SCC Court File No: 38534

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

B E T W E E N:

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

APELLANTS
(Respondents)

- and -

DAVID HELLER

RESPONDENT
(Appellant)

- and -

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INTERVENERS

FACTUM OF THE INTERVENER, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

Pursuant to Rules 37 and 42 of the Rules of the Supreme Court of Canada

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PART I – OVERVIEW

1. The day-to-day lives of Canadians are increasingly governed by electronic contracts of adhesion whose terms are non-negotiable and effectively unreadable.[1] Such boilerplate agreements, which condition everything from employment relations to the search for romantic relationships, often include terms that purport to bar access to the judicial adjudication of disputes, without providing consumers with practicable recourse to any fair and meaningful dispute resolution mechanism.

2. As Justice Abella stated in *Douez v Facebook*, courts ought to "intensify the scrutiny for clauses that have the effect of impairing a consumer's access to possible remedies."[2] CIPPIC invites this Court to do so by evolving the doctrine of unconscionability to invalidate adhesive contractual terms that deprive weaker parties of fair access to dispute resolution. Such deprivation occurs when the stronger party exploits its unequal bargaining power to impose upon the weaker party disproportionate costs in accessing fair and meaningful dispute resolution. Contractual terms that have the effect of denying access to justice deny justice itself, and should therefore be held unenforceable.[3]

PART II – POSITION ON APPELLANT'S QUESTION

3. CIPPIC submits that the equitable doctrine of unconscionability is the appropriate remedy where a standard form contract denies access to a practicable remedial mechanism. CIPPIC proposes a two-step test to aid courts in determining whether a contractual restriction would result in the unconscionable denial of access to justice.

4. CIPPIC also submits that there is a need for an attenuated scope of the competence-competence doctrine when an arbitration agreement operates to frustrate access to justice.

5. CIPPIC takes no position on the appellant's position regarding the Employment Standards Act.

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[1] The users generally do not read Terms of Use or Privacy Policies (Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, "Does Anyone Read the Fine Print: Consumer Attention to Standard-Form Contracts" (2014) 43 J Leg Stud 1). A user would spend on average 244 hours per year on just reading the Privacy Policies of each website a user visits annually (Aleecia M McDonald & Lorrie Faith Cranor, "The Cost of Reading Privacy Policies" (2008) 4:3 JL & Pol'y 543). Furthermore, the Terms of use and Privacy policies use very high content readability score that they are virtually incomprehensible to the general public (Uri Benoliel & Samuel I Becher, "The Duty to Read the Unreadable" forthcoming in [(2019) 60 Boston College L Rev].

[2] *Douez v. Facebook, Inc*, [2017] 1 SCR 751, 2017 SCC 33 at para 99 [*Douez*].

[3] Marina Pavlović, "Contracting Out of Access to Justice: Enforcement of Forum Selection Clauses in Consumer Contracts" (2016) 62:2 McGill LJ 389 [Pavlovic, "Contracting Out"].

PART III – STATEMENT OF ARGUMENT

6. Section A contextualizes the ubiquity of standard-form contracts in digital society and discusses how the restrictions such contracts impose on access to justice can deny justice. Section B observes how the law already recognizes how such restrictions can be unconscionable, while section C articulates a refinement of the existing analytical approach to unconscionability to help the courts determine when such restrictions are unenforceable. Section D concludes with a discussion on the limits of the competence-competence doctrine and the need to attenuate its scope in standard-form contracts, where contractual access to justice restrictions operate to frustrate access to justice.

A. Canadians have no choice but to accept contracts that restrict their access to the civil justice system

7. To participate in today's digital society,[4] Canadians have no choice but to accept non-negotiable standard-form contracts that are offered on a "take-it-or-leave-it" basis.[5] Such contracts are ubiquitous and govern Canadians' access to a wide range of services, including essential digital services ranging from search engines[6] to social media[7] to the ride-hailing service at the heart of this case.

8. The rise of standard-form contracts coincides with the "growth of large business organizations and the parallel substitution of management for bargaining in the marketplace" over the last two centuries.[8] The support afforded by the legal system to contracts of adhesion must, however, bear in mind that such documents "generate ... and allocate ... power."[9] Correspondingly, "the legal question whether to enforce contracts of adhesion ultimately becomes an issue of how to allocate power and freedom between commercial organizations and individuals."[10]

9. Clauses that restrict access to the civil justice system, such as mandatory arbitration clauses and class action waivers, bring into sharp relief the disparities between the sophisticated entities that proffer them

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[4] Marina Pavlović, "Consumer Rights in a Radically Different Marketplace", *Policy Options* (4 June 2018), online: <https://policyoptions.irpp.org/magazines/june-2018/consumer-rights-radically-different-marketplace/> [Pavlovic, "Consumer Rights"].
[5] *Douez, supra* note 2 at para 55; Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*, (Princeton: Princeton University Press, 2013) at 9 [Radin, *Boilerplate*].
[6] *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 [*Equustek*].
[7] *Douez, supra* note 2.
[8] Todd D Rakoff, "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96:6 Harv L Rev 1173 at 1229.
[9] *Ibid*. See also Deepak Gupta & Lina Khan, "Arbitration as Wealth Transfer" (2017) 35:499 Yale L & Policy Rev 499 at 502 ("...the rise and prevalence of forced arbitration clauses should be understood as both an outcome of and contributor to economic inequality").
[10] Rakoff, *supra* note 8 at 1174.

and the weak parties that often have no choice but to accept them. By definition, such clauses deprive vulnerable parties of the procedural and substantive protections that the civil justice system provides, including the right to an impartial decision-maker (both actual and perceived), the availability of discovery to overcome information asymmetries, transparency of process, openness of proceedings, and the ability for individual employees, users, and consumers to achieve strength in numbers through class actions.[11]

10. The mandatory class action waivers that are found in so many boilerplate agreements are among the most troubling examples of how such contracts reallocate power between commercial organizations and individuals. The availability of class actions "resolves [the] power imbalance" that would otherwise exist when powerful defendants cause widespread harms by pooling the plaintiffs' claims so that the class as a whole may approximate the aggregated resources and incentives that the defendant possesses.[12] Correspondingly, the use of "take-it-or-leave-it" contracts by powerful parties to short circuit a procedural device designed to rectify power imbalances merits the most exacting scrutiny by the courts.

11. Private alternatives to the civil justice system, such as arbitration or other forms of alternative dispute resolution processes, can in some circumstances provide for the fair, efficient, and meaningful resolution of disputes between strong and weak parties. Some weaker parties may prefer arbitration over litigation for various reasons, such as privacy, reputational risk, or speed. Public policy supports arbitration in such circumstances for all of these reasons, even though the *inter partes* nature of arbitral awards and the non-public nature of arbitral filings and awards[13] fails to generate either the precedent or incentives for behaviour modification that arise from the judicial resolution of disputes.[14] Writing for the majority in *Seidel*, Binnie J. recognised the risk that arbitration "will almost certainly inhibit rather than promote wide publicity (and thus deterrence) of deceptive and/or unconscionable commercial conduct."[15]

12. In many other circumstances, however, the effect of boilerplate clauses that restrict access to the civil

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[11] See e.g. Richard M Alderman, "Pre-Dispute Mandatory Arbitration In Consumer Contracts: A Call for Reform" (2001) 38:4 Hous L Rev 1237; Michael L Rustad et al, "An Empirical Study of Predispute Mandatory Arbitration Clauses In Social Media Terms of Service Agreements" (2012) 34:4 U Ark Little Rock L Rev 643 at 645, 668, 670, and 673.

[12] William B Rubenstein, *Amicus Curiae* Brief filed in United States Supreme Court Case No. 09-893 reported as *AT&T Mobility LLC v Vincent and Liza Concepcion*,563 US 333 (2011).

[13]Cynthia Estlund, "The Black Hole of Mandatory Arbitration" (2018) 96:3 NC L Rev 679.

[14] This applies in both individual litigation and class proceedings. For the latter, see Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto: Law Commission of Ontario, 2019) at 89-92.

[15] *Seidel v Telus Communications Inc*, 2011 SCC 15 at para 24 [*Seidel*].

justice system is to deprive weaker parties of fair access to any meaningful dispute resolution mechanism. When a wronged party can not pursue an action because the value of their claim is greatly surpassed by the expenses required to arbitrate, they are left without a remedy. In cases involving thousands (if not millions) of diffuse claimants, barring access to class proceedings in favour of a multitude of isolated and private arbitral proceedings may shield corporate wrongdoing from any real possibility of independent scrutiny,[16] thereby frustrating the potential for behaviour modification or disgorgement of unjust gains.

B. The law recognizes that boilerplate clauses restricting access to the civil justice system can be unconscionable

13. The question at the heart of this case is when and how the courts should decline to enforce clauses that restrict or deny access to justice because doing so would "contravene basic principles of justice and equity."[17]

14. In *Wellman*, Moldaver J., writing for the majority, recognised that "arguments over any potential unfairness resulting from the enforcement of arbitration clauses contained in standard-form contracts are better dealt with directly through the doctrine of unconscionability."[18]

15. Unconscionability is one of several equitable doctrines that English and Canadian courts have fashioned to determine when the terms of a contract should be unenforceable.[19] The doctrine currently addresses three types of inequities arising from boilerplate contracts: (1) diminished consent to clauses that are difficult to understand and seldom read,[20] (2) systemic inequality between parties in the employment or consumer context,[21] and (3) hidden terms at odds with one party's expectations.[22]

16. The Court of Appeal applied the traditional unconscionability doctrine to Uber's arbitration clause

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[16] Rustad et al, *supra* note 11 at 645; Jean R Sternlight, "Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?" (2019) 54 Harv CR-CLL Rev 155 at 202; US, Justice Denied: *Forced Arbitration and the Erosion of our Legal System: Testimony Before the House Subcommittee on Antitrust, Commercial, and Administrative Law*, 116th Cong (2019) (Myriam Gilles) at 10.
[17] Stephen Waddams, "Review Essay: The Problem of Standard Form Contracts: A Retreat to Formalism" (2012-2013) 53 Can Bus LJ 475 at 486.
[18] *Telus Communications v Wellman*, 2019 SCC 19 at para 85 [*Wellman*].
[19] See Waddams, *supra* note 17 at 482-483 (for the early emergence of unconscionability in English contract law and its subsequent evolution in Canadian law).
[20] Yannis Bakos et al, *supra* note 1.
[21] John Gardner, "The Contractualisation of Labour Law" in Hugh Collins, Gillian Lester & Virginia Mantouvalou, eds, *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018) at 33.
[22] *Tilden Rent-A-Car v Clendenning*, 1978 CanLII 1446 ONCA [*Tilden*].

because, if enforced, the clause would have barred access to justice for one of the parties to the contract.[23] Specifically, it applied the two-step *Douez* framework for assessing the enforceability of a forum selection clause to the enforcement of an arbitration clause. In the first step, the Court of Appeal assessed the validity of the arbitration clause by using the four-factor test for unconscionability from *Titus v. William F Cooke Enterprises Inc*: (1) an unfair or improvident bargain, (2) the victim's lack of legal advice, (3) imbalance in bargaining power, and (4) one party knowingly taking advantage of the other's vulnerability.[24] The Court of Appeal found that the arbitration clause in Uber's terms of use, read in the context in which it was intended to apply, met all four factors of unconscionability and was therefore invalid.[25]

17. The factors applied by the Court of Appeal do not precisely identify the root of what makes the arbitration clause unconscionable—namely, that it does not provide the claimant with fair access to a workable dispute resolution process. The Court of Appeal missed an opportunity to refine the unconscionability test to address a particular variant of an increasingly prevalent access to justice inequity: boilerplate restrictions on access to justice.[26] As a result, the framework for enforcing a broad category of contractual restrictions to access to justice—forum selection clauses, arbitration clauses, and class action waivers—remains fragmented and inconsistent, even though all three types of clauses produce the same effect of denying access to a workable dispute resolution process.

C. Inequality of bargaining power and disproportionality of costs should determine whether a contractual restriction on access to civil justice is unconscionable

18. CIPPIC proposes an analytical approach to assist courts in applying the unconscionability doctrine to contractual restrictions on access to justice. The approach is a modest one, consistent with the gradual evolution of the common law to contemporary conditions.

19. Courts have the power to exercise their inherent jurisdiction to deny the enforcement of clauses that restrict access to justice. CIPPIC proposes a unifying test for all types of contractual restrictions on access to justice. The proposed two-step test will aid courts in exercising this power and determining whether a contractual restriction (an arbitration clause in the present case) would result in the unconscionable denial

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[23] *Heller v. Uber Technologies Inc*., 2019 ONCA 1 [*Uber*]
[24] 2007 ONCA 573, 284 D.L.R. (4th) 734, at para. 38; *Uber*, *ibid* at para 60.
[25] *Uber*, *supra* note 23 at para 68.
[26] John Enman-Beech, "Unconscionable Inaccess to Justice" (2020) SCLR (forthcoming) at 34, 37.

of access to justice. The validity of such a clause will depend on a contextual and proportionate analysis of the following considerations: (i) the use by the stronger party of its unequal bargaining power to (ii) impose disproportionate costs on the weaker party in accessing fair and meaningful dispute resolution.

(i) Inequality of bargaining power

20. Inequality of bargaining power considers not only the relative size and sophistication of the parties but also the factual circumstances surrounding the relationship between them, such as the existence of market power. Standard-form contracts pose a particular problem when the weaker party has little, if any, choice but to accept them. As Justice Abella has noted, these documents involve "no bargaining, no choice, no adjustments".[27] What is more, the weaker parties in such transactions, whether they are users, consumers, or employees, have no choice but to rely on the party crafting the contract—the stronger party in the transaction—to offer fair and reasonable terms, including access to a fair and workable dispute resolution process.

(ii) Disproportionality of costs

21. The second step of the test considers whether the stronger party has abused their power to impose disproportionate costs on the weaker party when they seek the resolution of a dispute. The baseline for assessing proportionality of costs is the costs that the weaker party would otherwise incur seeking a remedy through the civil justice system. Factors in determining whether the costs imposed by the stronger party are disproportionate may include the real monetary cost to the weaker party of accessing the contractual dispute resolution mechanism, as well as the accessibility and relative convenience of such processes. The value of the claims and the predictability of the results should be factored with these considerations.

22. If the weaker party's monetary cost of pursuing the claim is out of proportion to the cost of pursuing it in court, or if significant up-front costs are involved in accessing private dispute resolution mechanisms, then such clauses are likely unconscionable.[28] Conversely, if such clauses offer a cheaper, clearer, and more convenient dispute resolution procedure than the courts, such terms are less likely to be found unconscionable.[29]

23. In applying this test, courts should be alive to the social costs that may arise by the parties' use of non-

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[27] *Douez, supra* note 2 at para. 98.
[28] Enman-Beech, *supra* note 26 at 32-33.
[29] *Ibid*.

judicial dispute resolution mechanisms. As Justice Binnie cautioned, the prevalence of confidential dispute resolution proceedings will undermine the deterrent effect of public judicial proceedings.[30]

D. A need for an attenuated scope of the competence-competence doctrine when an arbitration agreement operates to frustrate access to justice

24. CIPPIC submits that the prevalence of "take-it-or-leave-it" contracts that mandate arbitration and otherwise restrict access to civil justice also necessitate a modest recalibration of the competence-competence principle. In contractual relationships characterized by significant power imbalances, mechanically applying the competence-competence principle so that *all* issues dealing with jurisdiction are referred to an arbitration tribunal—including the validity of the underlying arbitration agreement—deprives the parties with low bargaining power of access to any adjudication or remedy.

25. If the inability to access arbitration for the purpose of determining the substantive rights of the parties renders the arbitration agreement unconscionable, the competence-competence principle must yield to permit the courts to rule on the validity of the arbitration agreement when an action is first brought before a court. This approach is consistent with the international instruments (the UNCITRAL *Model Law on International Commercial Arbitration*[31] and the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[32]), the Ontario *Arbitration Act*,[33] and this Court's interpretation of the competence-competence principle articulated in *Dell v Union des Consommateurs*.[34]

26. The principle of competence-competence rests on two competing policy objectives. On the one hand, the principles of party autonomy and arbitral efficiency require that a valid arbitration agreement be enforced and, therefore, the parties should take their dispute to arbitration.[35] On the other hand, the principle of fairness requires "uphold[ing] a party's fundamental right to court access when that party has not given up that right through an arbitration agreement."[36] Furthermore, the principle of procedural efficiency may

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[30] *Seidel*, *supra* note 15 at para 24.
[31] United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL* Model Law on International Commercial Arbitration, Annex 1, UN Doc A/40/17 (1985).
[32] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1968, UNTS 330 (entered into force 7 June 1959). <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>.
[33] *Arbitration Ac*t, SO 1991, c 17.
[34] *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 SCR 801, 2007 SCC 34 [*Dell*].
[35] John James Barcelo, "Kompetenz-Kompetenz and Its Negative Effect — A Comparative View" (2017) Cornell Legal Studies Research Paper No. 17-40.
[36] *Ibid* at 2.

also favor court's initial determination of jurisdictional issues, rather than determining them during the enforcement of the arbitration award.[37]

27. Despite their strong policy favoring arbitration, both the *Model Law on International Commercial Arbitration* and the *New York Convention* are inconclusive on the appropriate balancing of these objectives.[38] Correspondingly, there is no uniform approach to competence-competence on the international level regarding whether courts or arbitral tribunals should be the first to decide whether an arbitration agreement is valid and what standard of review they should use to do so. Rather, there is a wide spectrum of approaches to this question.[39] On one end are countries where all jurisdictional issues, including questions regarding the validity of the arbitration agreement, are referred to an arbitral tribunal.[40] On the other end are jurisdictions where courts thoroughly assess the validity of the arbitration agreement before issuing a stay of judicial proceedings to permit the arbitration to take place.[41] This Court's interpretation of the competence-competence principle in *Dell v Union des consommateurs*[42] falls in the middle of this spectrum.

28. While *Dell* supports a strong policy in favor of arbitration,[43] it builds in some flexibility to permit the courts to resolve certain jurisdictional issues. The factors delineating who addresses the jurisdictional issues are related to when the challenge is raised (before or after an arbitral tribunal has been formed); to whom the challenge is raised (a court or an arbitrator); the nature of the challenge (issue of law, fact, or mixed fact and law); and the institutional expertise.[44] This Court recognized in *Dell* that the role of the judiciary in resolving core jurisdictional issues (such as the validity of the arbitration agreement) may be an exception to the "the rule of systematic referral to arbitration," but "[i]t allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate."[45]

29. In CIPPIC's submission, a nuanced interpretation of the competence-competence doctrine is particularly important in cases involving standard-form contracts, where the underlying power imbalance between

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[37] *Ibid.*
[38] *Ibid* at 8.
[39] *Ibid,* at 2; *Dell, supra* note 34 at paras 69-70
[40] For example, France. See *Ibid* at 8-11.
[41] For example, Germany. See *Ibid* at 12-14
[42] *Dell, supra* note 34 at para 84-86**.**
[43] *Dell, supra* note 34 at paras 142-145; *Seidel, supra* note 15 at para 2.
[44] *Dell, supra* note 34 at paras 84-86.
[45] *Dell, supra* note 34 at para 84.

the parties and the disproportionate costs imposed on the weaker party to pursue meaningful dispute resolution may result in unconscionability of the arbitration agreement. In such cases, where the party with lower bargaining power has commenced an action before a court, it is appropriate (and consistent with both the *International Commercial Arbitration Act*[46] and *Arbitration Act*) for a court to determine the validity of the arbitration agreement. Requiring a wronged party to put the question of contractual invalidity to an arbitrator would frustrate access to any form of dispute resolution and a corresponding remedy.

PART IV – COSTS

30. CIPPIC will not seek costs in this matter and asks that costs not be awarded against it.

PART V – ORDER SOUGHT

31. CIPPIC respectfully requests that its submissions be considered in resolving this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED in Ottawa, Ontario, this 18th day of October, 2019.

[original signed]	***[original signed]***	***[original signed]***
Marina Pavlović	Cynthia Khoo	Johann Kwan

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[46] *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sch 5.

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