Recent Cases Interpreting Insurance Exclusions: While policies may be “standard-form”, disputes over interpretation continue

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Insurance coverage jurisprudence has its share of general principles. Lawyers even remotely familiar with the area may eagerly recite phrases like “contracts of adhesion”, they may expound that “coverage is interpreted broadly while exclusions are interpreted narrowly”, or perhaps at the opportune moment they may even throw out a “contra proferentem”. Insurance “generalities” are so reliable that in Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co., 2016 SCC 37 the Supreme Court of Canada assured us that parties interpreting insurance policies should resort to the general rules of interpretation that apply to insurance policies, adding further that appeal courts ought to apply a correctness standard of review as insurance policies constitute standard-form contracts not normally subject to negotiation. But although insurance coverage cases have generated well-established principles of interpretation, various cases within the last year confirm that the current state of the law does not provide all the answers or foreclose on future insurance coverage litigation.

A survey of recent insurance coverage cases over the past year confirm that interpreting exclusion clauses remains a nuanced and highly contestable topic. These recent cases display certain themes including the declining utility of legal terminology in insurance policies, the importance of plain and precise language, and suggest that (as before) the facts are what drive individual coverage determinations.

Tort Does Not Equal Contract

On the use of legal terminology, in CIT Financial Ltd. v. Insurance Corporation of British Columbia, 2017 BCSC 641, the British Columbia Supreme Court recently addressed distinctions between tort law and contract law when interpreting the meaning of an exclusion pertaining to “conversion”. A lessee committed arson, and the decision addresses whether an exclusion referencing “conversion” ought to exclude the loss.

To interpret the exclusion in context, both parties attempted to outline to the Court what ‘conversion’ meant. They did so by focusing their submissions on tort principles of conversion. However, citing jurisprudence, the Court wrote that “general principles of tort law are no substitute for the language of the policy” and “…that general principles of tort law do not necessarily inform the meaning of insurance policy wording”.

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2 One of our profession’s last vestiges of Latin.
Rather, the Court encouraged a “plain language” approach when interpreting policy language. Therefore, a plain language approach must apply to interpret the term “conversion” as it was used in the policy. Seemingly somewhat reluctant to accept the legally accepted meaning of the term “conversion”, the Court noted that “[i]t is a virtual certainty that the proverbial average insured has never heard of the tort of conversion”. The Court went so far as to express doubt that members of the insurance industry, and even most lawyers, would have an accurate appreciation for the tort of conversion. Noting uncertainty in the case law about the tort of conversion (as to the nature of the impugned act - such as theft, denial of title or possession to the owner - or even the extent of damage necessary), the Court ruled it is incumbent upon an insurer to specifically delineate what types of loss or damage it intends to exclude; and failing an adequate degree of precision, an exclusion may be read against the insurer.

Thus, after assessing what constitutes the tort of conversion, and what the term could possibly mean within the policy wording, the Court concluded “this particular exclusion (“conversion”) is so vague and obscure in its application as to be effectively unenforceable”. The Court added that as exclusions are to be narrowly construed, and as the damage in this case was repairable, there could be no finding that the vehicle was “lost to its owner” (as the Court deemed necessary to establish the tort of conversion). The decision serves as a reminder that the use of legal terminology within a policy does not necessarily provide certain guidance on that policy’s application.

The challenge with relying on legal terminology in exclusion clauses is again highlighted in Desjardins Financial Security Life Assurance Company v. Émond, 2017 SCC 19, a recent short decision of the Supreme Court of Canada that adopted the reasoning of the Quebec Court of Appeal. At issue was an exclusion clause that excluded liability for incidents involving an indictable offence. However, the particular offence at issue, in fact, permitted the Crown to elect to proceed summarily or by indictment. The insured had died before being charged, but the claim against the policy was being advanced by his heirs.

The Court noted that exclusions must be interpreted to favour “… precision and certainty…” The Quebec Court of Appeal held, and the Supreme Court agreed, that the exclusion “…concerns only indictable offences, those that are punishable exclusively by way of indictment, and not, as in this case, hybrid offences.” Thus, the courts avoided any ambiguity by applying a restrictive (and exclusive) interpretation of the exclusion. Notably, as in the CIT Financial case, the Quebec Court of Appeal once again encouraged insurers to use precise and explicit language in exclusion clauses.

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4 Ibid at para. 40.
5 Ibid at para. 60.
6 Ibid at para. 61.
8 Ibid.
9 Ibid.
The Demand for Precision

The case *Aviva Insurance Co. of Canada v. Intact Insurance Co.*, 2017 ONSC 509 involved an insurer resisting a defence duty based on a pollution exclusion. A claim against Avondale Stores Limited alleged that contaminants from property on which Avondale had operated (“source property”) had migrated onto the plaintiff’s property and caused damage. The umbrella insurer and the CGL insurer’s policies both included the same pollution exclusion clause, which contained an exception in the event of release of pollution that was “sudden and accidental”.  

Aviva provided the primary and umbrella insurance from 1993 to 1999. However, the Aviva umbrella policies from 1993 to 1997 included a qualified pollution exclusion (“QPE”) that contained an exception if the “…discharge, dispersal, release or escape [of pollution] was sudden and accidental”. Given the exception within the QPE, Aviva responded and defended Avondale under the 93-97 umbrella policies. Meanwhile, Intact was the commercial general liability insurer from 1983 to 1991. The Intact policies from 1983 to 1986 had the same QPE wording as the early Aviva Umbrella policies.  

Aviva acknowledged Intact could deny liability for 1987 to 1991, but (because Intact’s QPE also contained the exception) disagreed that Intact could otherwise deny all liability and refuse to defend Avondale. Aviva therefore applied for a declaration that the Intact 1983-86 policies were triggered and Intact should participate in Avondale’s defence and indemnify Aviva for Intact’s proportionate share of expenses and defence costs incurred and into the future.

The Court granted Aviva’s application. The Court concluded that the underlying pleading did not sufficiently allege particularized facts as to how the pollution escaped from the insured’s underground storage tanks. The pleading repeatedly used the term “migrate”. But the Court noted that such a term pertained to the manner of damage to the property, rather than to the manner of release from its source. Notably, “…the word ‘sudden’ as used in the exception will be held to relate to the discharge, dispersal, release or escape of contaminants out of which damage to property arises, and not to the damage to property arising therefrom.”

Therefore, there was a possibility at trial that the manner of escape may be found to be ‘sudden’. As a possibility remained, the insurer who sought to resist the defence duty could not establish that all of the possible claims made in the underlying action would ultimately be found to be excluded from coverage. The nature of the claim could fall within the exception to the exclusion and the insurer had a duty to defend the insured.

The decision emphasizes the difficult burden a party may have in demonstrating that all possible outcomes could still fall within the wording of an exclusion clause. Parties attempting to rely upon exclusions to negate cover must do so with particular caution.

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11 The Intact policies referred to the QPE as an “environmental liability exclusion”.
13 *Ibid* at para. 22.
Lastly, although the principles of insurance interpretation are well-established, the actual application may vary depending on statutory differences, and the fact scenarios at issue. The next two cases underscore that despite the adage “insurance contracts ... should be interpreted based on how an ordinary person would understand them”,¹⁴ the results may not be what an ordinary person may expect or desire.

**Just Results for Intentional Conduct Exclusions**

The Ontario Superior Court and the Court of Queen’s Bench in Alberta both recently addressed whether interests of co-insureds might be joint or several. While “an ordinary person will generally believe that the interests of multiple co-insureds under the same policy are several and not joint...”¹⁵ these contrasting cases show the application of the law is not always so favourable to an innocent co-insured.¹⁶

In *Soczek v. Allstate Insurance Co.*, 2017 ONSC 2262, the Ontario Superior Court considered the rights of a wife who was co-owner of property to claim under a property insurance policy after the husband caused damage to a property through an intentional, criminal act. In this tragic case, the husband attempted to murder the wife by pouring gasoline on her and lighting the gasoline. The wife suffered grievous burns over a large percentage of her body while the home was damaged by the fire. The husband was convicted of attempted murder and was imprisoned.

The insurer, Allstate, denied the wife’s claim for property damage to the home because the husband was a co-owner and the policy excluded liability for property damage caused by any intentional or criminal act done by a person insured under the policy. The Court acknowledged that the exclusion clause was not ambiguous and that it was:

“...within Allstate’s discretion to interpret the exclusionary clause in the policy in a way that would exclude Soczek, but not the Plaintiff, from a claim. However, the company is standing strictly on what it sees as its rights under the contract of insurance”.¹⁷

In addition to Allstate standing on its rights under the contract, Allstate asserted that the wife’s claim was an abuse of process.¹⁸ The Court refused to accept the claim was abusive. Still, and despite the apparent unfairness to the innocent wife, the Court acknowledged Allstate’s decision to “…stand firmly on this ‘fine print’” and to exclude a claim for damage caused by the intentional act of a co-insured.¹⁹


¹⁵ *Ibid*. Note that if their interests are joint, then the actions of one may permit the insurance company to deny recovery by other innocent co-insured. However, if the interests are several, then the actions of one co-insured will not bar the innocent co-insured from collecting under the same policy.

¹⁶ *Ibid*.


¹⁸ As a collateral attack on the criminal trial.

¹⁹ The Court was seemingly bound by the majority decision in *Scott v. Wawanesa Mutual Insurance Co*. 1989 CanLII 105 (SCC), [1989] 1 SCR 1445, at para. 14. In a somewhat similar fact scenario, the Supreme Court of Canada permitted an exclusion to omit coverage after a teenager burnt down his parents’ home. Interestingly, portions
The Court also noted that British Columbia, Quebec and Alberta have enacted legislation prohibiting insurance policies from denying compensation to innocent co-insureds, while Ontario has not.\textsuperscript{20} The Court recognized that in most contexts, Allstate, as the successful party, would be entitled to costs. However, the Court declined to award costs to either side.\textsuperscript{21}

This innocent co-insured theme was also explored in \textit{Haraba v. Wawanesa Mutual Insurance Company (The)}, 2017 ABQB 190, albeit with a different outcome. The plaintiff purchased a truck for her live-in boyfriend and listed him as a co-insured and the primary driver of the truck. Unbeknownst to the plaintiff and the agent for Wawanesa, the boyfriend provided his Nova Scotia identification, which the plaintiff and agent mistook as his driver’s license. In fact, the boyfriend’s license was suspended at the time. Eight days after he obtained the vehicle, the boyfriend was involved in an accident. Wawanesa realized that the boyfriend was not permitted to drive and asserted that the policy was void as against the plaintiff and her boyfriend due to the boyfriend’s misrepresentation.

Wawanesa contended that the plaintiff violated Section 554 of the Alberta \textit{Insurance Act}, which indicates that “...a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited” if “an applicant ... knowingly misrepresents or fails to disclose in the application any fact required to be stated in the application”.\textsuperscript{22} However, the Court:

- applied “... the modern approach to interpreting insurance contracts...”;
- noted that policies “... should be interpreted based on how an ordinary person would understand it”; and
- added that “... the ordinary person will generally believe that the interests of multiple co-insureds under the same policy are several and not joint, and that the misrepresentations of one co-insured will not affect the other co-insureds’ interests.”

On that basis, the boyfriend’s misrepresentations did not undermine the plaintiff’s “... ability to claim under the policy because the statute and the insurance contract do not contain express language indicating that the policy will be void against innocent co-insureds if another co-insured makes a material misrepresentation.”\textsuperscript{23}

\textsuperscript{20} Supra, note 16, at para. 21-22.
\textsuperscript{21} Supra, note 16; see also “[42] Given my dismissal of the claim, in most contexts I would say that Allstate, as the successful party, is entitled to costs. Much as Allstate’s counsel has made a successful legal argument, however, it must be said that Allstate’s corporate conduct is less than admirable. At least since the publication of the Scott decision in 1989, with its strongly worded criticism by Justice La Forest, Allstate has been aware that its exclusionary clause, while technically legal, is unfair to its innocent customers.”
\textsuperscript{22} Haraba v. Wawanesa Mutual Insurance Company (The), 2017 ABQB 190 at para. 34.
\textsuperscript{23} Ibid, para 35. In contrast with the decision in Soczek, see also para. 25, wherein the Court wrote “I conclude that, given that the Supreme Court cited La Forest J’s interpretive framework with approval in Katsikonouris, it is possible to follow the Saskatchewan Court of Appeal’s line of reasoning in Wigmore to narrowly construe the majority decision in Scott, adopt La Forest J’s framework from the dissent, and apply it to situations where one
Conclusions on Exclusions

The above cases confirm that insurance coverage exclusions are a challenging tool upon which to maintain a denial of coverage. As courts increasingly embrace an ordinary and plain meaning, as expected by the “ordinary person”, the utility of the insurance exclusion increasingly narrows.

Insurance policy exclusions are most effective when crafted with precise, but ordinary, wording. Imprecision may permit a multitude of interpretations and expose insurers and insureds to uncertainty, and thus to risk. Incorporating legal terminology into policy wording does not necessarily lead to certainty, and may do the opposite. Parties are best able to assess their respective positions through a policy with straightforward meanings and carefully delineated scopes of coverage. And last, a decent set of facts will go a long way.
A recent decision of the Federal Court in *Minister of National Revenue v. Iggillis Holdings Inc.*, 2016 FC 1352, may have critical implications for the scope of common interest privilege in the commercial context. If this decision is upheld on appeal, parties to a commercial transaction or other arrangement will have to revisit their practices and may no longer wish to share privileged communications in this context unless they are represented by the same law firm.

Common interest privilege operates, in limited circumstances, to negate the waiver of privilege that would otherwise occur when a privileged communication is shared with a third party. Prior to *Iggillis*, there had been widespread acceptance that parties to commercial transactions have entirely legitimate objectives in seeking to evaluate a particular legal risk applicable to, or affecting, a counterparty through a review of privileged materials. Where parties have shared a common interest in getting the deal done, both federal and provincial courts have been prepared to protect that common interest because there are economic and social benefits if parties engaged in commercial transactions are free to exchange privileged communications "without fear of jeopardizing the confidence that is critical to obtaining legal advice." The Federal Court's decision in *Iggillis* rejects all of the previous decisions and, in turn, casts significant doubt on this practice.

In *Iggillis*, the Canada Revenue Agency (CRA) was seeking disclosure of a legal memorandum prepared in the course of certain commercial transactions. The memo had been prepared by counsel to the purchaser to discuss the tax issues arising from the proposed transactions, and described a series of steps to permit the transactions to be completed on the most tax efficient basis to both parties. The purchaser's counsel circulated the memo to the vendors' counsel to ensure that vendors understood the steps to be undertaken, and the associated tax and legal risks. It was therefore useful in advancing negotiations but would also, if disclosed, provide the CRA with a "road map" of possible arguments to challenge the parties' tax position. The Court found that the memo was subject to solicitor-client privilege, but held that the privilege had been waived when it was shared with vendors' counsel.

In the Court's view, the sharing of privileged communications in furtherance of commercial dealings (referred to as "advisory common interest privilege") essentially serves only two purposes, neither of which was worth protecting: first, it enables transactions that anticipate litigation; second, it affords the litigant with a significant strategic advantage by denying opposing parties and the Court access to evidence. The Court ultimately concluded that any

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1 *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)*, 2002 BCSC 1344 at para 14.
advantages associated with advancing commercial transactions are outweighed by the costs to the administration of justice. Thus, the Court determined that the prior jurisprudence had relied on the “false” policy rationale of fostering commercial transactions, and was no longer good law.

As it stands, the Federal Court’s decision places significant restrictions on the ability of parties to share privileged materials. It effectively restricts the application of advisory common interest privilege in the deal context to situations in which the shared communications are also protected by a direct joint solicitor-client relationship, that is, where all of the parties to the transaction are represented by the same counsel or firm. Privilege over the legal advice of "allied lawyers" whether in relation to a proposed transaction directly or in relation to a previously existing issue (such as pre-existing or potential litigation), may now be considered to have been waived if it is shared with a proposed counterparty. In these situations, it will be significantly more challenging to resist production to the CRA, regulators or third parties on the basis of common interest privilege.

The decision in Iggillis conflicts with a number of other decisions, including previous decisions of the Tax Court and the Federal Court itself (see, for example, Imperial Tobacco Canada Limited v. HMQ, 2013 TCC 144 and Pitney Bowes of Canada Ltd. v. Canada, 2003 FCT 214). It is also inconsistent with the prevailing Superior Court jurisprudence in a number of provinces (see for example Trillium Motor World v. General Motors et. al., 2014 ONSC 1338, aff’d 2014 ONSC 4894).

Iggillis is not binding on any of the provincial Superior Courts and, in any event, has been appealed to the Federal Court of Appeal. The Federation of Law Societies and the Canadian Bar Association have also sought leave to intervene in the proceedings before the Federal Court of Appeal. However, until that Court weighs in, the status of advisory common interest privilege in the transactional context remains uncertain. As such, parties to commercial transactions should consider the risk of waiver, both with respect to future civil litigation and subsequent dealings with the tax authorities, and may wish to take the more conservative approach required by Iggillis, regardless of what might previously have been considered permissible.

At the core of the Federal Court’s decision in Iggillis was the conclusion that the benefits associated with protecting privileged communications that are disclosed in the context of a potential commercial transaction were speculative, while the cost to the administration of justice was obvious (namely, the suppression of relevant documents that the opposing party in a dispute or litigation context – in this case, the CRA – might otherwise seek to access). It is telling in this regard that the Court found that common interest privilege would "enable" commercial transactions that are of "questionable legality" given the purposes to which they are put, and cited the following examples in support of this conclusion: "placing wealth offshore, or estate planning of wealthy persons, or multinational corporations shifting their costs to high-tax countries and their profits to low-tax countries."
These conclusions have attracted considerable attention from commentators, who have argued that there are perfectly legitimate reasons to share privileged communications in the context of a proposed transaction, offshore or otherwise. If, as a result of this decision, that practice has to cease, it may impose a significant impediment to the execution of transactions going forward, with no corresponding benefit to the administration of justice (since parties will preserve privilege by not sharing privileged communications). It is hoped that these concerns will be fully considered by the Federal Court of Appeal.
In an explicit repudiation of the widespread societal suspicion of psychiatry and mental illness, in *Saadati v. Moorhead*, 2017 SCC 28, the Supreme Court of Canada has refused to impose a requirement for a claimant to prove that he or she has a recognizable psychiatric illness in order to recover damages for mental injury.

Whereas *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, spoke to the issue of causation in claims for mental injury, the Court’s recent decision *Saadati* speaks to the issue of proof of damage in such claims. Specifically, the Court clarified whether it is necessary for a claimant to call expert evidence or other proof of a recognized psychiatric illness, in order to support a finding of legally compensable mental injury.

At trial, the plaintiff successfully established that his personality had changed after an accident, based solely on the testimony of lay witnesses. The court did not rely upon a psychiatric expert to find that the plaintiff had proven his claim. The British Columbia Court of Appeal reversed the trial judge’s decision, finding that the plaintiff was required to prove a recognizable psychiatric illness, and that expert medical opinion evidence was required. That decision has been overturned.

Brown J., writing for the Court, stated that there was no requirement for a claimant to demonstrate a recognizable psychiatric illness as a precondition to recovering damages for mental injury. The requirements for proving liability in negligence, namely proximity leading to a duty of care; breach of the standard of care; existence of “damage” which qualifies as mental injury; and causation (in fact and law), combined with the “serious and prolonged” threshold outlined in *Mustapha*, provide sufficient protection against unworthy claims. Where a trier of fact is genuinely uncertain about the worthiness of a claim for mental injury, those concerns should be addressed via a “robust application” of these elements.

His Honour stated that imposing a requirement on a claimant to demonstrate that a mental injury has been recognized and diagnosed by a psychiatric expert places the decision on recovery of damages into the hands of psychiatry, and its established classification system. This was felt not to be a sound means of establishing a fact in law.

The trier of fact is supposed to be concerned with the harm that a claimant has sustained, with symptoms and their effects, not with the ability of an expert to affix a label to those symptoms.
and those effects. Moreover, imposing such a requirement would result in less protection to victims of mental injury than to victims of physical injury.

Experts are not entirely out of the picture, however. While rejecting an explicit requirement for expert evidence, the Court acknowledged that expert evidence would often be helpful in determining whether or not a mental injury has been shown. The seriousness and duration of the claimant’s impairment, and the effect of treatment (if any), must be considered. The trier of fact may be best informed about these issues by an expert. Furthermore, a defendant may rebut an allegation of mental injury by calling evidence from an expert who can establish that the accident could not have caused any mental injury. Any lack of diagnosis may then be weighed by the trier of fact in determining whether or not mental injury has been established.
Online contracts such as the one in this case put traditional contract principles to the test.\footnote{Douez v Facebook, Inc., 2017 SCC 33 per Abella J at para 99, concurring in the result [emphasis added] [Facebook].} Anyone who wants to join the Facebook must register and accept its terms of use, which include a forum selection clause requiring all disputes between Facebook and its registered users be litigated in Santa Clara County, California. In Douez v Facebook, Inc.,\footnote{Ibid.} the Supreme Court of Canada considered for the first time the question of the enforceability of a forum selection clause occurring in an online boilerplate consumer contract. The Court’s answers - rendered in three sets of reasons - illustrate the tension between legal doctrine and public policy with respect to contract enforceability, and, more generally, between the courts and legislatures as institutions of “public norm generation and legitimation, which guide the formation and understanding of relationships in pluralistic and democratic societies.”\footnote{Ibid per Karakatsanis, Wagner, and Gascon JJ at para 25, citing approvingly Trevor CW Farrow, Civil Justice, Privatization, and Democracy (Toronto: University of Toronto Press, 2014) at 41.}

Facebook, Preferences, and Privacy

Facebook, not unlike Google, Twitter, and Instagram (which is owned by Facebook) is a pervasive advertisement-financed Internet platform. Contrary, however, to the dissenting opinion in Facebook,\footnote{Ibid per McLachlin CJ & Côté J (Moldaver J concurring) at para 173.} these platforms are far from free. As Tufekci argues, “the price they extract in terms of privacy and control is getting only costlier.”\footnote{Zeynep Tufekci, “Mark Zuckerberg, Let Me Pay for Facebook”, The New York Times (4 June 2015), online: <https://www.nytimes.com/2015/06/04/opinion/zeynep-tufekci-mark-zuckerberg-let-me-pay-for-facebook.html?mcubz=06_r=0>.} As a Facebook user, Tufekci would “happily pay more than 20 cents per month for a Facebook or a Google that did not track me, upgraded its encryption and treated me as a customer whose preferences and privacy matter.”\footnote{Ibid. Facebook claims that its profits amount to approximately 20 cents per user per month.} In 2014, Facebook was valued at US$270 billion, and recorded profits of US$3 billion.\footnote{Tim Wu, “Facebook should pay all of us”, The New Yorker (14 August 2015), online: <https://www.newyorker.com/business/currency/facebook-should-pay-all-of-us>.} Private, personal information is inherently valuable. “When billions of people hand data over to just a few companies, the effect is a giant wealth transfer from the many to the few.”\footnote{Ibid.}
Moreover, as another commentator observes, “if one’s family, friends, and business associates are on Facebook ... using a competitor’s service is not a reasonable choice.”

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

Facebook, notwithstanding its contractual aspiration to “strive to respect local laws” (“Don’t be evil”), 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._

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

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

11 _Facebook, supra_ note 1 per Abella J at para 85 [emphasis original].

12 Quoted in _ibid_ per Abella J at para 83.
The Court of Appeal for British Columbia allowed Facebook’s appeal and granted it a stay of proceedings based on the forum selection clause.\(^\text{13}\)

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

**Once More Unto the Breach (of Boilerplate)**

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

Thus does Abella J assert that “[o]nline contracts such as the one in this case put traditional contract principles to the test.”\(^\text{15}\)

Justice Abella frames this test of contractual principles in two ways. First, she asks what “consent” means when the agreement is said to be made by a keystroke, and further questions whether it realistically can be said “that the consumer turned his or her mind to all the terms and gave meaningful consent?”\(^\text{16}\) In this initial framing of the problem, Abella J suggests that “some legal acknowledgement should be given to the automatic nature of the commitments made with this kind of contract, not for the purpose of invalidating the contract itself, but at the very least to intensify the scrutiny for clauses that have the effect of impairing a consumer’s access to possible remedies.”\(^\text{17}\)

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

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

\(^{13}\) *Ibid* per Abella J at para 87.

\(^{14}\) *Ibid* per Abella J at para 98 [emphasis added].

\(^{15}\) *Ibid* per Abella J at para 99.

\(^{16}\) *Ibid* per Abella J.

\(^{17}\) *Ibid* per Abella J.

\(^{18}\) *Ibid* per Abella J at para 111.

\(^{19}\) *Ibid* per Abella J [emphasis added].
clause unenforceable in this case."\(^{20}\) Indeed, Justice Abella concluded that "[t]his, to me, is a classic case of unconscionability."\(^{21}\)

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

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

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

Justices Karakatsanis, Wagner, and Gascon have modified the “strong cause” prong of the \textit{Pompey} test in the consumer context. They argue that “public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake"\(^{24}\) warrant a modified approach, “even if the circumstances of the bargain do not render the contract unconscionable at the first step.”\(^{25}\)

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

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

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

\(^{20}\) \textit{Ibid} per Abella J at para 113.
\(^{21}\) \textit{Ibid} per Abella J at para 116 [emphasis added].
\(^{22}\) \textit{ZI Pompey Industrie v ECU-Line NV}, [2003] 1 SCR 450 [\textit{Pompey}].
\(^{23}\) \textit{Ibid} at paras 31, 39.
\(^{24}\) \textit{Facebook}, supra note 1 per Karakatsanis, Wagner, and Gascon JJ at para 38.
\(^{25}\) \textit{Ibid} per Karakatsanis, Wagner, and Gascon JJ at para 39.
\(^{26}\) \textit{Ibid} per Karakatsanis, Wagner, and Gascon JJ at para 57.
\(^{27}\) \textit{Ibid} per Karakatsanis, Wagner, and Gascon JJ at para 47.
contract principles”,\(^{28}\) it becomes clear that there is no warrant for converting a doctrinal question into a question of public policy. To do so in this particular instance is to hollow-out if not entirely oust the doctrinal analysis altogether, effectively leaving only the more discretionary issue of public policy.

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

Conclusion: Courts In Loco Legis Lator?

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

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

\(^{28}\) Ibid per Abella J at para 94 [emphasis added].
\(^{29}\) Ibid per Abella J at para 98.
\(^{31}\) Facebook, supra note 1 per Abella J at para 99.
\(^{32}\) Radin, supra note 30 at 12 [emphasis added].
\(^{33}\) MacLean, “The Death of Contract, Redux”, supra note 30 at 289.
\(^{34}\) Seidel v Telus Communications Inc., [2011] 1 SCR 531 at para 172 [Seidel] [emphasis added].
\(^{35}\) Ibid at para 173.
online contracts with corporations, large and small, located in other countries.” In other words, this is a matter for the legislature, not the courts. Just so there is no misunderstanding, the dissent adds that the B.C. legislature has not adopted the “protective model” approach to forum selection clauses, and “[c]ourts are obliged to respect this choice”, no matter the impliedly less significant consequences for basic contractual principles.

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

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

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

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36 Facebook, supra note 1 per McLachlin CJ and Côté J (Moldaver J concurring) at para 123.
37 Ibid per McLachlin CJ and Côté J (Moldaver J concurring) at para 144.
38 Ibid per Karakatsanis, Wagner, and Gascon JJ at para 25.
39 MacLean, “The Death of Contract, Redux”, supra note 30 at 310, adapting the rationale for recognizing the general principle of good faith enunciated by the Supreme Court of Canada in Bhasin v Hrynew, [2014] 3 SCR 494 at para 33.
40 Radin, supra note 30 at 248.