CHAPTER 8

Consumers First, Digital Citizenry Second: Through the Gateway of Standard-Form Contracts

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Abstract

The combined effect of the digital and global economy has fundamentally changed the very concept of a consumer, the consumer's place in the digital society, and the relationship between consumers and other actors, such as governments. By using goods and services, consumers still play the role of passive actors in the market economy. However, in today's society, not only does our consumption behaviour make us consumers, but virtually all aspects of our daily lives and social interactions are made possible by, and conditional upon, being consumers first. To be producers, creators, learners, critical thinkers, and citizens, we must be consumers first, by clicking on or signing lengthy standard-form contracts before getting access to goods and services (including government services). Standard-form contracts have become the dominant regulatory mechanism of consumer relationships and, by extension, digital civic participation. This article frames the relationship between consumers and citizens within the growing dependency on standard-form contracts. It identifies the ineffectiveness in the current legal rules governing standard-form contracts and provides a related policy research agenda needed to limit the expansive private ordering of standard-form contracts.

The digital and global economy has fundamentally changed the very concept of a consumer, the consumer's place in society, and the relationship between the consumer and other actors, such as governments. By buying goods and using services, consumers still play the role of passive actors in the market economy. However, in today's society, with the increased digitization of goods and services, not only does traditional consumption behaviour make us consumers, but virtually all aspects of our daily lives and social interactions are made possible by, and conditional on, being consumers first. Indeed, citizens must consume digital products in order to fulfill other social, economic, and cultural roles.

Before we acquire a digital good or service that enables us to be producers, farmers, creators, learners, critical thinkers, or citizens, we must click on or sign lengthy terms and conditions—standard-form contracts—imposing the provider's terms of service. Standard-form contracts lead to increased *private ordering* in the digital context—that is, service providers building their own rules and enforcement mechanisms in lieu of, or parallel to, state's rules and enforcement mechanisms.

Standard-form contracts have now become the dominant regulatory mechanism of consumer relationships. Migrated from the commercial space, those standard-form contracts have also become important regulatory mechanisms of digital civic participation, as governments are now using such contracts for service delivery.

This chapter frames the relationship between consumers and citizens within the context of our growing dependency on standard-form contracts that effectively make us consumers first. It identifies the ineffectiveness in the current legal rules governing standard-form contracts and provides a related policy research agenda needed to limit the expansive private ordering of standard-form contracts.

The Paradigm of Consumers First

Up until the rise of the Internet and digital technology, consumers were, as Daniel Defoe noted in 1726, "the last article" (p. 5) or "utmost end" (p. 389) in a trade chain. As buyers and consumers of goods and services, consumers were exclusively situated within the marketplace. They were passive actors in that they were the end consumers of the products and services (Trentmann, 2016). Starting in the 1970s, consumer protection policies and legislation that were introduced in

Canada (and elsewhere) were deeply rooted in this classic paradigm of consumers as passive actors in the marketplace, articulated some 250 years prior. As weaker parties in the marketplace, consumers needed "protecting," hence, for example, a suite of policies were introduced on product safety and warranties (Ramsay, 1985). The same paradigm also underpins, to this day, competition policies, which focus on consumer welfare, defined purely in economic terms of price and market choice (Werden, 2011). While the consumer movement worldwide was built on strong social, political, and (arguably) ideological values (Ramsay, 1993), the remit of consumer activism and government-issued consumer policies was predominantly focused on consumption. There was very little, if any, intersection between the role of individuals as consumers, the goods and services they acquired and used, and their "civic experience" and role as citizens (Dubois and Martin-Bariteau, 2020). Even in socially driven actions, such as consumer boycotts of goods, "Political [activities were] difficult to distinguish from other aspects of consumption activities" (Jacobsen, 2017, p. 183).

As we lead more connected lives, either by choice or by immutable force, in the digital and increasingly global economy the paradigm of consumers as passive actors has fundamentally shifted. Individuals, as consumers, have been propelled from their passive role at the very end of a market transaction to the very beginning of virtually all social interactions, and not just within what has been the purview of market transactions, but also within what has been the purview of other social interactions, including citizenry.

As Margaret Scammell noted, "The act of consumption is becoming increasingly suffused with citizenship characteristics and considerations. … It is no longer possible to cut the deck neatly between citizenship and civic duty, on one side, and consumption and self-interest, on the other" (2000, p. 352). While the notion of citizen-consumer blurs the line between political and consumptive, in such a relationship, consumerism is subordinate to citizenship, even though citizenship is increasingly expressed through consumption behaviour (Scammell, 2000, p. 352; Cho et al., 2015).

I argue, however, that this shift goes beyond the blurring of the lines. The shift is so fundamental that almost all relationships become subordinate to, and are viewed through, the lens of individuals as consumers, where many aspects of our lives can only be realized by first consuming a digital good or a service. Our purchasing

behaviour still makes us consumers, fulfilling the traditional role of passive actors in the marketplace. More importantly, however, virtually all aspects of our daily lives and social interactions are made possible by, and conditional on, being consumers first. When they purchase farm equipment, farmers are being consumers first. When they read digital books, stream documentaries, or submit assignments through learning management systems, students are being consumers first. When we use our phones, the Internet, messaging apps, or social media to communicate with friends and family, we are all being consumers first (see, e.g., Shade et al., in Chapter 3). Political discourse and civic participation at municipal, provincial, federal, or global levels are increasingly happening through digital tools (Dubois & Martin-Bariteau, 2020). When we read the news, follow government announcements on social media, or share our views on issues that matter, we are all consumers first before we can be engaged citizenry.

Standard-Form Contracts as Dominant Regulatory Mechanisms

Standard-form contracts have migrated from the commercial environment into every aspect of our lives. For example, we are required to agree to terms of services before we use social media platforms, create an email account, apply for government services, and so on. In effect, only by first consuming a digital product can we fulfill other social, economic, and cultural roles. The main tool governing this consumptive role is a non-negotiable standard-form agreement (also called contract of adhesion or boilerplate), which is presented on a take-it-or-leave-it basis. As consumers first, we have become "contract takers" (Cohen, 1988, p. 1125). We are presented with a binary choice: either accept the contract terms as they are presented and get access to the services, or decline the contract and effectively be left behind.

Standard-form contracts have been a business reality for almost two centuries (Rakoff, 1983). They are an efficient mechanism to standardize frequent transactions and significantly reduce, if not eliminate, transaction costs. In the commercial environment, where these contracts originated, the parties have the commercial acumen to understand the consequences of the terms of a standard-from contract, to assess, and, if necessary, absorb any future legal or business risk arising from it (Pavlović, 2016, pp. 406–409).

Freedom of contract and party autonomy are foundational principles of contract law and by extension, private law. The state does not interfere in the private contractual bargain between parties, unless the contract itself is fundamentally flawed. For example, if the parties lack legal capacity to contract, the contract is unconscionable, illegal, or against public policy objectives. Historically, each of these exceptions has been interpreted narrowly, and over the decades their scope has gotten even narrower. These exceptions define the outer boundaries of the contractual relationships. Such a broad scope of what is permissible, the theory goes, is essential for the markets to function and the state has little interest (or capacity) to police how these individual and private relationships are ordered. In other words, what is within these rather expansive boundaries is permissible behaviour. What is out of the boundaries is not permissible. As a result, the courts rarely interfere with or alter the contractual bargain. In the industrial society, there are few, if any, challenges to this type of private ordering. Private ordering generally affects only the commercial parties and it affects their mutual relationship. It does not affect third parties or ordinary people, and it does not pose significant challenges to society as a whole (Trebilcock, 1995).

The initial migration of standard-form contracts from the purely commercial sphere into the consumer environment was reserved for odd transactions such as tickets, standardized waivers of liability for dangerous sports, rent-a-car agreements, or major financial transactions. Canadian courts have generally enforced these contracts, pending sufficient notice to consumers (*Tilden Rent-A-Car v. Clendenning*, 1978; *Trigg v. MI Movers International Transport Services*, 1991).

The true scope of the intrusion of these contracts into the daily lives of individuals happened at the confluence of digitization and the ever-growing role of the Internet. Standard-form contracts became an integral and unavoidable gate through which we pass, as consumers first, into the realm of digital services and our collective digital lives. In the digital environment, as Ian Kerr put it, these contracts have become "the rule[,] and [the businesses,] the rulers." (Kerr, 2005, p. 191). Rakoff's observation from the last quarter of the Twentieth century captures the significance of the rule-making power of these contracts: "The use of form documents, if legally enforceable, imparts to firms … a freedom from legal restraint and an ability to control relationships across a market" (1983, p. 1229). The current reality where virtually all aspects of our lives are subject to

standard-form contracts leads to a significant expansion of private ordering beyond what Rakoff originally contemplated and has significant implications, not just for consumer rights proper but also, and perhaps more importantly, for civic participation and human rights more broadly.

On their own, boilerplate standard-form contracts are arguably not what is problematic. It is the way in which they have effectively become the main rule-making instrument in the digital environment and have expanded the role of private ordering into all realms of digital life. Unilaterally defined contracts implement an online private ordering which allows private actors to effectively work around states' laws. This migration of standard-form contracts, from the commercial environment to consumer space and numerous social spaces, raises many challenges and questions about the appropriate limits of private ordering in the digital society.

First, the commercial environment in which these contracts have developed is markedly different from the current environment in which we are consumers first. There is a fundamental informational and bargaining asymmetry between the contracting parties—businesses, on the one hand, decide unilaterally on the terms with complete information about services and risks, and consumers (or citizens), on the other, can only accept the terms not fully aware of all the risks. This asymmetry is at the core of why the boilerplate contracts are currently being used to push the boundaries of private ordering.

Second, people do not have a real ability to opt out of these contracts. While for certain services, there may be an alternative service that arguably does not come with the same restrictions, often there is no practical alternative, or the alternative comes with a very similar standard-form contract (Pavlović, 2016, p. 423). More fundamentally, it is not about whether there are alternatives; it is about the lack of choice and the lack of any control that people have over the terms of these relationships (see Shade et al., in Chapter 3). The rapid shift toward digitization of everything means that every aspect of our lives and social activities—from work to entertainment to civic participation—is now governed by these contracts. This concern is further amplified in relationships where people do not have any choice—such as government services or a growing number of formal or informal public-private partnerships that are taking over

what once was a realm of public services (for example, the increasing use of Google Classroom in delivering K–12 education).

Third, the way these contracts are structured—from their length, to their readability, to their need for instantaneous acceptance, makes it impossible for consumers to realistically understand the rights and obligations under the contract, assess the risks, and make a truly informed choice (Bakos, 2014; Ben-Shahar & Schneider, 2014; Shade et al., in Chapter 3).

And, lastly, if there is a serious problem with the goods, services, or the provider's practices, due to restrictive contractual terms (such as arbitration clauses, forum selection clauses, or class action waivers) that limit consumer's access to domestic courts, it is virtually impossible for an individual to obtain a recourse, which renders any rights that one may have under the contract (or even under a legislative or regulatory mechanism) effectively meaningless. In addition, even if consumers had unobstructed access to domestic courts, the perennial problem of consumer complaints has been that the cost of pursuing a claim is much higher (by multiple amounts) than the value of the claim (Best, 1981). The value of consumer claims is often in the range of several hundred dollars (or, at a higher end, several thousand dollars), while the cost of the legal process, including legal representations, is often in the tens of thousands of dollars. The high cost of pursuing the claim acts as a significant barrier to seeking enforcement of one's rights or challenging unfair practices. While collective recourse, such as class action, may provide an avenue for resolving problems that affect the collective user base or the underlying unfair practices, meaningful dispute resolution is increasingly being contracted out in standard-form contracts through arbitration clauses, forum selection clauses, and class action waivers (Pavlović, 2016; Enman-Beech, 2020). The contracting out of meaningful access to a judicial process (as a necessary vehicle toward access to substantive justice) makes the standard-form agreements virtually impenetrable since it eliminates an accountability mechanism to challenge the service providers' practices.

Limitations of the Current Regulation of Standard-Form Contracts

Despite a normative view that the enforcement of (electronic) standard-form contracts poses challenges and risks in the consumer

context (Radin, 2013; Ben-Shahar, 2007), Canadian courts, over the last two decades, have prioritized commercial certainty and party autonomy over the social reality of standard-form contracts and their regulatory role by routinely enforcing consumer electronic standard-form contracts. What follows is a brief summary of the most important Canadian cases on electronic contracts insofar as they exemplify the courts' approach to regulating the contracts from the perspective of consumers as passive market (and social) actors.

Rudder v. Microsoft (1999) was the first Canadian case involving electronic standard-form contracts and exemplifies this approach, which has been subsequently carried through in a number of consumer cases involving boilerplate contracts. In what is now an oft-cited paragraph, Justice Winkler prioritized party autonomy and commercial certainty over the collective interests of consumers, which were perhaps not as apparent then as they are today. The following quote from Justice Winkler also exemplifies the classic paradigm of consumers as having no other role other than being market participants:

> Neither the form of this contract nor its manner of presentation to potential members are so aberrant as to lead to such an anomalous result. To give effect to the plaintiffs' argument [to not enforce the forum selection clause] would, rather than advancing the goal of "commercial certainty" … move this type of electronic transaction into the realm of commercial absurdity. It would lead to chaos in the marketplace, render ineffectual electronic commerce and undermine the integrity of any agreement entered through this medium. On the present facts, the Membership Agreement must be afforded the sanctity that must be given to any agreement in writing. (*Rudder v. Microsoft*, 1999, para. 16)

When the case was decided, in 1999, electronic commerce and electronic consumer contracts were nascent, and it may have been difficult to imagine how pervasive these contracts and digital services over the Internet would become in the daily lives of individuals. By focusing on party autonomy and commercial certainty, the court set an almost irreversible course for electronic standard-form contracts, whose negative consequences are strongly felt even today.

In *Kanitz v. Rogers Cable* (2002) and *Dell Computer v. Union des consommateurs* (2007), the courts have further entrenched the view that these contracts are about freedom of choice and party autonomy, and, as such, should be given the same effect as freely negotiated contracts in the commercial environment. Such a narrow approach is particularly challenging for contemporary circumstances, in which standard-form contracts are regulating a much wider swath of social relationships. By routinely enforcing standard-form contracts, the courts are effectively giving private actors much more power than to regulate pure market relations.

In contrast, the Supreme Court of Canada's decision *in Douez v. Facebook* (2017) represents a significant shift toward both understanding the regulatory role of standard-form contracts and their implication to both economic and social relationships. The majority of the Supreme Court (which included two decisions, one by Justice Karakatsanis for the majority and a concurring opinion by Justice Abella) recognized that the contemporary environment of consumer contracts is distinct from the commercial environment in which the contract rules have developed over the years. The majority recognized that these contracts are now ubiquitous and are based on the inequality of bargaining powers. Justice Abella went further than the majority to encapsulate the reality of these contracts: there is "no bargaining, no choice, no adjustments" (*Douez v. Facebook*, 2017, para. 98), which is at the core of why these contracts challenge the traditional bases of contract law, such as consent, choice, and party autonomy. The majority found Facebook's terms of service to be a valid agreement but did not enforce the forum selection clause, which effectively permitted for the class action against Facebook to proceed in British Columbia. Justice Abella found that the forum selection clause as a contract was not valid since it was unconscionable.

In my view, the Supreme Court's decision in *Douez v. Facebook* (2017) marks a fundamental shift in the court's approach to consumer contracts but is short of revolutionary. The Supreme Court' justices' 4–3 split—as well as the arguments used by the majority (that there is a new social reality in which these contracts are effectively powerful regulators) and the dissent (that the economic reality in which "certainty and predictability of transactions" take precedence)—are indicative of the tension between the old and new paradigms of consumer relationships.

While the Supreme Court recognized in *Douez v. Facebook* (2017) that consumer relationships are different than commercial ones, two years later, in *TELUS Communications v. Wellman* (*TELUS*, 2019), the court failed to recognize that the same dynamic applies to other similarly situated parties, such as small businesses. In the court's view, the case primarily hinged on the statutory interpretation of the Ontario *Arbitration Act* (1991), leaving little room for addressing normative and policy arguments about the role of standard-form contracts and their impact on relationships involving vulnerable parties. Similarly to *Douez v. Facebook*, although with a different split, *TELUS Communications v. Wellman* embodies the tension between maintaining commercial certainty (in the majority decision), and understanding the social and economic reality of "absence of choice" for the weaker parties (in the dissenting decision [*TELUS*, 2019, para. 166]). It is worth noting, however, that Justice Moldaver, writing for the majority, did recognize that there are broader policy implications of these contracts, but that they "are better dealt with directly through the doctrine of unconscionability" (*TELUS*, 2019, para. 85). The doctrine of unconscionability is an equitable doctrine the courts use to deny enforcement of a contract or, more commonly, a clause in a contract. In *Douez v. Facebook*, Justice Abella found Facebook's terms of use unenforceable based on the doctrine of unconscionability. The doctrine is not uniform across Canada, and generally sets a high threshold (Enman-Beech, 2020).

In *Heller v. Uber Technologies* (2019), the Ontario Court of Appeal did what the Supreme Court of Canada in *TELUS* did not, and recognized that in relationships governed by standard-form contracts other similarly situated parties—such as workers in the gig economy—ought to be protected due to the inequality and unfairness of the underlying relationship. In this case, Uber drivers were seeking a declaration that they were employees, not independent contractors; but an arbitration clause in Uber's terms of service required Canadian drivers to arbitrate their claims in the Netherlands, with an upfront filing fee of $14,500. Revolving around the enforceability of this arbitration clause, the case was all about access to justice and access to class proceedings as a meaningful dispute resolution mechanism for class-wide claims. In its decision, the Ontario Court of Appeal recognized that workers in the gig economy are as equally vulnerable as consumers, and found that an arbitration clause in Uber's terms of service was unconscionable. Yet it remained to be seen if,

on appeal, the Supreme Court would carry forward the paradigm shift introduced in *Douez v. Facebook*.

On June 26, 2020, the Supreme Court of Canada issued its decision in *Uber v. Heller*, ruling the arbitration clause in Uber's terms of service was unconscionable, and therefore unenforceable. While, like *TELUS*, *Uber v. Heller* is not a consumer case, the underlying issue of the regulatory power of standard-form contracts is equally applicable to consumer relationships.

The Supreme Court's decision in *Uber v. Heller* might be much more groundbreaking than the court's quite revolutionary decision in *Douez v. Facebook*. First, contrary to the 2017 divided bench, the very strong majority of eight justices to one in *Uber v. Heller* would signal that the court now embraces the new reality of how far-reaching the regulatory power of standard-form contracts has become. Written by Justice Abella and Justice Rowe, the majority judgment lays out a modern version of the unconscionability test that is particularly tailored to standard-form contracts in the mass-market environment. Concurring, Justice Brown agreed with the unforceability of the arbitration clause, but on the ground that it "undermine[d] the rule of law by denying access to justice" (*Uber v. Heller*, 2020, para. 101). On the opposite end, the dissenting opinion by Justice Coté is a treatise on freedom of contract and party autonomy, showing the rift between the old and new paradigms. Second, the majority and the concurring judgments distinctly recognize that, while being a procedural mechanism, arbitration clauses have a direct impact on the substantive rights under the contract, and effectively eliminates any rights of the weaker party when it prevents access to an appropriate adjudicatory mechanism. Thirdly, and perhaps most importantly, the Supreme Court recognized that standard-form contracts are a necessary tool in today's mass market, but put on notice the drafters of these agreements: going forward both procedural and substantive clauses will be subject to a closer judicial scrutiny.

Conclusion: Ways Forward

It has taken almost twenty years for the courts to recognize the radically different reality of the contemporary society in which we are consumers first—a necessary rationale to start recalibrating certain aspects of contract law. In today's society, where our lives are largely digital, the line is blurring between a consumer, who acquires digital

services, and a citizen, who uses those digital services to be informed or participate in civic discourse. Citizenry in a digital context is often premised on digital consumerism, and both activities are tightly wrapped into standard-form contracts. Boilerplate contracts have thus migrated even further, from a purely commercial environment to a consumer environment, and now to citizenship and participation in a digital context.

Contracts have been a regulatory tool for private economic relationships, yet they are increasingly being used to regulate socio-economic rights (such as the right to work) and a wide range of social relationships that often include significant public interest (such as civic participation). As a result, standard-form contracts have become a powerful tool that extend the boundaries of private ordering into somewhat of an unchartered territory with significant risks for the public. By supercharging contracts with procedural limitations (such as forum selection clauses, arbitration clauses, and class action waivers), businesses are making it difficult, if not impossible, for users to challenge their practices before the courts. This effectively shields businesses from any oversight over their practices and makes them into powerful gatekeepers of numerous social interactions, including access to and provision of information.

A robust and multifaceted research and policy agenda is urgently required in order to strengthen consumer rights, preserve the integrity of civic participation, and prevent further erosion of human and democratic rights by non-negotiated standard-form contracts:

- First, given the diversity of contracts (and the relationships they regulate), a more nuanced, empirically based approach to identifying risks and challenges is required for meaningful evidence-based policy-making. While it is easy to paint all standard-form contracts with the same "unfairness" brush, not all of them are the same or produce the same impact, given the wide range of relationships they regulate and the multitude of provisions they include. Cataloguing the provisions (Marotta-Wurgler, 2007), identifying their negative impact, and correlating the contracts with the market power and market options would be the first step, and would provide a sound empirical basis for identifying appropriate and proportionate regulatory approaches.

- Second, Canada needs to learn from other comparable jurisdictions, such as from the European Union's (EU) New Deal for Consumers (*Directive [EU] 2019/2161*, 2019) and Australia's comprehensive legislative review of consumer law (2018). Canada also needs to overcome federal-provincial jurisdictional issues and create a strong and well-rounded consumer rights framework that would be applicable across industries, across federal and provincial borders, and across a myriad of regulatory schemes and regulatory agencies. Basing this consumer rights framework on the consumers-first paradigm would help resolve the current reluctance to limit the reach of contracts, since contracts are currently seen exclusively as economic regulators.
- Third, a uniform legislation that limits the reach of standard-form contracts, and that applies to not only consumer relationships but other similarly situated relationships, would go far in addressing some of the current tensions. The legislation could use as a model, or expand on, the EU Directive on unfair terms in consumer contracts (*Directive 2005/29/EC*, 2005) or the American Law Institute's draft "Restatement of the law of Consumer Contracts" (McGowan, 2019). In addition, providing a uniform format and simplifying the language of the contracts would go far in fostering digital and legal literacy, and helping people understand their rights and obligations (Shade et al., in Chapter 3).
- Finally, and perhaps more importantly, given that standard-form contracts act as entry points to all aspects of digital life, it is imperative that the narrow view of standard-form contracts as economic regulatory mechanisms gives way to a more expansive view of boilerplate contracts as social regulatory mechanisms. Only by changing this starting viewpoint can we shift the thinking and corresponding regulatory approaches to contracts both in the areas of consumer relationships as well as social or civic relationships. The Supreme Court of Canada may have just done that in *Uber v. Heller*, but it remains to be seen whether the Supreme Court's recognition of the new social reality of these contracts and the corresponding shift in the way they are enforced are carried forward by that Court itself, as well as the lower courts, in both the consumer context and, more importantly, the

broader social context of these contracts—until regulators and legislators finally act.

References

Arbitration Act, 1991, SO 1991, c. 17.

Bakos, Y., Marotta-Wurgler, F., & Trossen, D. R. (2014). Does anyone read the fine print: Consumer attention to standard-form contracts. *Journal of Legal Studies*, *43*(1), 1–35.

Ben-Shahar, O. (2007). *Boilerplate: The foundation of market contracts*. Cambridge University Press.

Ben-Shahar, O. & Schenier, C. (2014). *More than you wanted to know: The failure of mandated disclosures*. Princeton University Press.

Best, A. (1981). *When consumers complain*. Columbia University Press.

Cho, J., Keum, H., & Shah, D. (2015). News consumers, opinion leaders, and citizen consumers: Moderators of the consumption—participation. *Journalism & Mass Communication Quarterly*, *92*(1), 161–178.

Cohen, J. E. (1988). Copyright and the jurisprudence of self-help. *Berkeley Technology Law Review*, *13*(3), 1089–1143.

Defoe, D. (1726). *The complete English tradesman, in familiar letters: Directing him in all the several parts and progressions of trade*. Printed for Charles Rivington. https://babel.hathitrust.org/cgi/pt?id=nnc1.0112322717&view=1up&seq=29

Dell Computer Corp. v. Union des consommateurs, [2007] 2 SCR 801.

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, O.J., L. 149, 11.6.2005, 22–39.

Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, O.J., L. 328, 18.12.2019, 7–28.

Douez v. Facebook Inc., 2017 SCC 33.

Dubois, E. and Martin-Bariteau, F. (2020). Citizens and their political institutions in a digital context. In W. H. Dutton (Ed.), *A research agenda for digital politics*. Edward Elgar. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3499315

Enman-Beech, J. (2020). Unconscionable inaccess to justice. *Supreme Court Law Review*. Advance online publication. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3467019

Heller v. Uber Technologies Inc., 2019 ONCA 1.

Jacobsen, E. (2017). Political consumption—citizenship and consumerism. In M. Keller, B. Halkier, T. A. Wilska, & M. Truninger. (Eds.), *Routledge Handbook on Consumption* (pp. 181–190). Routledge.

Kanitz v. Rogers Cable Inc., [2002] OJ No 665, [2002] 58 OR (3d) 299.

Kerr, I. R. (2005). If left to their own devices …: How DRM and anti-circumvention laws can be used to hack privacy. In M. Geist (Ed.), *In the public interest: The future of Canadian copyright law* (pp. 167–210). Irwin Law.

Marotta-Wurgler, F. (2007). What's in a standard-form contract? An empirical analysis of software license agreements. *Journal of Empirical Legal Studies*, *4*(4), 677–713.

McGowan, D. (2019). Consumer contracts and the restatement project (Paper no. 19–424). *San Diego Legal Studies*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3446802

Pavlović, M. (2016). Contracting out of access to justice: Enforcement of forum selection clauses in consumer contracts. *McGill Law Journal*, *62*(2), 389–440.

Productivity Commission (2018). *Review of Australia's Consumer Policy Framework*. Productivity Commission Inquiry Report no 45, Australian Government. https://www.pc.gov.au/inquiries/completed/consumer-policy/report

Radin, M. J. (2013). *Boilerplate: The fine print, vanishing rights, and the rule of law.* Princeton University Press.

Rakoff, T. D. (1983). Contracts of adhesion: An essay in reconstruction. *Harvard Law Review*, *96*(6), 1173–1284.

Ramsay, I. (1985). Framework for regulation of the consumer marketplace. *Journal of Consumer Policy*, *8*(4), 353–372.

Ramsay, I. (1993). Consumer law and structures of thought: A comment. *Journal of Consumer Policy*, *16*(1), 79–94.

Rudder v. Microsoft Corp., [1999] OJ No 3778, [1999] 2 CPR (4th) 474.

Scammell, M. (2000). The Internet and civic engagement: The age of the citizen consumer. *Political Communication*, *17*(4), 351–355.

TELUS Communications Inc. v Wellman, 2019 SCC 19.

Tilden Rent-A-Car Co. v Clendenning (1978), 83 DLR (3d) 400.

Trebilcock, M. J. (1995). Critiques of the limits of freedom of contract: A rejoinder. *Osgoode Hall Law Journal*, *33*(2), 353–377.

Trentmann, F. (2016). *The empire of things: How we became a world of consumers, from the fifteenth century to the twenty-first*. HarperCollins.

Trigg v. MI Movers International Transport Services Ltd. et al., (1991) 4 OR (3d) 562, 50 OAC 321 (CA).

Uber v. Heller, 2020 SCC 16.

Werden, G. J. (2011). Consumer welfare and competition policy. In J. Drexl, W. Kerber, & R. Podszun (Eds.), *Competition policy and the economic approach* (pp. 11–43). Edward Elgar Publishing.

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