhesion are a particularly pernicious form of the rights-limiting provisions discussed above:

> …[B]y drafting sophisticated arbitration schemes, stronger parties use their freedom of contract to avoid all their other obligations – statutory and contractual alike. Even in a neoliberal age, non-drafting parties such as workers and consumers may have some rights under application regulations and/or under their respective contracts. For example, employees may be entitled to a certain combination of wages and benefits. And yet, these rights are meaningless when they are subjected to an arbitration scheme that makes them virtually unenforceable – an effect that is achieved by arbitration terms that block access not only to the public justice system but also to its privatized alternative.
>
> Hila Keren, "Undermining Justice: The Two Rises of Freedom of Contract and the Fall of Equity", (2016) 2:1 Canadian Journal of Comparative and Contemporary Law pp 339-402 at 381

19. Consistent with the comments above, Sharpe J.A., speaking for a five member panel of the Ontario Court of Appeal, stated the following with respect to arbitration clauses in *Griffin v Dell Canada Inc*:

> Clauses that require arbitration and preclude the aggregation of claims have the effect of removing consumer claims from the reach of class actions. The seller's stated preference for arbitration is often nothing more than a guise to avoid liability for widespread low-value wrongs that cannot be litigated individually but when aggregated form the subject of a viable class proceeding: see Theodore Eisenberg, Geoffrey P. Miller and Emily Sherwin, "Mandatory Arbitration for Customers but not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts" (2008), 92 Judicature 118. When consumer disputes are in fact arbitrated through bodies such as NAF that sell their services to corporate suppliers, consumers are often disadvantaged by arbitrator bias in favour of the dominant and repeat-player corporate client: "Developments in the Law: Access to Courts" (2009), 122 Harv. L. Rev. 1151, at pp. 1170-75. I have already noted that allegations of precisely that nature forced NAF to terminat e its activities in the field of consumer arbitration. I agree with the observation made by Jonnette Watson Hamilton in "Pre- Dispute Consumer Arbitration Clauses: Denying Access to Justice?" (2006), 51 McGill L.J. 693, at p. 734:
>
> > Deference to arbitration is largely based on freedom of contract and the value of personal autonomy. How can such values come into play in contracts of adhesion where that autonomy is only exercised by one of the parties? There is no reason to defer to businesses that seek to advance only their own self-interests and evade laws not to their liking.
>
> *Griffin v Dell Canada Inc*, 2010 ONCA 29 at para 30

20. A similar sentiment was expressed in the dissent of Abella and Karakatsanis JJ in *Wellman*, in which the learned justices wrote that the “empirical reality” of mandatory arbitration clauses is the denial of access to justice in the context of low-value claims.

Wellman at para 163

21. In the employment context, arbitration clauses are touted by employers as mechanisms to increase the equality of access to justice amongst employees. However, mandatory arbitration can increase the cost and hassle associated with vindicating one’s rights as an employee, disrupt the structure of rules through which individual employment rights are enforced and make it more difficult for employee claimants to find counsel.

Alexander J.S. Colvin, "Mandatory Arbitration and Inequality of Justice in Employment" (2017) 35 Berkeley J Emp & Lab L 71 at 89-90

Application of unconscionability doctrine

22. In *Telus Communications Inc v Seidel*, this Court approached the issue of arbitration provisions in consumer contracts of adhesion as one of statutory interpretation. Namely, does the applicable consumer protection legislation operate to render the arbitration clause void?

See, for example, *Telus Communications Inc v Seidel*, 2011 SCC 15 [*Seidel*] at para 2

23. *Seidel* does not, however, suggest that the doctrine of unconscionability cannot also operate to render a arbitration provision in a contract of adhesion void. In fact, Mr Justice Binnie expressly declined to deal with unconscionability in *Seidel*, as the impugned consumer protection legislation applied and obviated the need for an unconscionability analysis.

Seidel at para 45

24. In *Wellman*, Justice Moldaver expressly stated in his majority opinion that the potential unfairness resulting from the enforcement of an arbitration clause in a standard form contract is to be addressed by application of the doctrine of unconscionability.

Wellman at para 85

25. This presents an important step forward from the Court's decision in *Douez*. In *Douez*, as noted above, Madam Justice Abella wrote that the circumstances of contract formation in lengthy electronic contracts of adhesion should be considered "not for the purpose of invalidating the contract itself", but rather for justifying increased judicial scrutiny towards rights-limiting provisions therein.

Douez at para 99

26. CLAS submits that the approach taken by Justice Moldaver in *Wellman* is correct, and must be coupled with a robust application of the unconscionability doctrine in order to mitigate the clear harms presented by the proliferation of lengthy standard form contracts of adhesion in

modern society as discussed above. In particular, this Court ought to adopt a robust test for unconscionability that does not place an undue evidentiary burden on the weaker party seeking to rely on the doctrine.

27. In the case below, the Ontario Court of Appeal identified two competing tests for unconscionability which have been used in different Canadian jurisdictions. The two-part test for unconscionability requires inequality of bargaining power and unfairness. The four-part test requires (1) a grossly unfair and improvident transaction, (2) a victim's lack of independent legal advice or other suitable advice, (3) an overwhelming imbalance in bargaining power by reason of the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility or similar disability, and (4) the other party having knowingly taken advantage of this vulnerability.

Heller v Uber Technologies Inc, 2019 ONCA 1 at paras 60-61

28. Given the above-noted concerns about the harms of lengthy standard form contracts of adhesion, both in the specific context of arbitration provisions and more generally, CLAS submits that the two-part test for unconscionability is far preferable to the four-part test. The two-part test finds support in certain of the opinions from this Court's decision in *Douez* and permits of much more judicial discretion to craft a just result in the circumstances of each case.

Douez at paras 115 & 145

29. By contrast, the four-part test is unresponsive to the practical concerns raised by consumer and consumer-like contracts of adhesion entered into on a computer or smart phone without proper negotiation or even consideration of terms. The requirement that the victim be ignorant of business or subject to a disability ignores the reality that people of all abilities are compelled on a daily basis to agree to objectively unfair contracts in order to participate in modern society.

30. Moreover, the requirement that the stronger party must have <u>knowingly</u> taken advantage of the weaker party's vulnerability places an onerous evidentiary burden on the weaker party. This requirement also ignores the fact that standard form contracts of adhesion are essentially

offered to the world, and the stronger party is unlikely to know anything about the weaker party, let alone have specific knowledge of the weaker party's idiosyncratic vulnerabilities.

31. CLAS submits that the two-part test for unconscionability provides courts with the tools required to address the real-world harm presented by the proliferation of lengthy standard form contracts of adhesion containing rights-limiting provisions.

PART IV: COSTS

32. CLAS seeks no costs and asks that no costs be awarded against it.

PART V: NATURE OF ORDER SOUGHT

33. Pursuant to the Order of Justice Moldaver dated October 8, 2019, CLAS has been granted permission to present oral argument at the hearing of this appeal for 5 minutes. As noted above, CLAS takes no position on the outcome of the appeal.

DATED: October 18, 2019

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PART VI – TABLE OF AUTHORITIES

Jurisprudence	**Paragraph(s)**
Douez v Facebook Inc, 2017 SCC 33	14, 15, 25, 28
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Margaret Jane Radin, "From Baby-selling to Boilerplate: Reflections on the Limits of Infrastructures of the Market" (2017) 54:2 Osgoode Hall LJ 339	12
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Stephen Waddams, "Unfairness and Good Faith in Contract Law: A New Approach" (2017), 80 SCLR 2d 309 [Book of Authorities Tab 5]	13