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"Browse-Wrap" Contracts and Unfair Terms: What the Supreme Court Missed in *Dell Computer Corporation* v. *Union des consommateurs et Dumoulin*

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1. INTRODUCTION

1. The Internet has revolutionized commerce: businesses can now sell to a worldwide market at any time of the day or night, and can do so using low-cost methods of instantaneous

1. Canadian Internet Policy and Public Interest Clinic. CIPPIC intervened in the *Dell Computer* case before the Supreme Court of Canada, arguing that pre-dispute mandatory arbitration clauses in consumer contracts are contrary to public order under Québec law, and that the arbitration clause was not in this case adequately brought to the attention of Dell customers.

communication with far-flung consumers. Terms of sale, previously in paper form, can now be posted on the company website and thus communicated to consumers without any extra effort. But is mere posting of applicable terms on the website sufficient to bind customers? Should online businesses be required to take any additional measures to bring the terms to the customer's attention or to obtain the customer's explicit assent to them? Does it matter whether the terms in question deny consumers rights and remedies to which they would otherwise be entitled?

2. The Supreme Court of Canada was faced with these questions among others in the recent case of *Dell Computer Corporation* v. *Union des consommateurs et Dumoulin* ("*Dell Computer*").[2] In *Dell Computer*, a group of consumers ("the consumers") in Québec sought to launch a class action against Dell Computer Corp. ("Dell") for failure to honour an advertised price. Dell applied to the Court for dismissal of the motion to institute a class action, and for referral of the claim to arbitration pursuant to an arbitration clause contained in the terms of sale. The consumers argued, successfully at the two lower Québec courts, that the arbitration clause was unenforceable under Québec law.[3] At the Supreme Court, however, Dell's arguments in favour of binding arbitration clauses in consumer contracts prevailed. While the focus of the case was on the validity *per se* of pre-dispute binding arbitration clauses in contracts of adhesion, the issue of what measures businesses must take to ensure that customers agree to the terms of sale was also raised.

3. Unfortunately, the Court missed a rare opportunity to clarify the law around "click-wrap" and "browse-wrap" contracts of adhesion generally. Instead, its findings on the issue

2. *Dell Computer Corp.* v. *Union des Consommateurs*, 2007 SCC 34 (Lexum), [On line]. http://scc.lexum.umontreal.ca/en/2007/2007scc34/2007scc34.html.

3. The Superior Court ruled that the arbitration agreement violated article 3149 of the *Civil Code of Québec* by substituting a U.S. based institute (the National Arbitration Forum) governed by U.S. law for Québec authorities. The Québec Court of Appeal found that Dell's "Terms and Conditions of Sale" constituted an "external clause" under article 1435 of the *Civil Code of Québec*, and that the arbitration agreement had not been "expressly brought to the attention" of Dumoulin as required by article 1435 : *Dell Computer Corp.* c. *Union des consommateurs*, [2005] R.J.Q. 1448 (C.A.).

of contract formation focused on article 1435 of the *Civil Code of Québec* — a rule protecting consumers from "external clauses" in contracts of adhesion. By failing to examine the broader issue of consumer consent to adhesion contracts in the online context, the Court missed an opportunity to advance consumer protection and commercial certainty in the online context.

2. E-CONTRACT FORMATION AND THE REQUIREMENT FOR CONSUMER ASSENT

4. By definition,[4] a contract is a bilateral juridical act, meaning that it is formed once there is coincidence of the offeror's offer and the offeree's acceptance. Although not concerning itself with the subjective state of mind of the parties, contract law requires evidence of an "agreement of wills" (art. 1378 C.C.Q.) or an "exchange of consents" (art. 1385 C.C.Q.) (in common law, a "meeting of the minds," or *consensus ad idem*[5]) in order to enforce a disputed contract.

5. Because they are not negotiated by the two parties but are instead offered on a "take it or leave it" basis, contracts of adhesion pose particular challenges to the notion of a "meeting of the minds." This is particularly true where the terms of contract are lengthy, difficult to understand, not brought to the attention of the customer, or presented in a manner that is not conducive to review. Recognizing the realities of mass-market commerce, the law in both civil and common law jurisdictions generally *deems* consent by consumers to adhesion contracts as long as the terms in question are not invalid pursuant to consumer protection statutes (or, under common law, pursuant to the doctrine of unconscionability), and as long as applicable disclosure and form requirements are met.[6]

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4. See, for example, *Civil Code of Québec*, art. 1378: "A contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation."

5. Richard LORD, *Williston on Contracts: A Treatise on the Law of Contracts*, 4th ed., Vol. 1, Rochester, NY, Lawyers Cooperative Publishing, 1990, par. 3:4, pp. 210-211; Stephen M. WADDAMS, *The Law of Contracts*, 5th ed., Toronto, Canada Law Book, 2005, para. 140.

6. S. M. WADDAMS, *The Law of Contracts*, *id.*, para. 441, p. 313-314.

6. Accordingly, the Supreme Court of Canada in *Dell Computer* rejected the argument that Dumoulin did not consent to Dell's terms of sale because they were imposed on him via a contract of adhesion. The minority quoted J.-L. Baudouin and P.-G. Jobin as follows :

> [Translation] Since the adhering party's only choice is between entering into the contract on the terms imposed by the other party and not entering into it, the question that arises is whether this is a true contract, that is, an *agreement of the wills* of the parties. Some authors argue that a contract of adhesion is more akin to a unilateral juridical act, whereas a contract is a bilateral juridical act. However, most authors consider a contract of adhesion to be a true contract even though the role of the will of the adhering party is reduced to a minimum. Support for this position can be found in the variety of mechanisms that have been developed at law to correct the inequities and problems of consent that result from the adhering party's inability to negotiate [...]. [Emphasis in original][7]

7. In Québec, such mechanisms include rules invalidating "abusive clauses"[8] and other substantively unfair terms.[9] They also include a general rule that "consent may be given only in a free and enlightened manner"[10] (suggesting disclosure obligations on the part of the offeror), and specific disclosure requirements such as in the case of "external clauses"[11]

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7. Pierre-Gabriel JOBIN, Nathalie VÉZINA, *Les obligations*, 6th ed., Cowansville, Éditions Yvon Blais, 2005, p. 79; quoted in *Dell Computer Corp.* v. *Union des Consommateurs*, *supra*, note 2, par. 227.

8. Art. 1437 C.C.Q. : "An abusive clause in a consumer contract or contract of adhesion is null, or the obligation arising from it may be reduced. An abusive clause is a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and is therefore not in good faith; in particular, a clause which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract is an abusive clause."

9. See, for example, ss. 8, 10, 11, 11.1, 13, 19 of the *Consumer Protection Act*, R.S.Q., c. P-40.1.

10. Art. 1399 C.C.Q.

11. Art. 1435 C.C.Q. : "In a consumer contract or a contract of adhesion, [...]. an external clause is null if, at the time of formation of the contract, it was not expressly brought to the attention of the consumer or adhering party, unless the other party proves that the consumer or adhering party otherwise knew of it."

and certain types of consumer transactions.[12] It is not clear, however, what *evidence of consumer assent* is required in order to make an online contract of adhesion binding on the consumer.

8. In the offline context, assent to the terms of contract is typically demonstrated via a handwritten signature (art. 2829 C.C.Q.). This is difficult in the context of mass-marketed products and services, hence reliance on notice and deemed assent in combination with other consumer protection mechanisms mentioned above.[13] Courts in common law jurisdictions have generally held that "a document delivered by one party to the other at the time of the contract may be incorporated into the agreement if the document is the sort of document generally known to contain contractual terms and if the party seeking to rely on the document has taken reasonable steps to bring those terms to the other's attention".[14] But how such notions apply in the online context remains unclear. Legislation passed in all Canadian provinces gives legal effect to electronic documents and provides for the functional equivalence of different media for the creation, retention, transmission, and consultation of documents, but does not answer these questions.[15]

9. Courts should be careful when transposing rules designed for the offline context into the online context, given significant differences in, for example, ways in which terms can be presented to consumers, and the ease with which

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12. See, for example, ss. 58, 158, 170, 184, 190, 199, *Consumer Protection Act*, *supra*, note 9.

13. See, for example, consumers have been held to terms printed on the back of tickets: *Bata* v. *City Parking Canada Ltd.*, (1973) 43 D.L.R. (3d) 190 (Ont. C.A.), and on bills of lading, as well as to terms set out in "shrink-wrap" contracts that are readable by the consumer only after purchase of the product: *ProCD* v. *Zeidenberg*, 86 F. 3d 1447, 1450 (7th Cir. 1996).

14. S. M. WADDAMS, *The Law of Contracts*, *op. cit.*, note 5, para. 65, p. 47-49.

15. The Québec *Act to Establish a Legal Framework for Information Technology*, R.S.Q., c. C-1.1 [S.Q. 2001, c. 32], for example, states in section 31 that "A technology-based document is presumed received or delivered where it becomes accessible at the address indicated by the recipient as the address where the recipient accepts the receipt of documents from the sender[...]." The Ontario *Electronic Commerce Act, 2000*, S.O. 2000, c. 17, states in section 10 that a document legally required to be in writing, in original form, or in a specified non-electronic format is "not provided to a person if it is merely made available for access by the person, for example on a website."

consumer assent can be obtained. In particular, automation of electronic commerce has meant that obtaining explicit consumer assent to terms of sale is much simpler online than offline. Thus, while it may be unreasonable to expect a parking lot operator to obtain each customer's signature on the terms of service, it is not unreasonable to expect an online vendor to require each customer to scroll through the terms of service and click "I agree" before completing the transaction. The fact that "click-wrap" contracting methods (see below) have become the norm in online transactions is evidence that they do not involve unreasonable effort on the part of businesses.

10. Yet, the law remains undeveloped on this point, leaving unresolved fundamental questions as to whether it is sufficient for the terms in question to be merely available online for the consumer to review prior to contracting, or instead whether the business must obtain the consumer's express assent to the terms in order for them to be binding. Unfortunately, the Court in *Dell Computer* did not address this issue directly. Nevertheless, the reasoning of both the majority and minority suggests that they would find online adhesion contracts to be binding even without any express manifestation of consumer assent to the terms, as long as the terms of contract are available for review.[16] Other courts, confronted with the same issue, have explicitly taken this approach.[17]

11. Some courts, however, have taken a different approach. In the case of *Specht* v. *Netscape Communications Corp.*,[18] a New York appeals court found an online contract to be unenforceable against the consumer in part because there

16. See *Dell Computer Corp.* v. *Union des Consommateurs*, *supra*, note 2, paras. 100-101 of the majority decision, and paras. 232, 238 and 240 of the minority decision.

17. *Ticketmaster Corp.* v. *Tickets.com, Inc.*, U.S. Dist. Ct. LEXIS 6483 (C.D. Cal. 2003); *Register.com, Inc.* v. *Verio, Inc.*, 126 F Supp. 2d 238 (S.D.N.Y. 2000); *Pollstar* v. *Gigmania Ltd.*, 170 F Supp. 2d 974 (E.D. Cal. 200) (however the court in this case hesitated, finding only that "the browser wrap license agreement *may be arguably* valid and enforceable").

18. *Specht* v. *Netscape Communications Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001); affirmed by *Specht* v. *Netscape Communications Corp.*, 306 F. 3d 17 (2d Cir. N.Y., 2002).

was no clear manifestation of the consumer's assent to the terms of the contract:

> Netscape argues that the mere act of downloading indicates assent. However, downloading is hardly an unambiguous indication of assent. The primary purpose of downloading is to obtain a product, not to assent to an agreement. In contrast, clicking on an icon stating "I assent" has no meaning or purpose other than to indicate such assent. Netscape's failure to require users of SmartDownload to indicate assent to its license as a precondition to downloading and using its software is fatal to its argument that a contract has been formed.[19]

12. Similarly, in *Ticketmaster Corp.* v. *Tickets.com, Inc.*,[20] a California court held that website terms purporting to be agreements could not be considered binding, since "it cannot be said that merely putting the terms and conditions in this fashion necessarily creates a contract with anyone using the website."[21]

3. Online Contracting: "Click-Wrap" vs. "Browse-Wrap" Approaches

13. It has become customary for online businesses to obtain evidence of the consumer's assent to an adhesion contract by means of "click-wrap" contracts. The term "click-wrap" refers to the physical act taken by the consumer to express his or

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19. It was also relevant that Netscape, in this case, failed to "provide adequate notice either that a contract is being created or that the terms of the License Agreement will bind the user."

20. *Ticketmaster Corp.* v. *Tickets.com, Inc.*, 2000 U.S. Dist. LEXIS 12987; copy L. Rep. (CCH) p. 28146 (C.D. Cal. 2000).

21. This finding was reversed on appeal, in part because Ticketmaster had changed its practice and "placed in a prominent place on the home page the warning that proceeding further binds the user to the conditions of use." Moreover, in the intervening period, there had been gathered "sufficient evidence to defeat summary judgment on the contract theory if knowledge of the asserted conditions of use was had by Tickets.com." In this context, the Appeals court found that "the principle has long been established that no particular form of words is necessary to indicate assent — the offeror may specify that a certain action in connection with his offer is deemed acceptance, and ripens into a contract when the action is taken. [...] Thus, as relevant here, a contract can be formed by proceeding into the interior web pages after knowledge (or, in some cases, presumptive knowledge) of the conditions accepted when doing so.": *Ticketmaster Corp.* v. *Tickets.com, Inc.*, *supra*, note 17.

her assent to the terms of sale : a click of the computer mouse on a button that usually states "I agree," with reference to the said terms of sale. Some online businesses require customers to scroll through the full set of terms before clicking "I agree," or require the customer to agree to a more specific statement such as "I have read and understand and agree to the terms of sale," before the transaction can be concluded. In any case, click-wrap contracts are characterized by the consumer's clear act of assent to the terms of contract, separate from the act of assenting to the purchase itself. Click-wrap contracts have been found to be binding on consumers, as long as their terms are not unconscionable.[22]

14. In contrast, "browse-wrap" methods of contracting require no separate act of assent by the consumer to the terms of sale. Instead, the consumer's agreement to the posted terms is assumed on the basis that they are *capable* of being accessed by the consumer by simply browsing the site. As in the case of click-wrap contracts, the terms are accessible via a hyperlink, commonly located at the bottom of the webpage along with other standard information such as contact details and privacy policies. Unlike click-wrap methods, however, browse-wrap methods do not necessarily involve any active measure by the business to bring the terms of sale to the attention of the customer; passively making them available for review is sufficient. Within this category, one can differentiate "browse-wrap with notice" from simple browse-wrap without any efforts to bring the terms to the attention of the customer.

15. In the instant case, Dell relied upon a "browse-wrap with notice" approach. Its "Terms and Conditions of Sale" were available via a hyperlink on the website, but customers were neither required to click on the terms nor to express their assent to the terms in order to transact. The link to the terms was situated at the bottom of each webpage. In addition, it was included on the transaction page with a statement that the sale was subject to Terms and Conditions of Sale (the notice). Focusing on the narrow issue of "external clauses" under Québec law, the Court found that Dell's terms of sale were binding on consumers because they were reasonably accessible.

22. *Rudder* v. *Microsoft Corp.*, (1999) 2 C.P.R. (4th) 474 (Ont. S.C.J.).

16. The Court's reasoning on this important e-commerce issue is disappointing. Neither the majority nor the minority addressed the issue of e-consent other than in the context of article 1435 of the *Civil Code of Québec*, which invalidates "external clauses" in consumer contracts or contracts of adhesion unless they are "expressly brought to the attention of the consumer or the adhering party... ." The majority found that the arbitration clause was not an "external clause" under article 1435 because it "was no more difficult for the consumer to access than would have been the case had he or she been given a paper copy of the entire contract on which the terms and conditions of sale appeared on the back of the first page."[23] According to the majority, this settled the issue of whether there was a binding agreement between the parties.[24]

17. The minority followed similar reasoning, accepting Dell's evidence that placing a hyperlink to the terms of sale at the bottom of every webpage is "consistent with industry standards," such that "it is proper to assume, then, that consumers that were engaging in e-commerce at the time would have expected to find a company's terms and conditions at the bottom of the web page."[25] "Furthermore," they reasoned, "the Configurator Page [transaction page] contained a notice that the sale was subject to the Terms and Conditions of Sale, available by hyperlink, thus bringing the Terms and Conditions expressly to Dumoulin's attention." It is not clear whether the former (mere hyperlink) was considered to be sufficient to bind consumers, or whether Dell's additional notice on the Configurator (transaction) page was critical to the minority's finding.

18. In any case, the possibility of requiring that Dumoulin agree to the Terms by way of an explicit click, separate from agreement to the transaction, was apparently not considered by the Court, despite the fact that it is common practice, just as posting links to the Terms and Conditions at the bottom of

23. *Dell Computer Corp.* v. *Union des Consommateurs*, *supra*, note 2, para. 100.

24. *Id.*, para. 108: "In the case at bar, the parties agreed to submit their disputes to arbitration."

25. *Id.*, para. 238.

each webpage is an industry standard. Such an approach (since adopted by Dell) would, of course, have ensured that the Terms were brought to Dumoulin's attention.

19. The Court was apparently limited in its analysis of this issue by Québec law, which expressly requires that clauses be "expressly brought to the attention of the consumer" only when they are "external clauses." In the view of both the majority and minority, the clause in question did not constitute an "external clause," and therefore did not engage the "express notice" requirement.[26] Nevertheless, the minority went on to find that the Terms were in fact brought to the customer's attention in this case by way of a more conspicuous notice on the Configurator page, and that once the hyperlinked Terms were clicked on, the clause in question was easily locatable.[27] This, in the Court's view, met all the requirements for a valid contract. In coming to its decision, the minority reasoned that "as e-commerce increasingly gains a greater foothold within our society, courts must be mindful of advancing the goal of commercial certainty," and that "the context demands that a certain level of computer competence be attributed to those who choose to engage in e-commerce."[28]

20. This reasoning was borrowed from lower court findings in two early e-commerce cases from Ontario in which the plaintiffs were held to a high standard of computer literacy.[29] With respect, we wonder how accurate and fair such an attribution is in 2007, when a large majority of Canadians are transacting online,[30] often in response to heavy pressure from businesses to do so. Moreover, the Court's failure to address the issue of browse-wrap contracts head-on has, in our view, not served the goal of commercial certainty.

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26. *Id.*, paras. 90-104, and 230-241.

27. *Id.*, paras. 238-240. The majority's finding was based on the mere accessibility of the hyperlink to the Terms and Conditions of Sale.

28. *Id.*, para. 232.

29. *Rudder* v. *Microsoft Corp.*, *supra*, note 22; *Kanitz* v. *Rogers*, (2002) 58 O.R. (3d) 299 (Ont. S.C.J.).

30. According to Statistics Canada, 68 % of Canadians used the Internet for personal non-business reasons in 2005 : *The Daily*, August 15, 2006.

4. POLICY REASONS TO INVALIDATE BROWSE-WRAP CONTRACTS

21. It could be argued that an explicit consent requirement adds nothing of value to consumers engaged in online contracting, as long as the terms are readily available for review. This theory can no doubt be supported by evidence proving that most consumers assent to standard terms without reading, let alone understanding, them.[31] As one commentator has stated, "No idea is more insipid than the one of consent in the context of standardized terms."[32]

22. We agree that consumer consent to standard form contracts is rarely more than a legal fiction, and that meaningful consumer protection measures should therefore focus on invalidating if not prohibiting unfair terms in consumer contracts. Regardless, there are good policy reasons to require clear evidence of consumer consent to adhesion contracts.[33] First, consumers have not drafted the terms. Instead, the terms are being imposed on them. In this context, consent cannot and should not be assumed.

23. Second, the party that is imposing the terms has interests that conflict in many ways with those of consumers. It is therefore not surprising that many common terms are excessively one-sided and detrimental to the consumer. As long as some terms that restrain consumers' rights are allowed in adhesion contracts, it becomes especially important that they are not only brought to the attention of consumers, but unequivocally agreed to. Indeed, we would argue that such terms should require consent *separate* from the rest of the contract, so as to force businesses to be up front about them and at the same time to increase the likelihood that consumers are aware of them.

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31. See Nathaniel S. GOOD, Jens GROSSKLAGS, Deirdre MULLIGAN, and Joseph A. KONSTAN, "Noticing Notice : A Large-Scale Experiment on the Timing of Software License Agreements", *Proceedings of the SIGCHI Conference on Human Factors in Computing Systems*, New York, ACM Press, 2007.

32. John A. BURKE, "Reinventing Contract", *Murdoch University Electronic Journal of Law*, Vol. 10, No. 2 (June 2003).

33. See Vincent GAUTRAIS, "The Colour of E-Consent", (2003-2004) 1 *U.O.L.T.J.* 189.

24. Third, requiring that businesses obtain express consumer consent to the terms advances the goal of a properly functioning marketplace by increasing the likelihood the consumers will make purchasing decisions based on the applicable terms of sale. If consent to specific terms that restrain consumers' rights were required, businesses might actually compete on such terms, rather than hiding them in lengthy, dense documents that few consumers read. Shedding the bright light of the marketplace on unfair terms could well lead to a fairer marketplace for all.[34]

25. It is true that the same arguments apply in the offline context. However, as explained above, the impracticality of obtaining express consumer consent, central to the theory that consumer assent to standard terms can be deemed as long as sufficient notice of such terms is provided, is not present in the online context. Indeed, it is a simple matter for online businesses to require that customers click "I agree" to the terms, thereby unequivocally manifesting their assent. This fundamental difference between the two environments calls for a more nuanced approach when transposing requirements for valid adhesion contracts from one setting to the other.

26. Some provinces in Canada have enacted laws allowing consumers to cancel online transactions if the vendor relies upon browse-wrap methods for obtaining the consumer's assent to certain terms and conditions of sale.[35] These laws are based on a legislative template[36] drafted by the Consumer Measures Committee[37] and approved in 2001 by

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34. In keeping with this goal, businesses should be required to make their terms of sale publicly available for review by consumers generally, outside the context of specific transactions.

35. *Internet Sales Contract Regulation*, Alta. Reg. 81/2001; *Internet Sales Contract Regulations*, N.S. Reg. 91/2002; *Consumer Protection Act*, C.C.S.M. c. C. 200 at ss. 127-133; *Internet Agreements Regulation*, Man. Reg. 176/2000; *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 at ss. 46-51; *Consumer Protection Act, 2002*, S.O. 2002, c. 30 at ss. 37-40; *Consumer Protection Act, 2002 Regulations*, O. Reg. 17/05 at ss. 31-33.

36. *Internet Sales Contract Harmonization Template*, [On line]. http ://www.ic.gc.ca/epic/site/oca-bc.nsf/en/ca01642e.html.

37. The CMC is "a federal-provincial-territorial forum for national cooperation to improve the marketplace for Canadian consumers through harmonization of laws, regulations and practices and through actions to raise public awareness." See , [On line]. http ://www.cmcweb.ca.

federal, provincial and territorial Ministers responsible for consumer affairs. Ontario's *Consumer Protection Act, 2002*, for example, requires that online vendors disclose, among other things, cancellation, exchange, return and refund policies and that such disclosure "shall be accessible and shall be available in a manner that ensures that (a) the consumer has accessed the information[...]".[38] While these laws do not require explicit consumer assent to all terms and conditions of sale, they are evidence of broad policy agreement that browse-wrap approaches are inadequate for at least certain key contractual provisions in online consumer transactions.

27. The online context provides an unprecedented opportunity for courts and legislatures to ensure greater fairness in the marketplace. In the absence of comprehensive laws prohibiting or invalidating unfair terms, it can be expected that businesses will continue to exploit their bargaining power[39] by including unfair terms in the terms of sale that they impose on consumers. Requiring that businesses not only bring to the attention of consumers terms that restrain their rights, but also obtain the consumer's explicit assent to such terms, may go some way toward levelling the playing field between businesses and consumers.

5. Approaches to Unfair Terms in Adhesion Contracts

28. The majority in *Dell Computer* found that binding arbitration clauses in contracts of adhesion were valid under Québec law at the time,[40] despite the fact that they force the consumer, before the dispute has even arisen, to give up the right to sue in court. The minority dissented, arguing that Dell's arbitration clause was invalid under article 3149 of the

38. *Consumer Protection Act, 2002*, *supra*, note 35, Sch. A, s. 38.

39. By "bargaining power" we mean information, time, investment, resources to defend one's position, etc.

40. Subsequent to the filing of the case, and prior to its argument, the Québec legislature passed a law invalidating such clauses in pre-dispute consumer contracts : Bill 48, now s. 11.1, *Consumer Protection Act*, *supra*, note 9.

Civil Code, on the grounds that "a contractual arbitrator cannot be a 'Québec authority.'" Article 3149 states :

> A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

29. In its reasoning on this point, the minority noted that :

> [...] our interpretation [does not] signify that arbitration clauses in consumer and worker contracts are always invalid. It simply means that the agreement to arbitrate in advance of the dispute, which is the effect of an arbitration clause included in a contract of adhesion, could not be set up against the consumer or worker. The consumer or worker could well decide they want to arbitrate; in that case, recourse to art. 3149 is unnecessary.[41]

30. Unfortunately, the rationale behind this interpretation of article 3149 — that forcing consumers to agree to arbitration *in advance of the dispute arising* is unfair — was lost on all members of the Court when it came to considering whether the arbitration clause in *Dell Computer* was abusive, contrary to public policy, or otherwise void. The minority, for example, stated :

> The [pre-dispute] agreement to arbitrate a consumer dispute is not inherently unfair and abusive for the consumer. On the contrary, it may well facilitate the consumer's access to justice.[42]

31. Giving consumers the option of arbitration once a dispute has arisen clearly facilitates the consumer's access to justice. With respect, forcing consumers to waive their right to access the publicly funded justice system *in advance of*

41. *Dell Computer Corp.* v. *Union des Consommateurs*, *supra*, note 2, para. 216.

42. *Id.*, para. 229.

any dispute arising cannot be said to facilitate the consumer's access to justice. This has been recognized by other courts and legislatures, who have found pre-dispute mandatory arbitration clauses in the context of adhesion contracts to be unconscionable[43] or have passed laws invalidating them.[44] Indeed, the Québec legislature did just that before the *Dell Computer* case was argued.[45] Unfortunately for Mr. Dumoulin, the Québec legislature was too late to protect him from Dell's mandatory arbitration clause, but other Québec consumers who wish to pursue disputes with businesses can now enjoy a meaningful right to choose their dispute resolution forum.

32. As the minority in *Dell Computer* recognized,[46] legislatures play a critical role in balancing the inequality of bargaining power between businesses and consumers. It is common, for example, to legislate the invalidity of "unfair terms" in consumer contracts, listing specific terms that are considered to be "unfair".[47]

33. Short of legislative prohibition or invalidation of unfair terms, however, there are simple methods by which courts and legislatures can help to counter the vast disparities in bargaining power between businesses and consumers in the online context. Such methods include requiring that businesses bring to the attention of consumers specific terms that restrain their rights,[48] and obtain the customer's assent to

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43. *Comb* v. *PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002); *Brazil* v. *Dell*, 2007 U.S. Dist. LEXIS 59095 (N.D.Cal. 2007).

44. *Ontario Consumer Protection Act, 2002*, *supra*, note 35, ss. 7, 8; B.C. *Business Practices and Consumer Protection Act*, *supra*, note 35, ss. 3, 171; Alberta *Fair Trading Act*, R.S.A. 2000, c. F-2, ss. 2(1), 13(1); Brazil *Consumer Defense Code*, Act n. 8.078 (11 Sept. 1990), Article 51 (VII).

45. *Consumer Protection Act*, *supra*, note 9, s. 11.1.

46. *Dell Computer Corp.* v. *Union des Consommateurs*, *supra*, note 2, para. 227.

47. See, for example, the EU *Unfair Contract Terms Directive*, 93/13/EEC, 5 April 1993, and member state legislation implementing this directive. See also the *Brazil Consumer Defense Code*, Act n. 8.078 (11 Sept. 1990), Article 51.

48. As required by Article 54 (4) of the Brazil *Consumer Defense Code* : [Translation] "Contractual terms and conditions that restrain consumers' rights must be brought to the attention of the consumer in a manner that allows for immediate and easy comprehension."

each such term. While this would no doubt slow e-commerce and frustrate many consumers and businesses in the short term, it would create a powerful incentive for businesses to reconsider many of the one-sided and unfair terms that they currently include in their online contracts. In the long term, it could result in a much fairer marketplace.

34. Requirements for online businesses to make their terms of sale publicly available online, so that consumers can compare terms as they shop around, would further improve the electronic marketplace as businesses would thereby be encouraged to compete on more than just price and reputation. For similar reasons, businesses should be required to present their terms online in a manner that allows for saving or printing without undue effort.

35. At a minimum, however, businesses should be required to obtain express consent from online consumers to the terms of sale before such terms can be considered binding. While this provides only minimal protection to consumers from unfair terms, it at least ensures that they have been made aware of the existence of a set of terms. It is notable in this respect, and to Dell's credit, that the company changed its practice after the case was brought, and now requires consumers to express their assent to the contract by clicking the statement: "I AGREE to Dell's Terms and Conditions of Sale."

36. In our view, a proper application in the online environment of the law regarding offline consumer contracts (i.e., the requirement for reasonable steps to bring the terms to the consumer's attention) requires such measures, given the ease with which they can be implemented online.

6. Conclusion

37. Electronic contracts offer particularly fertile ground for businesses to impose unfair terms on consumers. Businesses know that consumers do not and cannot reasonably be expected to research, compare, and make purchasing decisions on the basis of terms dealing with such matters as dispute resolution or liability. Yet as the Supreme Court's decision in *Dell Computer* demonstrates, Canadian courts are

reluctant to interfere with the legal fiction of consumer assent to contracts of adhesion, even where the terms imposed are clearly one-sided and detrimental to the consumer. The only truly effective way to protect consumers from unfair terms is therefore to prohibit or invalidate them by legislation, as the Québec legislature has now done in respect of the pre-dispute arbitration clause that was at issue in the *Dell Computer* case.

38. Recognizing however that legislatures will often permit arguably unfair terms to apply, and that reasonable people will disagree on whether certain terms are unfair, businesses should be required to obtain explicit assent to terms that restrain consumers' rights where to do so is not impractical. As the prevalence of click-wrap contracting methods in the online context demonstrates, it is not impractical for online businesses to obtain such consent.

39. The approach likely to be most effective, both in ensuring that the contract represents a true agreement between the parties and in discouraging businesses from imposing unfair terms on consumers, is to require the consumer's explicit assent to each term that restrains the consumer's rights. At a minimum, however, the consumer's express assent to the full set of terms, with specific detrimental terms highlighted, should be required. Given the ease of implementing click-wrap approaches online, there is no good reason to accept browse-wrap contracts in the context of consumer e-commerce.

40. The Supreme Court's decision in *Dell Computer* is disappointing in a number of respects, not just its failure to appreciate the unfairness inherent in pre-dispute arbitration clauses in consumer contracts. The Court's lack of awareness of the realities of consumer e-commerce, its uncritical acceptance of legal fictions such as "the autonomy of the parties," and its failure to distinguish the business-to-consumer context from the business-to-business context, resulted in a decision that, while facilitating business interests, leaves Canadian consumers with little hope of achieving marketplace fairness through court challenges. If the *Dell Computer* decision stands for anything, it is that Canadian consumers must rely on legislatures, not

the courts, to protect them from unfair terms and practices in the online marketplace.

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