

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN

COOL WORLD TECHNOLOGIES, INC.

First Applicant

and

ETHEL KATHERINE DODDS

Second Applicant

and

TWITTER, INC.

First Respondent

and

TWITTER CANADA ULC

Second Respondent

APPLICATION UNDER RULE 14.05 OF THE *RULES OF CIVIL PROCEDURE*

NOTICE OF APPLICATION

TO THE RESPONDENTS

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION will come on for a hearing on _____, at 10:00 am, at 393 University Avenue, 10th Floor, Toronto ON, M5G 1E6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

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APPLICATION

1. The Applicants make application for:

- (a) An order declaring that the Respondents' Political Content Policy, Cause-Based Advertising Policy, Inappropriate Content Policy and Targeting of Sensitive Categories Policy, which are incorporated by reference into its User Agreement with the Applicants, and which it enforced to refuse to promote a Tweet of the Applicants, violate the doctrine of public policy under contract law, and are therefore void;
- (b) In the alternative to (a), an order that the Respondents' Political Content Policy, Cause-Based Advertising Policy, Inappropriate Content Policy and Targeting of Sensitive Categories Policy must be read down to comply with the doctrine of public policy;
- (c) An order declaring that the Respondents' refusals to promote the Applicants' Tweet and run the Applicants' advertisements pursuant to the Respondents' Political Content Policy, Cause-Based Advertising Policy, and/or Inappropriate Content Policy breached its duty of good faith under contract law;
- (d) An order declaring that the Respondents' freedom of contract does not license their inclusion of the Political Content Policy, Cause-Based Advertising Policy, and Inappropriate Content Policy in their User Agreement;
- (e) In the alternative to (d), an order that Respondents' freedom of contract does not license their refusals to promote the Applicants' Tweet and run the Applicants' advertisements;
- (f) An order for costs;
- (g) Such relief as may be sought by the Applicants and as this Honourable Court may deem just;
and
- (h) Such further and other relief as to this Honourable Court may deem just.

2. The grounds for the application are:

Overview and Applicants

- (a) This case arises at a moment of revolutionary change in communications in Canada and worldwide. Over the last two decades, the social media platform operated by the Respondents, Twitter, which hosts hundreds of millions of users across the globe, has become a central

public arena for democratic dialogue and debate among citizens, organizations, and governments. Twitter is widely regarded, and promotes itself, as a forum for expressive activity, open to all. It is where heads of state, politicians, and public institutions make significant statements, communicate with citizens and media, and relay critical information. Moreover, Twitter is a platform for citizens to engage with political decision-makers and each other. Because of its role as a public arena for political and social speech, Twitter is unique among companies, including traditional media outlets and other social media platforms.

- (b) Within Canada, Twitter is the principal social media platform for government communications. Prime Minister Trudeau has 5.6M Twitter followers (@JustinTrudeau), and makes all of his important announcements there. Official accounts now exist for federal, provincial and territorial ministers and departments. The Supreme Court of Canada (@SCC_eng and @CSC_fra), the Ontario Court of Appeal (@ONCA_en), the Superior Court of Justice (Ontario) (@SCJOntario_en) and the Ontario Court of Justice (@OntarioOn) all have accounts on Twitter. The COVID-19 pandemic has cemented Twitter's role as the social media platform of choice for Canadian public institutions: for example, the Superior Court relied on Twitter to issue a historically unprecedented number of Notices to the Profession to adapt court operations and procedures.
- (c) Twitter's substantial power over democratic dialogue and debate is widely regarded as a matter of urgent public concern that is intrinsically tied to the fate of democracy itself. The reason is the absolute power of Twitter to censor at will the political and social expression which takes place on its platform, through exercise of its ownership rights. Twitter wields its power as owner to ban ("de-platform") users, suspend tweets, hide tweets, and refuse to promote tweets at its discretion. There is little to no transparency to the processes that lead to these decisions, many of which are automated through the use of artificial intelligence. In addition, Twitter's decisions to censor speech in Canada are made mainly from its corporate headquarters in California.
- (d) As the Supreme Court has observed, " 'access to ... social media platforms, including the online communities they make possible, has become increasingly important for the exercise of free speech, freedom of association and for full participation in democracy.' " (*Douez v. Facebook*, 2017 SCC 33 at para. 56). The United States Supreme Court has likewise stated that social media platforms are a "quintessential forum for the exercise of First Amendment rights,"

and that “[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular” (*Packingham v. North Carolina*, 582 US _ (2017) at 5).

- (e) Nevertheless, Canada has not regulated Twitter to protect freedom of expression. By default, in the absence of government regulation, Twitter is governed by the online standard form agreement (the “**User Agreement**”), a contract of adhesion in relation to which there is no negotiation, that it has entered with its hundreds of millions of users worldwide, including millions of users in Canada.
- (f) The fundamental question raised by this Application is: how must the common law of contracts evolve to respond to Twitter, a platform that, while privately owned, has become a public arena for democratic dialogue and debate and has powerful sway over core constitutional values of freedom of expression and democracy?
- (g) The First Applicant, Cool World Technologies Inc. (“**Cool World**”) is a marketing firm incorporated under the *Canada Business Corporations Act*, RSC 1985, c C-44. Cool World specializes in campaigns and strategies on social media platforms, particularly Respondents’. The Second Applicant, Ethel Katherine Dodds (“**Dodds**”) is CEO and co-founder of Cool World.
- (h) In the fall of 2020, Cool World entered into a contract with Grant Street Productions (“**GSP**”), a film production company, to, *inter alia*, “deploy[] Direct outreach campaigns” to promote GSP’s newly released feature documentary film, *The New Corporation: The Unfortunately Necessary Sequel*.
- (i) *The New Corporation* was commissioned by the Canadian broadcaster Crave (Bell Media), and funded by, among others, the Rogers Documentary Fund, Telefilm Canada, and the Canada Media Fund. *The New Corporation* is a sequel to the award-winning 2003 documentary film, *The Corporation*. Both films are based on award-winning books by University of British Columbia law professor Joel Bakan, published in North America by Simon and Schuster and Penguin Random House. Both the books and films have been translated into dozens of languages. Bakan is co-director (with Jennifer Abbott), writer, and executive producer of *The New Corporation*.

- (j) *The New Corporation* premiered at the Toronto International Film Festival in September 2020, and was released in Canada by Crave in February 2021. It has played at numerous international film festivals, been nominated for awards, and continues to be lauded by critics, including in reviews appearing in (among many other outlets) the *Globe and Mail*, *Variety* and *Forbes Magazine*. Based upon rigorous research and analysis, the film features interviews with leading scholars (such as Michael Sandel, Klaus Schwab, and Wendy Brown), business people (such as Lord John Brown, Jamie Dimon, and Richard Edelman), and activists (such as Vandana Shiva, Grand Chief Stewart Phillip, and Mayor Ada Colau). Universities, business groups, and civil society organizations have held (and continue to hold) special screenings of the film, and the film and book have been featured and discussed at international scholarly conferences.
- (k) In partial fulfilment of its contractual obligations to GSP, Cool World, through Jane Tattersall (“**Tattersall**”) of SqueezeCMM, a Toronto-based marketing firm, sought to purchase promotion of Tweets and advertisements from the Respondents that featured a trailer of *The New Corporation*. It did this based on its knowledge that Tweets which are not promoted reach only a small fraction (3 to 5%) of an account holder’s followers, and do not reach any non-follower users.
- (l) The Tweets and ads were comprised mainly of a link to a one minute and fifty second trailer for *The New Corporation*. Dodds used a Twitter account that she owned, @CorporationFilm, to create the Tweets that she wished Cool World to promote and to solicit the ads. Under its agreement with GSP, Cool World undertakes to manage all advertising for *The New Corporation*, while payment for advertising is by GSP or the film’s distributor.
- (m) The attempt to purchase promotion of Tweets and ads on Dodds’ @CorporationFilm account was made on 18 November 2020 by Tattersall, on the basis of an oral agreement between Dodds and SqueezeCMM. Dodds’ @CorporationFilm account is, like all Twitter accounts, governed by the User Agreement. Article 1 of the User Agreement establishes a contractual relationship between Dodds and the first Respondent. Article 4 of the User Agreement incorporates by reference the “Twitter Rules and Policies”, which include the Twitter Ads policies. Article 4 also provides that a Twitter account holder that wishes to advertise on Twitter (including through promoted Tweets) must agree to the Twitter Master Services Agreement (“**Master Services Agreement**”). Article 3 of the Master Services Agreement subjects advertising to compliance with the Twitter Ads policies.

- (n) On 18 November 2020, the Respondents refused Tattersall’s requests through an automated reply (“**Rejection No. 1**”).
- (o) From November through December 2020, Tattersall challenged Twitter’s refusals through Twitter’s internal complaints procedure. Twitter rejected Cool World’s requests five more times – for a total of six rejections. Each time, Twitter offered a different justification for rejecting Cool World’s requests.
- (p) On 18 November 2020 Tattersall requested an explanation from Twitter for Rejection No. 1.
- (q) On 18 November 2020, Twitter sent what appeared to be an automated reply explaining that: “Tweets can be disapproved if they are found to violate the Twitter Ads Policies,” and provided links to those policies (“**Rejection No. 2**”).
- (r) On 19 November 2020, Tattersall responded to Rejection No. 2: “I read reason for the disapproval of the campaign and also the policy. It says ‘sensitive targeting’ but I can’t tell what in my audience target would qualify for that. I removed several keywords and focused on authorized accounts as I thought that would help? Can you advise what in the targeting is considered the violation so I can remove it?”.
- (s) On 20 November 2020, Twitter replied: “Our team reviewed your content and confirmed that it violates our Political Content policy. Some examples of content that violate this policy include, but are not limited to: referencing a candidate for election, a political party, or an election; appeals for votes; appeals for financial support; legislative advocacy.” (“**Rejection No. 3**”).
- (t) On 20 November 2020, Tattersall responded to Rejection No. 3, and wrote Twitter: “The video is a trailer for a documentary film about abuse of power of corporations – it is not inherently political in the sense that it is not advocating for any candidate or any election, or appealing for financial support, votes or any specific legislative advocacy....It has received accolades across all facets of media.... Please advise [why] a documentary chronicling abuse of corporate power would be perceived as a violation of policy on the Twitter platform. Please escalate this issue.”
- (u) On 28 November 2020, Twitter replied: “Our team manually reviewed your content and confirmed that it violates our Inappropriate Content policy. Some examples of content that violate this policy include but are not limited to: inflammatory or demeaning content;

misleading or misrepresentative content; dangerous or violent content; using or referring to COVID-19/coronavirus terms; sale of face masks and hand sanitizer” (“**Rejection No. 4**”).

- (v) On 1 December 2020, Tattersall reached out to a Twitter staff member to discuss Rejection No. 4: “Can we connect on this? I’ve received a 4th rejection for a third (different) reason now and it is getting very frustrating.”
- (w) On 1 December 2020, Twitter’s Abigail Scott responded: “Taking another look, I am confirming that it seems that the tweets have been halted for violating our sensitive/inappropriate content as well as our political policy. Based on the content of the trailer, it is likely that this will continue to be flagged. You are able to tweet the content to share organically, but unfortunately it will not be able to be promoted on the platform through our ads” (“**Rejection No. 5**”).
- (x) On 1 December 2020, Tattersall wrote to Scott in response to Rejection No. 5: “Can you please clarify this a little further? This is a documentary that has been recognized by numerous mainstream media outlets as credible, along with the documentary film community. It was partly funded by one of Canada’s largest governmental arts funding partners. A couple of other points from the policy cited below: 1) *‘Twitter restricts the promotion of and requires advertiser certification for ads that educate, raise awareness, and/or call for people to take action.’* In Canada, advertiser certification for political ads is no longer available, effectively making it impossible for Canadian creators to leverage twitter as an ad platform for exposure while at the same time permitting non-Canadian entities to advertise to a Canadian audience. 2) *‘Advertising should not be used to drive political, judicial, legislative or regulatory outcomes.’* The film examines the prevalence of corporate influence on democratic institutions, but does not advocate for specific outcomes on any of these fronts, aside from holding corporations accountable....”.
- (y) On 1 December 2020, Scott responded to Tattersall: “Regardless of whether or not a film is acclaimed or whether or not it’s a documentary, the same policies must be adhered to. One of the reasons here is that Twitter does not have the resources to deem all of the content on our platform as ‘credible’ as many areas are quite nuanced and subjective. As mentioned on our policy page, Twitter *globally* prohibits the promotion of political content. We have made this decision on our belief that political message should be earned, not bought. This as well as the sensitive content policy are applicable in all regions, not just the US as these policies apply to

all of Twitter’s advertising products. Looking at the trailer it does seem that there are some political undertones to the content. We encourage you to promote organically, but unfortunately we are not able to allow it to be promoted” (“**Rejection No. 6**”).

- (z) Twitter invoked four different Twitter Ad policies to justify refusing to promote *The New Corporation* tweet.
- (aa) Twitter’s “Political Content Policy” provides that “Twitter globally prohibits the promotion of political content.” This policy defines political content as “content that references a candidate, political party, elected or appointed government official, election, referendum, ballot measure, legislation, regulation, directive, or judicial outcome.”
- (bb) Twitter’s “Cause-Based Advertising Policy” applies globally to “ads that educate, raise awareness, and/or call for people to take action in connection with civic engagement, economic growth, environmental stewardship, or social equity causes.” The policy “requires advertiser certification.” As well, cause-based ads run by for-profit organizations (which include CoolWorld) “should not have the primary goal of driving political, judicial, legislative, or regulatory outcomes,” and “ads must be tied to the organization’s publicly stated values, principles, and/or beliefs.”
- (cc) Twitter’s “Inappropriate Content Policy” is global and states simply: “Twitter prohibits the promotion of inappropriate content.” Inappropriate content, includes, *inter alia*, “content that refers to a sensitive event or topic (e.g. deaths, natural/industrial disasters, violent attacks, civil disorder, etc.) and contains any of the following: personal attacks, hashtag appropriation, the selling of goods/services, political campaigning, solicitation of followers, or other inappropriate content.”
- (dd) Twitter’s “Targeting of Sensitive Categories Policy” prohibits ads that target or exclude users based on designated “sensitive categories.” One such category is “political affiliation and/or beliefs.”

Contract Law and the Charter

- (ee) Section 52 of the *Constitution Act*, 1982 provides that “*any law* that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” The words “any law” include the common law of contract. The common law of contract must be

interpreted and developed to comport with *Charter* values, in relation to: first, the doctrine of public policy; second, the duty of good faith; and third, the principle of freedom of contract.

- (ff) In the circumstances of this Application, two contextual factors should shape the development of the common law of contract to comport with the *Charter*: first, Twitter's role as a public arena, and second the fact that Twitter's policies and/or actions have banned high value social and political expression.
- (gg) Courts may refuse to enforce otherwise valid contractual provisions when "the existence of an overriding public policy ... outweighs the very strong public interest in the enforcement of contracts" (*Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para. 123). The constitutionally protected rights and freedoms in the *Charter* are sources of public policy in contract law. The Twitter Ad policies offend an "overriding public policy" because they are overbroad in relation to section 2(b) values (i.e., they prohibit high value expression without any reasonable apprehension of harm), and because Twitter uniquely functions as a public arena.
- (hh) Contracting parties owe each other duties of good faith in the performance of contractual obligations and in the exercise of contractual rights. Twitter breached its duty of good faith toward Applicants by refusing to promote *The New Corporation* Tweet because it exercised its discretion in a manner that was unreasonable, arbitrary and capricious (*Wastech Services v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7), in at least four ways: first, it made its decision initially through automation; second, it provided shifting reasons with minimal justification; third, it refused to substantively respond to reasoned arguments made, and questions raised, by Tattersall; and, fourth, it did all these things operating as a central public arena and in relation to restricting high value social and political expression.
- (ii) The Respondents cannot defend their actions by invoking the principle of freedom of contract. Though freedom of contract is the overarching principle of contract law, courts are clear and consistent in holding it must, in some contexts, give way to weightier competing values. This is one of those contexts, because: first, the Tweet is social and political speech that lies at the heart of the *Charter*'s freedom of expression guarantee and would clearly be protected by courts from government intrusion; second, the lack of any reasonable apprehension of harm caused by the Tweet; and third, the central role Twitter plays as a public arena.

3. The Applicant relies on the following legal instruments:

- (a) The *Canadian Charter of Rights and Freedoms*;
- (b) The *Constitution Act, 1982*; and
- (c) Such further and other grounds as counsel may advise and this Honourable Court may permit.

4. The following documentary evidence will be used at the hearing of the application:

- (a) Affidavits of directors, officers, employees and/or subcontractors of Cool World, and Dodds; and
- (b) Such further and other evidence as counsel may advise and this Honourable Court may permit.

19 July 2021



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