Court File No. CV-21-00666255-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

COOL WORLD TECHNOLOGIES, INC., and ETHEL KATHERINE DODDS

Applicants (Responding Parties)

and

TWITTER, INC. and TWITTER CANADA ULC

Respondents (Moving Parties)

FACTUM OF THE RESPONDING PARTIES

Date: November 14, 2022

Hāki Chambers Global
www.hakichambers.com
c/o Sujit Choudhry Professional Corporation
319 Sunnyside Avenue
Toronto ON M5H 1A1

Sujit Choudhry
LSO#: 45011E
Tel: 416-436-3679
suj@choudhry.law
sujit.choudhry@hakichambers.com

Joel Bakan
LSO#: 82093M
Tel: 778-855-3955
bakan@law.ubc.ca
joel.bakan@hakichambers.com

Counsel for the Applicants

TO: **Registrar**
Superior Court of Justice
330 University Ave., 8th Floor
Toronto, ON M5G 1R7

AND TO: **Dentons Canada LLP**
Barristers and Solicitors
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto, ON M5K 0A1

Matthew Diskin
LSO#: 51010R
Tel: 416-863-4391
matthew.diskin@dentons.com

Krstin AuCoin
LSO#: 82396Q
Tel: 416-361-2391
kristin.aucoin@dentons.com

Counsel for the Respondents

TABLE OF CONTENTS

I. OVERVIEW

1. The Moving Parties ("**Twitter**") bring a motion to strike the *Cool World (Contract) NOA* under Rule 21.01(1)(b).[1] That Motion should fail. The *Cool World (Contract) NOA* should *not* be struck for three reasons: ***first***, it discloses reasonable causes of action in the common law of contract, rooted in doctrines of public policy, unconscionability, and the duty of good faith; ***second***, it links these contractual causes of action to the *Charter* value of freedom of expression; and ***third***, it adapts settled law to a novel and pressing issue for Canadian society: the legal governance of social media platforms ("**online platforms**").

2. The *Cool World (Contract) NOA* was filed by the Responding Parties' ("**Applicants**") in response to Twitter's refusal of their requests to purchase an advertising service, a "**Promoted Tweet**" featuring a trailer ("**Trailer**") for *The New Corporation*, a documentary film ("**Film**") that is critical of contemporary capitalism, including the political power wielded by large technology companies. Twitter refused to promote that Tweet because of its *content*, claiming the Trailer offended its Political Content Policy, Inappropriate Content Policy, and its Targeting of Sensitive Categories Policy ("**Ad Policies**"), each a provision in its "**User Agreement**."

3. The test under Rule 21.01(1)(b) is whether it is "plain and obvious" that the Notice "discloses no reasonable cause of action."[2] That test is not met by Twitter. It is "plain and obvious" that the Notice *discloses* reasonable causes of action rooted in the contract law doctrines of public policy, unconscionability, and duty of good faith. The Supreme Court of Canada decisions on these doctrines are settled law. A second body of settled Supreme Court of Canada law relates to the relevance of *Charter* values in common law disputes between private parties. What is novel about this Notice is that it applies these two bodies of settled law to a new social issue – the pressing question of how freedom of expression should be legally protected on Twitter. All of which makes this exactly the kind of case that demands a hearing on the merits based upon a complete record so as to ensure "that the common law … continue[s] to evolve to meet the legal challenges that arise in our modern industrial society."[3]

---

[1] Amended Amended Notice of Application, *Cool World et al. v. Twitter et al.* (Court File CV-21-00666255-0000) ["*Cool World (Contract) NOA*"].
[2] *Hunt v. Carey*, [1990] 2 SCR 959, pp. 972, 980 ["*Hunt*"].
[3] *Hunt*, pp. 990 to 991.

4. The Application comes at a moment of revolutionary change in communications in Canada and worldwide. Over the last two decades, the online platform operated by Twitter, which hosts hundreds of millions of users across the globe, has become a *de facto* public arena for democratic dialogue and debate among citizens, organizations, and governments across the world and in Canada.[4] It claims to be, and functions as, the world's "town square." Twitter is widely regarded, and promotes itself, as a forum for expressive activity, open to all.[5] It is where heads of state, politicians, public institutions, and courts 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 engagement, Twitter is unique among media and communications companies, including other online platforms. Moreover, unlike any other private actor, it has become a key part of Canada's democratic infrastructure.[6] Canada's governmental and public institutions use Twitter intensively as a central platform for democratic engagement with citizens, as do governments and public institutions at all levels and across the country.[7]

5. Despite its function as, and claim to be, the world's and Canada's "town square," Twitter insists that it has "absolute discretion" to refuse expressive content, for any reason, in its paid domains, and in its unpaid domains as well.[8] The rapid rise of online platforms, and the absence of legislation or regulation to govern them, are sources of growing concern among courts,[9] scholars,[10] and policy-makers worldwide. The facts of this case disclose one instance of how

---

[4] *Cool World (Contract) NOA*, para. 2(fff), pp. 26-9.
[5] *Cool World (Contract) NOA*, paras. 2(eee), pp. 25-6 and 2(fff), pp. 26-9.
[6] *Cool World (Contract) NOA*, paras. 2(fff).
[7] *Cool World (Contract) NOA*, paras. 2(fff).
[8] Twitter Factum, paras. 16, 17, and 21.
[9] *Douez v. Facebook*, 2017 SCC 33 ["*Douez*"]; *Packingham v. North Carolina*, 582 US (2017) ["*Packingham*"]; *Netchoice v. Paxton*, USCA (5th Cir.), 21-51178, 2022 ["*Netchoice*"]; *Facebook*, BGH [German Court of Justice], Judgment of 29.07.2021 - III ZR 192/20 ["*Facebook*"].
[10] Stefan Theil, 'Private Censorship and Structural Dominance: Why Social Media Platforms Should have Obligations to their Users Under Freedom of Expression', *The Cambridge Law Journal*, August 2022, pp. 1 - 28; Giovanni De Gregorio and Roxana Radu, 'Digital constitutionalism in the new era of Internet governance', *International Journal of Law and Information Technology*, 30:2022, pp. 68–87; Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism* (Hart Publishing, 2021), chs. 2 and 5; Lucia Belli, 'Structural Power as a Critical element of Social Media Platforms' Private Sovereignty', in Edoardo Celeste et al (eds.), *Constitutionalising Social Media* (Hart Publishing, 2022), ch. 6, pp. 81–99; Amelie P Heldt, 'Content Moderation by Social Media Platforms: The Importance of Judicial Review', in Edoardo Celeste et al. (eds.), *Constitutionalising Social Media* (Hart Publishing, 2022), ch. 15, pp. 252–65; Edoardo Celeste et al., 'Digital Constitutionalism: In Search of a Content Governance Standard', in Edoardo Celeste et al. (eds.), *Constitutionalising Social Media* (Hart Publishing, 2022), ch. 16, pp. 267–87; Oreste Pollicino, 'Digital Private Powers Exercising Public Functions: The Constitutional Paradox in the Digital Age and its Possible

Twitter's "absolute discretion" can result in its censorship of high-value speech, with complete impunity. By its own logic, Twitter could unilaterally ban, at its discretion, any political party, politician, journalist, media organization, viewpoint, or activist group; any content or speaker whatsoever. It could ban, for example, the Conservative Party of Canada, Prime Minister Justin Trudeau, the *Globe and Mail*, the Supreme Court of Canada, or the Legal Education and Action Fund.[11] And currently, such bans would attract no legislative or regulatory repercussions.[12]

6. In this regard, the United States Court of Appeals for the Fifth Circuit notes in *Netchoice*

> [T]he platforms argue that a business can acquire a dominant market position by holding itself out as open to everyone—as Twitter did in championing itself as "the free speech wing of the free speech party." Then, having cemented itself as the monopolist of "the modern public square," *Packingham v. North Carolina*…Twitter unapologetically argues that it could turn around and ban all pro-LGBT speech for no other reason than its employees want to pick on members of that community.[13]

7. In a parallel Application, *Bakan et al. v. Attorney General of Canada* (Court File CV-21-00666251-0000), in which this Honourable Court is also hearing a motion to strike under Rule 21.01(1)(b), the Applicants in this matter join Joel Bakan and Grant Street Productions ("**GSP**") to claim that Canada is in breach of section 2(b) of the *Charter* for failing to protect high-value non-harmful speech on Twitter. Canada responds with the claim it has no such constitutional duty. If Twitter and Canada succeed in their respective Motions to Strike, that will leave unexamined and in place a state of affairs in which Twitter, despite being a key public arena for Canadian democracy, has complete impunity and absolute discretion to ban and limit any speech or speaker it chooses, including social and political speech that is the lifeblood of Canadian democracy.[14]

8. Twitter's new status as of October 30, 2022 as a private company, in effect, leaves this power over content in the hands of one person, the world's richest person, Elon Musk, who resides outside of Canada and whose business concerns are primarily outside of Canada. The stakes in

---

Solutions', European Court of Human Rights [draft article]; Nicolas P. Suzor, *Lawless: The secret rules that govern our digital lives* (Cambridge University Press, 2019), chs. 6, 7, 8, and 9.

[11] *Cool World (Contract) NOA*, para. 2(b) and (c), p. 5.

[12] Twitter Factum, paras. 16, 17, and 21.

[13] *Netchoice*, p. 2.

[14] Twitter Factum, paras. 16, 17, and 21.

these paired Applications could not be higher, not only for the Applicants but for all Canadians. Moreover, these Applications are global test cases for the way in which courts can apply public and private law to the problem of platform governance in the 21st century.

II. FACTS

A. BACKGROUND

9. For the sake of readability, the facts as pled are stated to be facts through these written representations.

10. This Application arises out of Twitter's refusal to post on its social media platform advertisements featuring the Trailer promoting the Film. The Film was commissioned by Bell Media's Crave streaming platform, produced by GSP, written and co-directed by Joel Bakan, and marketed by the First Applicant, Cool World Technologies Inc. ("**Cool World**"), and the Second Applicant, Ethel Katherine Dodds ("**Dodds**"). The ads took the form of "Promoted Tweets" – one type of advertising service offered by Twitter, which are, according to it, "ordinary Tweets purchased by advertisers who want to reach a wider group of users or spark engagement from their existing followers."[15] Promoted Tweets enable users to reach audiences at scale.[16] Non-paid-for Tweets ("**Organic Tweets**") reach only a very small portion of a user's followers, and they do not reach any non-followers.[17]

11. The Applicants requested that Twitter promote a Tweet of the Trailer. Twitter refused that request because of the Tweet's content, claiming that content offended its Ad Policies. The Ad Policies are terms of the User Agreement, a contract of adhesion, which, according to Twitter, is comprised of Twitter's "Terms of Service" ("**Terms**"), "Privacy Policy", "Twitter Rules and Policies", and all incorporated policies.[18] The "Twitter Rules and Policies" page includes a heading "Platform Use Guidelines" which includes the link "Content Monetization Standards." The latter page states, *inter alia*: "All people who advertise on Twitter must follow Twitter's Ads Policies." Clicking the Ad Policies link leads to a page with further links to, *inter alia*, the three Ad Policies.[19]

---

[15] *Cool World (Contract) NOA*, para. 2(p), p. 11.
[16] *Cool World (Contract) NOA*, para. 2(s), (t), (u), (v).
[17] *Cool World (Contract) NOA.* 2(r), (s).
[18] *Cool World (Contract) NOA*, para. 2(cc), p. 13.
[19] *Cool World (Contract) NOA*, para. 2(ee), p. 17.

B. APPLICANTS

12. Cool World is incorporated under the *Canada Business Corporations Act*.[20] The company was founded in 2019 by Dodds, who is also Cool World's Chief Executive Officer. Dodds, at all relevant times the sole shareholder and owner of Cool World, is also sole owner of the Twitter account, @CorporationFilm, which was used to create and request to promote the Tweets featuring the Trailer.[21] Cool World does not accept purely commercial projects. It is a cause-driven social enterprise, a platform for audience building for politically progressive groups to share audiences for content on questions of social, environmental and economic justice, health equity, Indigenous solidarity, and harm reduction. In 2020-21 Fiscal Year (running from April 2020 to March 2021), Cool World had net income of $5,785.38. Dodds has never drawn a salary or dividends from Cool World – i.e., she has received no compensation from Cool World. Cool World has no employees. All of its work is performed by Dodds and sub-contractors. Dodds operates Cool World out of her rental apartment.[22]

13. Dodds is a party to the User Agreement by virtue of her entering that Agreement to create the account, @CorporationFilm. Cool World is also a party to the User Agreement by virtue of the fact Dodds, in operating the @CorporationFilm account in relation to the Film campaign, was accepting the Terms and using Twitter's services on behalf of Cool World, with authority to do so and to bind Cool World to the Terms, in accordance with Article 1 of the Terms.[23]

C. COURSE OF EVENTS

14. In the fall of 2020, Cool World entered into an agreement with GSP to, *inter alia*, "deploy[] Direct outreach campaigns" to promote the Film ("**Marketing Agreement**"). Under the Marketing Agreement, Cool World undertook to manage all advertising for the Film.

15. In partial fulfilment of its obligations under the Marketing Agreement, the Applicants sought to purchase Promoted Tweets featuring the Trailer on Dodds' Twitter account, @CorporationFilm. Dodds had created that account on June 26, 2010 (to promote an earlier film,

[20] RSC 1985, c C-44.
[21] *Cool World (Contract) NOA*, paras. 2(d) to (f), pp. 5-6.
[22] *Cool World (Contract) NOA*, paras. 2(d) to (f), pp. 5-6.
[23] *Cool World (Contract) NOA*, para. 2(cc), p. 13.

The Corporation) by entering into the User Agreement with Twitter.[24] Twitter requires anyone seeking to purchase a Promoted Tweet to be a party to the User Agreement.

16. Six of the Applicants' attempts to purchase Promoted Tweets were rejected by Twitter on the basis of the three Ad Policies at issue. The first attempt was made on November 18, 2020 by Jane Tattersall ("**Tattersall**") of SqueezeCMM, a Toronto-based marketing firm with whom Cool World had sub-contracted to run its promotional campaign on Dodds' @CorporationFilm Twitter account.[25] On the same day Twitter refused the request through an automated reply ("**Rejection No. 1**").[26] Tattersall requested an explanation through Twitter's internal complaints procedure. Twitter responded with what appeared to be another automated reply, stating that: "Tweets can be disapproved if they are found to violate the Twitter Ads Policies," and provided links to those policies ("**Rejection No. 2**").[27]

17. On November 19, 2020, Tattersall responded to Rejection No. 2 as follows: "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?"[28]

18. On November 20, 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**").[29]

19. On that same day, Tattersall responded to Rejection No. 3, and wrote to 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

[24] *Cool World (Contract) NOA*, para. 2(x), p. 13.
[25] *Cool World (Contract) NOA*, para. 2(z), p. 14.
[26] *Cool World (Contract) NOA*, paras. 2(gg) and (hh), pp. 17-18.
[27] *Cool World (Contract) NOA*, paras. 2(jj) and (kk), p. 18.
[28] *Cool World (Contract) NOA*, para. 2(ll), p. 18.
[29] *Cool World (Contract) NOA*, para. 2(mm), p. 18.

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."[30]

20. On November 28, 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**").[31]

21. On December 1, 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." On that same day, Twitter employee 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**").[32]

22. On December 1, 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: …. *'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….".[33]

23. On December 1, 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

[30] *Cool World (Contract) NOA*, para. 2(nn), p. 18.
[31] *Cool World (Contract) NOA*, para. 2(oo), p. 19.
[32] *Cool World (Contract) NOA*, paras. 2(pp) and (qq), p. 19.
[33] *Cool World (Contract) NOA*, para. 2(rr), p. 19.

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**").[34]

III. ISSUE

24. The sole issue on this motion is:

> Should the *Cool World (Contract) NOA* be struck for failing to disclose a reasonable cause of action? *The answer is no.*

IV. ARGUMENTS

A. THE "PLAIN AND OBVIOUS" TEST GOVERNS RULE 21.01(1)(B)

25. A line of Supreme Court cases – *Operation Dismantle*, *Hunt*, *Odhavji Estate*, *Imperial Tobacco*, *Nevsun*, and *Babstock* – set out the "plain and obvious" test, which provides a legal framework for motions to strike under Rule 21.01(1)(b).[35]

26. The jurisprudence on the "plain and obvious" test stands for three propositions:

27. ***First***, the test is whether it is "plain and obvious" that the Notice "discloses no reasonable cause of action."[36] The "plain and obvious" test "is a stringent one" in which the question is whether "the action must fail because it contains a 'radical defect'."[37] Moreover, "the motion to strike is a tool that must be used with care," and "[t]he approach must be generous"[38] to the Applicants. The reason for the "stringent test" and "generous approach" is that the proceeding "is

---

[34] *Cool World (Contract) NOA*, para. 2(ss), 19-20.
[35] *Operation Dismantle v. The Queen*, [1985] 1 SCR 441 ["*Operation Dismantle*"]; *Hunt*; *Odhavji Estate v. Woodhouse*, 2003 SCC 69 ["*Odhavji Estate*"]; *R. v. Imperial Tobacco*, 2011 SCC 42 ["*Imperial Tobacco*"]; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 ["*Nevsun*"]; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 ["*Babstock*"].
[36] *Hunt*, p. 972, p. 980.
[37] *Odhavji Estate*, para. 15, quoting *Hunt*, p. 980.
[38] *Imperial Tobacco*, para. 21.

still at a preliminary stage" and this Honourable Court must be given the opportunity to determine if the Applicants' claims should prevail, "and, if so, what remedies are appropriate."[39]

28. This Honourable Court should follow its approach in *Mathur* and *Toussaint*, in which it recently dismissed Rule 21.01(1)(b) motions.[40] In those cases, this Honourable Court found the "plain and obvious" test had not been met because the Applicants' claims were based on Supreme Court of Canada *dicta* (from *Gosselin*[41] and *Nevsun*,[42] respectively). Those holdings apply *a fortiori* to this Application which is rooted not only in *dicta*, but also well-established *ratio decidendi* from, *inter alia*, numerous Supreme Court of Canada authorities. As elaborated below, the Applicants' claim builds upon well-established jurisprudence on the contract law doctrines of offer and acceptance, public policy, unconscionability, duty of good faith, and the relevance of constitutional values, particularly freedom of expression, in common law disputes between private actors.

29. ***Second***, the "plain and obvious" test must be applied in a manner that permits the evolution of the law, because "[t]he law is not static and unchanging," and "[a]ctions that yesterday were deemed hopeless may tomorrow succeed."[43] As the Supreme Court explains in *Hunt*, "[o]nly in this way can we be sure that the common law … will continue to evolve to meet the legal challenges that arise in our modern industrial society."[44] Thus, a "radical defect" in a pleading must consist of "a decided case directly on point from the same jurisdiction demonstrating that the very issues has been squarely dealt with and rejected by our courts."[45] It is common cause among the parties that there is no decided case directly on point from Ontario or Canada (although cases on point from comparative jurisdictions support the Applicants' position, as argued below). Moreover, as the Court observes in *Imperial Tobacco:* "[t]he history of our law reveals that often new developments in the law first surface on motions to strike," which requires that the application

---

[39] *Nevsun*, para. 131.
[40] *Mathur v Ontario*, 2020 ONSC 6918, para. 39 ["*Mathur*"]; *Toussaint v. Canada (Attorney General)*, 2022 ONSC 4747 ["*Toussaint*"]. The decision on the motion to strike is currently under appeal before the Ontario Court of Appeal. Court File No. M53747.COA-22-CV-0101.
[41] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, para. 83; *Mathur*, paras. 192, 212, 229, 234 and 235.
[42] *Nevsun*, para. 119; *Toussaint*, para. 189.
[43] *Imperial Tobacco*, para. 21.
[44] *Hunt*, pp. 990 to 991.
[45] *Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463 (S.C.), para. 6, cited by *Mathur*, para. 39.

of the "plain and obvious" test "err on the side of permitting a novel but arguable case to proceed to trial."[46]

30. This Honourable Court must bear in mind that the Application raises an issue of fundamental importance: how should the law protect users' freedom of expression on online platforms? Over the past decade, this has become an increasingly urgent question among scholars, courts, and policy-makers worldwide.[47] Because of Twitter's role as a key public arena for Canadian democracy, answering the question is of crucial importance to Canadian society and democratic life. The Applicants reiterate (see para. 8 above) that this Application and *Canada (Charter)* are global test cases for the way in which courts can apply public and private law to the problem of platform governance in the 21st century.

31. One of the most important cases in the 20th century on the law of torts in the Commonwealth – *Donoghue* – illustrates the need to apply the "plain and obvious" test to permit the law to adapt to profound technological and social change. *Donoghue* came before the House of Lords on a motion to strike for failing to disclose a reasonable cause of action.[48] The tort of negligence had not yet been recognized as a cause of action. *Donoghue* revolutionized the common law, to enable it to protect the interests of consumers, in the context of the new phenomena of manufactured food products. A direct parallel can be drawn to this Application and the *Canada (Charter) NOA* in relation to platform governance.

32. ***Third***, under the "plain and obvious" test, the court "proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven" or are "patently ridiculous."[49] The Applicants note that Twitter's motion to strike proceeds based on the facts as pled and does not seek to dispute them in *any* respect.

B. IT IS NOT PLAIN AND OBVIOUS THAT THE *COOL WORLD (CONTRACT) NOA* DOES NOT DISCLOSE A REASONABLE CAUSE OF ACTION

33. It is not "plain and obvious" that the *Cool World (Contract) NOA* does not disclose a reasonable cause of action, for the following reasons: ***First***, the Applicants were exercising rights

[46] *Imperial Tobacco*, para. 21.
[47] This Factum, para. 5, *supra*.
[48] *Donoghue v. Stevenson*, [1932] AC 562, pp. 563, 566, 578, 601, 606, and 609.
[49] *Imperial Tobacco*, para. 22; *Nash v. Ontario*, 1995 CanLII 2934 (ON CA).

under the User Agreement when they requested Promoted Tweets. Therefore, Twitter's claim of "no contract" must fail. ***Second***, the provisions of the User Agreement Twitter invoked to refuse the Applicants' requests for Promoted Tweets – the three Ad Policies – are contrary to the contract law doctrine of public policy because they seriously encroach upon the *Charter* value of freedom of expression. ***Third***, the three Ad Policies are contrary to the doctrine of unconscionability because they create an improvident bargain in a contract of adhesion between unequal parties, due, *inter alia*, to the contract's total negation of the Applicants' free speech interest in relation to Promoted Tweets; ***Fourth***, and in the alternative, Twitter's application of the Ad Policies to refuse the Trailer Tweet was unreasonable, arbitrary, and capricious and thereby in breach of the duty of good faith.

1. ***The Applicants were exercising rights under the User Agreement when they requested Promoted Tweets***

34. It is not plain and obvious that there was no contract governing the Applicants' request for and Twitter's refusal of the Promoted Tweets, as Twitter argues.[50] Contrary to that argument, the User Agreement grants to users a *right to request* Promoted Tweets, in exchange for which users, like Dodds, provide good consideration when they enter the User Agreement. Twitter's *own* reliance on User Agreement provisions to refuse the Applicants' request confirms that the User Agreement governs the Applicants' attempts, and Twitter's refusals, in relation to the purchase of Promoted Tweets. There is no right to request Promoted Tweets, nor to refuse them, except *under* the User Agreement. Twitter's claim that the Applicants have no contractual rights to request Promoted Tweets is fundamentally flawed.

35. The correct account is that the Applicants exercised rights *under* the User Agreement with Twitter when they requested access to Promoted Tweets, and Twitter exercised its rights *under* the User Agreement to refuse those requests pursuant to the three Ad Policies. That account follows from the rules of offer and acceptance.

36. The legal test for determining whether an offer has been made is well established, and affirmed by *Carlill*, which is relied upon by Twitter.[51] The relevant question is whether "the plain meaning, as the public would understand it"[52] of Twitter's offer of services in its User Agreement

[50] Twitter Factum, paras. 37-44.
[51] Twitter Factum, para. 41.
[52] *Carlill v. Carbolic Smoke Ball Corporation*, [1892] EWCA Civ 1, p. 266.

would encompass a right to request Promoted Tweets. That question must be "determined upon the language used, in light of the circumstances in which it is used;"[53] "the test is the reasonableness of the offeree's expectation in all the circumstances of the case,"[54] and whether the parties reasonably appear to intend to create legal relations.[55] Applying these criteria, Twitter *offered* Dodds, through its User Agreement, *inter alia*, a right to request and access Promoted Tweets, subject to its discretion and conditions. Dodds accepted that offer and provided good consideration for it when she entered the User Agreement to create @CorporationFilm. Twitter is wrong – and, *a fortiori*, it is not plain and obvious – that its *offer* of a right to request Promoted Tweets was a mere invitation to treat.

37. Four aspects of language and circumstance support this conclusion: (a) the language of the User Agreement; (b) the mode of access to Promoted Tweets; (c) the inadequacy of Twitter's services for the Applicants *without* access to Promoted Tweets; and (d) the fact Applicants' contractual right to request Promoted Tweets is not denied by Twitter's discretion to refuse such requests.

a. The language of the User Agreement

38. According to the User Agreement, advertising services, including Promoted Tweets, are among the services offered by Twitter to users when they enter the User Agreement. This is apparent on the face of the User Agreement, which provides, *inter alia*: (a) that "Terms of Service ("Terms") govern your access to and use of our services, including…***ads***…."; (b) that, under Articles 3 and 4 of the Terms, users grant Twitter a broad range of rights and licenses to use and monetize their Tweeted content as consideration for access to and use of services; and, related to the latter, (c) that "use of the Services by you is hereby agreed as being sufficient compensation for the [user's] Content and grant of rights herein."[56]

[53] *Canadian Dyers Association Ltd. V. Burton* [1920] O.J. (H.C.), para. 5.
[54] Stephen M. Waddams, *The Law of Contracts* (1984), p. 24.
[55] *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, 1 SCR 619 *("M.J.B.")*. As cited in Twitter Factum, para. 39.
[56] *Cool World (Contract) NOA*, para. 2(ee), p. 14 (emphasis added).

b. The mode of access to Promoted Tweets

39. Promoted Tweets are functionally and seamlessly integrated into "Organic Tweets" thereby creating reasonable expectations among prospective users that they are an integral part of the package of services offered by Twitter through its User Agreement. Users begin a Promoted Tweet campaign by simply clicking on a button *within* an Organic Tweet.[57] As Twitter itself claims, Promoted Tweets are "*ordinary Tweets* purchased by advertisers who want to reach a wider group of users or spark engagement from their existing followers" (emphasis added).[58] For all these reasons, prospective users would reasonably expect Twitter's offer of access to Twitter's platform to include a right to request Promoted Tweets.

c. The inadequacy of Twitter services for the Applicants without access to Promoted Tweets

40. Organic Tweets reach only small proportions of users' followers, and no non-followers. The reach of Organic Tweets is limited by Twitter algorithms that emphasize popularity and numbers of followers, and that are biased against users like the Applicants. According to Twitter's own research, for example, its algorithmic amplification of Tweets and users is biased towards accounts on the right-wing side of the political spectrum, including in Canada.[59] The trailer reflects the left-wing side of that spectrum. Twitter's organic domains also magnify the reach of powerful and wealthy actors, in particular celebrities, major brands, and well-known political actors,[60] and they can be manipulated by users who pay other users to amplify their content in ways that might otherwise violate the Ad Policies.[61] Twitter also hosts automated accounts, known as "bots," which amplify Tweets or engage in other ways to improve a Tweet's reach, often in relation to political content that would be banned if in the form of a paid advertisement.[62]

41. For all these reasons, Organic Tweets are inadequate for users, such as the Applicants, who (like many users) deploy Twitter to reach significant numbers of followers and non-followers, have small followings in organic domains,[63] and are subject to the above-described biases. Such

[57] *Cool World (Contract) NOA*, para. 2(v), footnote 11.
[58] *Cool World (Contract) NOA*, para. 2(p), p. 11.
[59] *Cool World (Contract) NOA*, para. 2(ccc)b.
[60] *Cool World (Contract) NOA*, para. 2(ccc)c.
[61] *Cool World (Contract) NOA*, para. 2(ccc)d.
[62] *Cool World (Contract) NOA*, para. 2(ccc)e.
[63] *Cool World (Contract) NOA*, para. 2(ccc), p. 22; (u) and (v), pp. 12-13.

users would have no reason to accept Twitter's offer of services by entering the User Agreement, and providing consideration for those services, if that offer did *not* include a contractual right to request Promoted Tweets. The right to request a Promoted Tweet is valuable even if it does not guarantee access to such a Tweet. There is no such right outside the User Agreement, and it is part of what a user reasonably expects to get by entering the User Agreement. Twitter's *own* marketing bolsters such a reasonable expectation by cajoling users to use its advertising services to "broaden your reach," "open up your reach on Twitter to more people," and "connect to the most valuable and receptive conversations and audiences,"[64]all of which contributes to users' reasonable expectations that Twitter's offer of services includes a right to request Promoted Tweets.

d. Twitter's alleged absolute discretion to refuse ads

42. Twitter argues that its alleged "absolute discretion" to refuse Promoted Tweets means that when a user requests a Promoted Tweet, that request is not governed by the User Agreement.[65] That argument incorrectly presumes that a user's contractual right to request a Promoted Tweet is incompatible with Twitter's contractual discretion to refuse such a request. In fact, the User Agreement grants *both* users' rights to request Promoted Tweets *and* Twitter's right to refuse such requests in accordance with the Terms, including the Ad Policies at issue.

43. Twitter's argument is fundamentally flawed because it relies on provisions of the User Agreement to claim its "absolute discretion," but then denies that the User Agreement governs the exercise of that discretion. Moreover, if Twitter is correct that its broad discretion to refuse Promoted Tweets is not based on a contractual right conferring such discretion – which the Applicants deny – then the same conclusion must hold in relation to Organic Tweets, where Twitter also asserts a broad discretion to refuse Tweets.[66] But this would lead to the absurd result that the User Agreement does not govern Twitter's relationship with users regarding Organic Tweets. In short, Twitter cannot rely on its broad discretion to refuse Tweets, whether Organic or Promoted, as a basis for denying that users have contractual rights to request them.

[64] *Cool World (Contract) NOA*, para. 2(t), p. 12.
[65] Twitter Factum, Paras 16, 42.
[66] Twitter Factum, para. 17.

2. ***Twitter's three Ad Policies are contrary to public policy and are therefore invalid because they encroach upon the Charter value of freedom of expression***

44. Courts must refuse to enforce otherwise valid contractual terms when "the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, outweighs the very strong public interest in the enforcement of contracts," the Supreme Court of Canada held in *Tercen*.[67] In "'clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds',"[68] contractual terms and particular exercises of contractual powers that offend public policy are not enforced – even if "the contract breaker's conduct [does] not rise to the level of criminality or fraud."[69]

45. It is not plain and obvious that the within Application is *not* such a "clear case." That is because: ***first***, constitutional values are sources of public policy in contract law; ***second,*** the Ad Policies restrict high-value non-harmful expression; ***third,*** the form of the Trailer as an advertisement does not detract from its high-value; ***fourth***, the context of Twitter's platform adds to the Trailer's high-value; and ***fifth***, Twitter's freedom of expression and freedom of contract interests are significantly less weighty than the Applicants' freedom of expression interests.

a. Constitutional values are sources of public policy in contract law

46. Professors Lorraine Weinrib and Ernest Weinrib of the Faculty of Law, University of Toronto write: "The *Charter* has expanded the scope for infusing public policy with constitutional values."[70] ***Five*** synergistic lines of authority support the Applicants' argument that the common law, including its public policy doctrines, must comport with constitutional values.

47. ***First***, in *Dolphin Delivery*[71] the Supreme Court held that the phrase "any law" in section 52 of the *Constitution Act 1982* – which states that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect" – includes the

---

[67] *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 ["*Tercon*"], para. 123.
[68] *Tercon*, para. 117, citing Duff CJ, in *Re Millar Estate*, 1937 CanLII 10 (SCC), [1938] S.C.R. 1, at p. 4.
[69] *Tercon*, para. 118.
[70] Lorraine Weinrib and Ernest Weinrib, *Constitutional Values and Private Law in Canada, in Daniel Friedmann and Daphne Barak-Erez, Human Rights in Private Law* (Hart Publishing, 2001), pp. 43-72 ["Weinrib"], pp. 43, 63.
[71] *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573 ["*Dolphin Delivery*"].

common law. Building on that logic, the Supreme Court held in *Salituro*,[72] *Dagenais*,[73] *Hill*,[74] *Ryan*,[75] *Pepsi-Cola*,[76] *Simpson*,[77] and *Grant*,[78] that consideration of *Charter* values is relevant, and sometimes imperative, in disputes between private parties governed by the common law – i.e., where there is no state actor involved, nor legislation or regulation being challenged. In each of these cases, the Court held that when *Charter* values are at stake they must be balanced against competing common law values. In *Pepsico, Simpson, Grant,* and *Dagenais* that balance required protecting one private actor's freedom of expression from another private actor – just as the Applicants seek here. In *Jones*, an Ontario Court of Appeal case, it required protecting one private actor's right to seclusion from intrusion by another private actor.[79]

48. ***Second***, courts have held that provisions in trusts, and exercises of trustees' discretion, are contrary to public policy when they encroach upon *Charter* values. According to the Ontario Court of Appeal in *Canada Trust*,[80] the principles of public policy under common law are to be found in "the democratic principles governing our pluralistic society in which equality rights are constitutionally guaranteed" (per Robins JA, writing for the majority);[81] and they can be "gleaned from a variety of sources, including provincial and federal statutes, official declarations of government policy and the Constitution" (per Tarnopolsky JA, concurring).[82] The Court held that a discriminatory provision of a trust was unenforceable as contrary to public policy, including the equality values found in section 15 of the *Charter*. *Canada Trust* has been followed by the Superior Court in *Royal Trust*,[83] by the Court of Appeal in *Fox*[84] and *Spence*,[85] and by superior courts in New Brunswick (*McCorkill*[86]) and Saskatchewan (*Grams*[87]). The *Canada Trust* line of cases

[72] *R. v. Salituro*, [1991] 3 SCR 654 ["*Salituro*"].
[73] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 ["*Dagenais*"].
[74] *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 ["*Hill*"].
[75] *M. (A.) v. Ryan*, [1997] 1 SCR 157 ["*Ryan*"].
[76] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 ["*Pepsi-Cola*"].
[77] *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 ["*Simpson*"].
[78] *Grant v. Torstar Corp.*, 2009 SCC 61 ["*Grant*"].
[79] *Jones v. Tsige*, 2012 ONCA 32, para. 46 ["*Jones*"].
[80] *Canada Trust Co. v. Ontario Human Rights Commission* 74 OR (2d) 481 (1990) ["*Canada Trust*"].
[81] *Canada Trust*, para. 37.
[82] *Canada Trust*, para. 92.
[83] *Royal Trust Corporation of Canada v. The University of Western Ontario et al.*, 2016 ONSC 1143
[84] *Fox v. Fox Estate*, 1996 CanLII 779 (ON CA) ["*Fox*"].
[85] *Spence Estate, Re*, 2016 ONCA 196 ["*Spence*"].
[86] *McCorkill v. Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased*, 2014 NBQB 148 ["*McCorkill*"].
[87] *Grams v. Babiarz*, 2015 SKQB 374 ["*Grams*"].

demonstrates the relevance of *Charter* values to the doctrine of public policy, despite not explicitly citing the Supreme Court's caselaw described above in paragraph 47. As the court observes in *Grams*: "While not expressly considered in this line of cases, it seems appropriate to also observe that the Supreme Court of Canada has directed that the values found in the *Canadian Charter of Rights and Freedoms* must be considered when analysing and considering common law principles."[88]

49. ***Third***, the Supreme Court has considered constitutional values as sources of public policy in contract cases. In *Douez* it held that because "constitutional or quasi-constitutional" rights (of privacy) were at stake, a forum selection clause in Facebook's User Agreement should not be enforced by Canadian courts.[89] In *Uber*, Justice Brown, in a concurring majority opinion, held that a contractual clause ousting Ontario courts' jurisdiction offended public policy because it undermined the constitutional value of rule of law, and also "access to justice [which] is constitutionally protected through s. 96 of the *Constitution Act*, 1867."[90] In *4 Pillars* the British Columbia Court of Appeal followed Justice Brown's concurrence in *Uber* to hold that "a clause that effectively prohibits a party's ability to have recourse to a justice system to enforce their agreement undermines the administration of justice, the rule of law, democracy and commercial certainty" and is therefore contrary to public policy.[91]

50. Though Twitter concedes that the "doctrine of public policy" can give rise to a cause of action, and thus implicitly concedes that its Rule 21.01(1)(b) motion would fail in that case, they incorrectly claim that public policy contraventions are limited to illegality, immorality, restraint of trade, injury to the state or injury to the justice system, thus ignoring the fact that an encroachment on constitutional values (including *Charter* values) can *also* violate public policy.[92] In any event, serious encroachments on constitutional values also fall within the category of "injury to the state or injury to the justice system."

51. ***Fourth***, support for the Applicants' claims concerning public policy, contract law, and constitutional values can found be in jurisprudence from comparable jurisdictions, which has held

---

[88] *Grams*, para. 23.
[89] *Douez*, paras. 58, 59.
[90] *Uber v. Heller*, 2020 SCC 16 ["*Uber*"], para. 120.
[91] *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198 ["*4 Pillars*"], para. 217.
[92] Twitter Factum, para. 46.

that contract clauses are contrary to public policy when they encroach upon constitutional values, including freedom of expression.[93]

52. In a study on multiple jurisdictions where constitutional values serve as sources of public policy in private law, Professor Aharon Barak, former President of the Israeli Supreme Court, writes: "The concept of public policy essentially absorbs human rights originating in the constitution….public policy is the channel through which constitutional values flow into private law."[94] In *Beadica*, the Constitutional Court of South Africa explained the logic of this approach – which it, along with Barak and other scholars, describe as "horizontality:"[95]

> [T]he Constitution…is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.…Constitutional rights apply through a process of indirect horizontality to contracts. The impact of the Constitution on the enforcement of contractual terms through the determination of public policy is profound. A careful balancing exercise is required to determine whether a contractual term, or its enforcement, would be contrary to public policy.[96]

As Professor Ernest Weinrib observes of horizontality:

> [T]he currency and broad diffusion of the phenomenon of horizontality among liberal democracies bespeaks a contemporary consensus that constitutional rights are not sealed off from private law…. [T]he idea that fundamental rights play a role in private law is now such a commonplace among liberal democracies worldwide that it ranks as a distinctive feature of the prevalent model of global constitutionalism.[97]

53. Horizontality has been deployed by some foreign courts to protect freedom of expression on online platforms. In Germany, for example, the Federal Court of Justice (*Bundesgerichtshof*), Germany's apex court for civil and criminal issues, held that, though "a private company is not

---

[93] Barak, Aharon, 'Constitutional Human Rights and Private Law', in Daniel Friedmann and Daphne Barak-Erez, *Human Rights in Private Law* (Hart Publishing, 2001), pp. 13-42, 22; *Beadica 231 CC and Others v. Trustees for the time being of the Oregon Trust and Others*, (CCT109/19), [2020] ZACC 13 ["*Beadica*"].
[94] Barak, 'Constitutional Human Rights and Private Law', p. 22.
[95] Weinrib, Ernest, *Reciprocal Freedom: Private Law and Public Right* (2022), Chap. 6, p. 118 ["Weinrib 2"]; Barak, 'Constitutional Human Rights and Private Law'; Weinrib, p. 43; also, Eleni Frantziou, 'The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle', *Cambridge Yearbook of European Legal Studies*, 22:2020, pp. 208–232.
[96] *Beadica*, para. 71.
[97] Weinrib 2, pp. 119, 118.

directly bound by fundamental [constitutional] rights…in the same way as a state,"[98] such rights may "radiate[] into" private legal relationships,[99] creating an "indirect effect of fundamental rights"[100] that, in turn, engenders a "constitutionally required balancing of the conflicting fundamental rights."[101] Based on the horizontal effect of constitutional rights on private law, the Court held that Facebook, when applying content standards in its user agreement, "must sufficiently take into account the users' fundamental right to freedom of expression … [and not use] the decision-making power resulting from its structural superiority to arbitrarily prohibit individual expressions of opinion."[102]

54. ***Fifth***, democracy, a basic structural imperative of the Canadian constitution, according to the Supreme Court of Canada in *Quebec Seccession*, is "predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top….A democratic system of government is committed to considering … dissenting voices, and seeking to acknowledge and address those voices *in the laws by which all in the community must live*" (emphasis added).[103] The "laws by which all in the community must live" include the common law.

55. In conclusion, these five lines of case-law demonstrate an emerging jurisprudence of horizontality in Canada and beyond. Taking them together with the aforementioned scholarly and judicial ferment worldwide around horizontality, freedom of expression on social media platforms, and the links between the two (as highlighted in *Facebook*), there is a strong jurisprudential foundation for claiming, as the Applicants do, that Twitter's three Ad Policies are contrary to the doctrine of public policy, as elaborated in *Tercen*, because (as sections **b** to **d** argue below), they seriously encroach upon the *Charter* value of freedom of expression.

b. The expressive content targeted and restricted by the three Ad Policies is high-value speech

56. Through its three Ad Policies, *inter alia*, Twitter claims to have an "absolute discretion" to curtail expressive content that the Supreme Court of Canada has consistently held to be of the

[98] *Facebook*, para. 139.
[99] *Facebook*, para. 164.
[100] *Facebook*, para. 135.
[101] *Facebook*, para. 163.
[102] *Facebook*, para. 161.
[103] *Reference re Secession of Quebec*, [1998] 2 SCR 217 ["*Quebec Secession*"], para. 68.

highest value, in the sense that it is about ideas, addresses social and political issues, and is informative and educational;[104] takes place in important arenas for public debate;[105] causes no judicially recognized harm that might justify limits;[106] and contributes significantly to democratic debate and dialogue[107] ("**high-value speech**").

57. It cannot be disputed that the *Charter* would prohibit a state actor from imposing restrictions like those contained in the three Ad Policies. In *Greater Vancouver Transportation Authority*, for example, the Court struck down bans on political and controversial advertisements on transit vehicles, holding that political speech is "a highly valued form of expression,"[108] and that in the absence of harmful effects, speech cannot be restricted merely because it is political or controversial. In similar spirit, Chief Justice McLachlin and Justice Major noted in *Harper* that "political speech lies at the core of the *Canadian Charter of Rights and Freedoms* guarantee of free expression."[109] In *Keegstra*, Chief Justice Dickson stated that "the connection between freedom of expression and the political process is perhaps the linchpin of the section 2(b) guarantee."[110] In *Sierra Club*, the Court described the "core values" of section 2(b) as "seeking the truth and the common good" and "ensuring that participation in the political process is open to all persons."[111]

58. Twitter's three Ad Policies operate as blanket bans on speech that lies at the core of the section 2(b) guarantee. The Trailer exemplifies such speech. It is a one minute and fifty second precis of an award-winning film made by legal scholar and public commentator, Joel Bakan, based on his award-winning book with the publisher Penguin Random House, funded by Canadian film-funding agencies Telefilm and Canada Media Fund, commissioned and broadcast by Bell Media's Crave streaming platform, and appearing on streaming services (such as Amazon Prime, Google

---

[104] *R. v. Keegstra*, [1990] 3 SCR 697, pp. 762 to 764 ["*Keegstra*"]; *Harper v. Canada (Attorney General)*, 2004 SCC 30, para. 1 (dissenting, but not on this point) ["*Harper*"]; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 31, para. 75 ["*Sierra Club*"]; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, para. 7 ["*Greater Vancouver Transportation Authority*"]
[105] *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 ["*Montréal*"]; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139 ["*Committee*"] *Ramsden v. Peterborough (City)*, [1993] 2 SCR 1084 ["*Ramsden*"].
[106] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 [*"Irwin Toy"*]; *Keegstra.*
[107] *Keegstra, Harper, Sierra Club, Greater Vancouver Transportation Authority.*
[108] *Greater Vancouver Transportation Authority*, para. 7.
[109] *Harper*, para. 1.
[110] *Keegstra*, p. 762.
[111] *Sierra Club*, para. 75.

Play, and Apple TV) in the United States and around the world. Like the Film itself, the Trailer features social and political issues, along with thought-leaders from the academy, business, government and civil society. The Film that the Trailer encapsulates has been lauded by critics worldwide as an important contribution to public discourse about corporate capitalism and democracy. It has won awards, and is frequently screened at scholarly conferences and universities.[112]

c. The form of the Trailer as an advertisement does not detract from its high value

59. The content of the Trailer is best described as social and political commentary and therefore lies at the "core" of section 2(b). Any possible *profit motive* is entirely irrelevant to the question of whether the Trailer is "core expression." As Justice McLachlin explained in *RJR MacDonald*:

> Book sellers, newspaper owners, toy sellers – all are linked by their shareholders' desire to profit from the corporation's business activity, whether the expression sought to be protected is closely linked to the core values of freedom of expression or not. In my view, motivation to profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified as an infringement of freedom of expression.[113]

60. Likewise, the use of *commercial means* – a Promoted Tweet containing the Trailer – is entirely irrelevant to the characterization of the Trailer as core expression. In *Greater Vancouver Transit Authority*, the Court emphasized that "the *content* of …expressive activity [prohibited by the Authority] was the political message and the *means* of expression was the advertising service enabling expression on the sides of the buses."[114] The same holds true here.

d. The context of the expression restricted by the Ad Policies adds to its value

61. Though privately owned, Twitter functions as a key public arena for dialogue and debate among citizens, organizations, and governments in Canada, and as a central forum for expressive activity. It is the platform of choice for, among others, governments, politicians, courts, public

[112] *Cool World (Contract) NOA*, paras. 2(h) to (n), pp. 6-8.
[113] *RJR-MacDonald Inc v. Canada (Attorney General)*, [1995] 3 SCR 199, para. 171.
[114] *Greater Vancouver Transportation Authority*, para. 31.

agencies and institutions, journalists, media outlets, scientists and scholars to communicate with citizens, hear from citizens, and for citizens to communicate among themselves.[115]

62. The Supreme Court of Canada has held that online platforms like Twitter, though privately-owned, are similar to the kind of public arenas it has held must be "constitutionally open to the public for engaging in expressive activity."[116] In *Douez* it observed that " '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'," and that "[h]aving the choice to remain 'offline' may not be a real choice in the Internet era."[117]

63. Similarly, the United States Supreme Court held in *Packingham v. North Carolina* that online platforms are a "quintessential forum for the exercise of First Amendment rights," analogous to streets and parks. It continued:

> While 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 …. Social media users employ these websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought."[118]

64. In summary, the *context* in which the Ad Policies restrict expression – Twitter's social media platform – is a *de facto* public arena, and the *content* of the speech they curtail is high value. The Ad Policies thereby prohibit precisely the kinds of speech to which the jurisprudence under section 2(b) of the *Charter*, including in the context of private litigation,[119] accords the most robust protection. The *form* such speech takes (advertisements) does not weaken that conclusion. Restrictions on high-value speech in publicly-owned public arenas[120] and when imposed by state actors[121] are routinely struck down by courts. That the public arena here, Twitter, is privately-

[115] *Cool World (Contract) NOA*, para. 2(fff), p. 26-9.
[116] *Committee*, p. 198; *Ramsden*, p. 1098.
[117] *Douez*, para 56.
[118] *Packingham*, pp. 4-5.
[119] *Pepsico; Simpson; Grant; Dagenais.*
[120] *Committee; Ramsden; Montreal*
[121] *Greater Vancouver Transportation Authority; Sierra Club*; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11.

owned, and that no state actor is involved, has no bearing on the fact the *kind* of speech restricted by the Ad Policies is routinely held by Canadian courts to be of the highest value, and deserving the strongest constitutional protection. It follows that the Ad Policies, though not directly subject to the *Charter*, nonetheless severely encroach upon the core constitutional value of freedom of expression.

e. Twitter's freedom of expression and freedom of contract interests are significantly less weighty than Applicants' freedom of expression interests

65. Twitter argues that its discretion to refuse Promoted Tweets "is a matter of its own freedom of expression,"[122] and that any restriction on that expression would constitute "compelled speech"[123] that "deprives one of the ability to speak one's mind or associates one with a position they disagree with."[124] In effect, Twitter argues that a *Charter* values analysis, following the case law described above,[125] grants it an absolute right to muzzle any "position they disagree with." For that reason, Twitter argues, "*Charter* values, if they are relevant to this matter, directly militate against the Applicants' position."[126]

66. Twitter's argument ignores the clear direction by the Supreme Court of Canada and other courts to *balance* competing values when constitutional values are at stake in private litigation.[127] Because of the substantial weight of the Applicants' free speech values in this case (as described in sections **b** to **d** above), such balancing favours *their* position, not Twitter's. Though the freedom to *not* speak might give Twitter the right to control *harmful* forms of expression such as hate speech, it would be inconsistent with the fundamental values of freedom of expression and Twitter's role as a public arena to permit the platform to bar, in the name of *Charter* values, *harmless* expression that courts have consistently held to be of the highest constitutional value.

67. The same reasoning applies with respect to freedom of contract. The Supreme Court of Canada has consistently held that that freedom of contract must sometimes give way to competing societal values, including constitutional values.[128] This is one of those occasions. To be clear, the

[122] Twitter Factum, para. 1.
[123] Twitter Factum, para. 48.
[124] Twitter Factum, para. 49.
[125] *Hill*; *Pepsico*; *Simpson*; *Grant*; *Dagenais*; *Ryan.*
[126] Twitter Factum, para. 49**.**
[127] *Hill*, para 97; *Pepsico*, para 22; *Ryan*, para 100; *Grant*, para 44.
[128] *Tercen, Douez, Uber, Bhasin v. Hrynew* 2014 SCC 71 ["*Bhasin*"]; *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 ["*Wastech*"].

Applicants do not argue that Twitter is barred from imposing any limits on content in Promoted Tweets. Beyond the three Ad Policies at issue in this case, Twitter has many restrictive policies, in both its advertising and organic services, mostly aimed at harmful speech, such as hate speech, which "strays some distance from the spirit of s. 2(b)."[129] Restricting these kinds of low-value speech does not offend public policy and is a valid exercise by Twitter of its freedom of contract and expression.

68. In sharp contrast to restrictions on low-value speech, the three Ad Policies impose sweeping bans on high-value and harmless speech, and therefore substantially encroach on weighty constitutional values that, on balance, outweigh whatever competing freedom of contract and freedom of expression values are at stake for Twitter.

f. Twitter's three Ad Policies are in a contract of adhesion

69. Because of their encroachment on freedom of expression values, the three Ad Policies at issue offend public policy regardless of what kind of contract they are housed in. But the fact they are part of a contract of adhesion between unequal parties makes their offense to public policy that much worse.

70. Contract provisions that raise public policy concerns are subject to even greater scrutiny when housed in contracts of adhesion between unequal parties.[130] As Justice Brown stated in *Uber*, in his consideration of the doctrine of public policy's application to a clause in a contract of adhesion that encroached on constitutional values:

> What is reasonable between the parties must be considered in light of the parties' relationship. The role that bargaining strength plays in this context is comparable to its role in the enforcement of other contractual provisions that raise public policy concerns, including restrictive covenants and forum selection clauses.[131]

71. The Applicants' relationship with Twitter is one of unequal bargaining strength in a contract of adhesion – the Twitter User Agreement. That relationship is characterized by *four* features that courts consider in public policy cases (and also, as discussed below, in unconscionability cases) concerning contracts of adhesion: (i) gross inequality of bargaining

[129] *Keegstra*, p. 766.
[130] *Douez*, para. 53; *Uber*, per Brown J, para 134.
[131] *Uber*, per Brown J, para. 134.

power; (ii) no opportunity for users to negotiate; (iii) dense and difficult to understand language; and (iv) no comparable alternatives to the service offered by the issuer.[132]

i. Gross inequality of bargaining power

72. At all relevant times, Cool World, a cause-driven, social enterprise that does not accept purely commercial projects, was functionally a sole proprietorship with Dodds as its sole shareholder and manager. In the 2020-21 Fiscal Year (running from April 2020 to March 2021), Cool World had net income of $5,785.38. Dodds receives no compensation from Cool World. Cool World has no employees. All its work is performed by Dodds and sub-contractors. Dodds operates Cool World out of her rental apartment. By contrast, Twitter is a multi-billion dollar company.[133]

ii. No opportunity for users to negotiate

73. The User Agreement is presented on a take-it-or-leave-it basis. There is "no bargaining, no choice, no adjustments," as the Court describes Facebook's analogous user agreement in *Douez*.[134]

iii. Dense and difficult to understand language

74. Despite their onerous terms, the Ad Policies are not reasonably accessible to typical users. They are buried deep in a plethora of online documents and links to various documents that make up, and are referentially incorporated into, the User Agreement. They do not appear to users on the face of the agreement and can only be accessed by navigating a complicated online path through different pages and links that make up the User Agreement, a task that a typical prospective user cannot reasonably be expected to do, as was analogously true in *Uber*.[135]

75. To access the three Ad Policies, a user must click on the Terms, read the opening sentence which informs them that the User Agreement includes, *inter alia*, Twitter Rules and Policies, then click on that link which takes them to a page of more than 80 links, one of them, about halfway down the page, and under the heading "Platform Use Guidelines", entitled "Content Monetization Standards". Clicking on that link, the user will read, in the second paragraph of the landing page:

[132] *Douez*, paras. 54, 55, 56; *Uber*, Brown J, para. 134.
[133] *Cool World (Contract) NOA*, paras. 2(d) to (f), pp. 5-6.
[134] *Douez*, para. 98.
[135] *Uber*, para. 71.

"All people who advertise on Twitter must follow Twitter's Ads Policies." Then, clicking the Ad Policies link, the user will be led to a page with over twenty further links, including the three Ad Policies.[136]

76. Twitter claims that "Applicants concede actual notice of Twitter's policies with respect to purchasing the promotion of Tweets. By using the Website to submit the Trailer Tweet, the Applicants had notice of the terms, MSA and Policies and are deemed to assent to them."[137] This statement misconstrues the relevant question, which is whether Applicants were aware they were binding themselves to the Ad Policies when they entered the User Agreement, not when they requested to purchase Promoted Tweets within the terms of that Agreement.[138]

77. Moreover, using a website to enter an agreement does not, in and of itself, constitute notice of and assent to all terms of that agreement, especially when the agreement is in the form of a contract of adhesion between parties of unequal bargaining power, and the provisions are onerous for the weaker party.[139] *Century 21*, relied upon by Twitter, can be distinguished on the ground it involved a commercial agreement between parties of equal bargaining strength.

iv. No comparable alternatives to the service offered by the issuer.

78. The Twitter platform is far and away the platform of choice for people seeking engagement relating to politics, policy, governance, and social issues. It is the world's town square. Audiences for this kind of content are precisely the ones Applicants needed to reach in their efforts to disseminate the Trailer and promote a Film about social and political issues, and there is no comparable alternative for doing so.[140]

3. ***The three Ad Policies are contrary to the doctrine of unconscionability***

79. It is not plain and obvious that the Ad Policies are *not* contrary to the doctrine of unconscionability. Court's may refuse to enforce otherwise valid provisions of a contract that are unconscionable. Unconscionability rests on the presence of two elements at the time an agreement is entered: inequality of bargaining power and a resulting improvident bargain. The first element,

[136] *Cool World (Contract) NOA*, para. 2(ee), p. 17.
[137] Twitter Factum, para. 52.
[138] See This Factum section IV(B)(a), *supra*.
[139] *Uber*.
[140] *Cool World (Contract) NOA*, para. 2(fff), pp. 26-9. *Douez*, para. 56; *Facebook*, paras. 146, 147.

inequality of bargaining power, may result from one party failing to understand and appreciate the full import of contractual terms due, *inter alia*, to personal vulnerability, or to the presence of dense or difficult-to-understand terms in the parties' agreement. Where such inequality is present, the second element of unconscionability, improvident bargain, is made out when the weaker party has been unduly disadvantaged by terms that party did not understand or appreciate. One measure of whether the bargain is improvident is whether the "reasonable expectations" of the weaker party are flouted, an objective standard, albeit one that has regard to context.[141]

80. Unconscionability is not limited to consumer agreements but may also be found in relation to business-to-business agreements characterized by inequality of bargaining power and an improvident bargain.[142]

a. Inequality of bargaining power

81. For the reasons submitted in paragraphs 71 to 78 above, there was inequality of bargaining power at the time the User Agreement was entered into between Dodds and Twitter, due to Dodds' personal vulnerability in relation to a multi-billion-dollar business, and the presence of dense and difficult to understand terms in the User Agreement.

b. Improvident bargain

82. The Applicants suffered undue disadvantage as a result of the sweeping and unfettered discretion Twitter gained through its three Ad Policies to bar their content. By binding themselves to those Ad Policies, the Applicants effectively granted Twitter an unfettered power to refuse Promoted Tweets with content that is high-value and lies at the heart of *Charter* protection (for the reasons stated above). That is an improvident bargain, especially when understood in relation to the consideration provided by the Applicants to Twitter, as described in paragraph 38.

83. The bans imposed by the Ad Policies also go beyond any reasonable expectation of the Applicants when entering the User Agreement.[143] Though users might reasonably expect to be barred from promoting Tweets containing expressive content that is harmful and of low-value – such as speech that is hateful, obscene, or discriminatory – the Ad Policies' sweeping ban on non-

[141] *Uber*, paras. 71, 74, 77.
[142] *Uber*; *Plas-Tex Can. Ltd. v. Dow Chemical*, 334 WAC 139.
[143] *Uber*, paras. 77.

harmful high-value speech is beyond any such reasonable expectation. That is especially true in light of Twitter's widely-publicized claims to be a forum for free speech, which would reasonably create expectations of its openness to such expressive content whether in organic or advertising domains.[144]

4. ***Twitter's application of the three Ad Policies is contrary to the doctrine of good faith in contract law***

84. In the alternative, if the three Ad Policies do not offend the doctrines of public policy and unconscionability, which the Applicants do not concede, then it is not plain and obvious that Twitter's reliance on them to refuse the Applicants' requests for Promoted Tweets of the Trailer did *not* breach the duty of good faith in contract law.

85. Contracting parties owe each other duties of good faith in the performance of contractual obligations,[145] and, in particular, in the exercise of discretion granted by contractual terms.[146] Twitter's exercise of discretion under the Ad Policies to refuse to promote Tweets of the Trailer breached the duty of good faith by being unreasonable, in the sense it was disconnected from, and arbitrary and capricious towards, the purposes of the Ad Policies in question, as ascertained through construction of the relevant provisions, the contract as a whole, and the broader context of the contract.[147] Twitter has acted unreasonably, arbitrarily and capriciously in regard to the Ad Policies' purposes in refusing the Applicants' requests to promote Tweets of the Trailer.

86. The premise of this *alternative* argument is that the purposes of the three Ad Policies in question *do not* include restricting high value non-harmful speech. That is consistent with Twitter's own statements of commitment to freedom of expression.[148] It is also consistent with the language of the Ad Policies and the practices of Twitter in applying them.

87. *The purpose of the "inappropriate content" Ad Policy* is to bar content that is harmful, whether because it is dangerous, exploitative, misleading, or otherwise harmful. That purpose is

[144] *Cool World (Contract) NOA*, para. 2(eee), pp. 25-6.
[145] *Bhasin.*
[146] *Wastech.*
[147] *Wastech*, paras. 71, 72, 75, 76.
[148] *Cool World (Contract) NOA*, para. 2(eee), pp. 25-6.

not served by barring Promoted Tweets of the Trailer, which is *not* dangerous, exploitative, misleading, or otherwise harmful.[149]

88. *The purpose of the "sensitive targeting" Ad Policy* is to regulate the use of Twitter's services for targeting different demographic groups with ads, including promoted Tweets. It cannot reasonably be relied upon to altogether reject a Promoted Tweet for the Trailer, but rather, only to limit the kinds of audiences such a Promoted Tweet can be aimed at using Twitter's targeting services.[150]

89. *The purpose of the "political content" Ad Policy* is to prevent Twitter from being used for paid advertising in relation to electoral processes, lobbying, and the operation of political and judicial institutions. The Trailer does not contain this kind of content. It addresses broad social and political issues. The Applicant's concede that the Trailer has "political undertones," as Twitter claimed,[151] but barring content with "political undertones" is not the purpose of the policy, so long as that content does not relate to electoral processes, lobbying, and the operation of political and judicial institutions.[152]

90. That the purpose of the "political content" Ad Policy is not to bar all content with "political undertones" is patent on the face of the record of Twitter's routine and regular acceptance of Promoted Tweets with "political undertones."[153] For example, Twitter has permitted, *inter alia*, the following Promoted Tweets and advertisements: **General Electric**: "To fight climate change, we must all work together. We commend the Biden Administration for demonstrating a commitment to this issue by rejoining the Paris agreement"; **Coca Cola**: "Building a better future means joining together as we move forward. We are donating to 100 Black Men of America, Inc. as part of an effort to end systemic racism and bring true equality to all. This is just a first step. Black Lives Matter;" **ExxonMobile**: "We're supporting the goals of the Paris Agreement; and **JP Morgan**: "J.P Morgan's David Freedman shares how to prepare for activist campaigns."

[149] *Cool World (Contract) NOA*, para. 2(vv), p. 20.
[150] *Cool World (Contract) NOA*, para. 2(ww), p. 21.
[151] See This Factum, IIC, *supra*.
[152] *Cool World (Contract) NOA*, para. 2(vv), p. 20.
[153] *Cool World (Contract) NOA*, para. 2(hhh), a to c, pp. 30-35.

91. Twitter also permits Promoted Tweets and advertisements for political documentary films, like the Film.[154] For example, Twitter has permitted, *inter alia*, Promoted Tweets and advertisements for: ***Knock Down the House***, a documentary film about US Congressional representative Alexandria Octavio-Cortez's campaign for office; ***Boys State***, a documentary film about political divisions and machinations in the United States; ***All In: The Fight for Democracy***, a documentary film featuring Stacy Abrams, a leading Democratic politician and commentator, among others, criticizing voter suppression by Republican administrations.

92. To summarize, both the language of the Ad Policies and Twitter's record of applications of those Ad Policies indicate that the purposes behind those policies were contradicted by Twitter's refusal to promote the Trailer Tweet. Those refusals were therefore unreasonable, arbitrary and capricious in relation to the Ad Policies' purposes and thus in breach of the duty of good faith.

V. ORDER

93. The Applicants request that this Honourable Court:

a. dismiss Twitter's Rule 21.01(1)(b) motion; and

b. grant an order for costs on a solicitor-client basis;

c. grant such other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of November, 2022

Sujit Choudhry
Counsel for the Applicants

Joel Bakan
Counsel for the Applicants

[154] *Cool World (Contract) NOA*, para. 2(hhh), d, pp. 35-6.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19

2. *Beadica 231 CC and Others v. Trustees for the time being of the Oregon Trust and Others*, (CCT109/19), [2020] ZACC 13

3. *Bhasin v. Hrynew* 2014 SCC 71

4. *Canada Trust Co. v. Ontario Human Rights Commission* 74 OR (2d) 481 (1990)

5. *Canadian Dyers Association Ltd. v. Burton* [1920] O.J. (H.C.) (H.C.)

6. *Carlill v. Carbolic Smoke Ball Corporation*, [1892] EWCA Civ 1

7. *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139

8. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835

9. *Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463 (S.C.)

10. *Donoghue v. Stevenson*, [1932] AC 562

11. *Douez v. Facebook*, 2017 SCC 33

12. *Facebook*, BGH [German Court of Justice], Judgment of 29.07.2021 - III ZR 192/20

13. *Fox v. Fox Estate*, 1996 CanLII 779 (ON CA)

14. *Gosselin v. Québec (Attorney General)*, 2002 SCC 84

15. *Grams v. Babiarz*, 2015 SKQB 374

16. *Grant v. Torstar Corp.*, 2009 SCC 61

17. *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31

18. *Harper v. Canada (Attorney General)*, 2004 SCC 30

19. *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130

20. *Hunt v. Carey*, [1990] 2 SCR 959

21. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927

22. *Jones v. Tsige*, 2012 ONCA 32

23. *M. (A.) v. Ryan*, [1997] 1 SCR 157

24. *Mathur v Ontario*, 2020 ONSC 6918

25. *McCorkill v. Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased*, 2014 NBQB 148

26. *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd*., [1990] 1 SCR 619

27. *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62

28. *Nash v. Ontario*, 1995 CanLII 2934 (ON CA)

29. *Netchoice v. Paxton*, USCA (5th Cir.), 21-51178, 2022

30. *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5

31. *Odhavji Estate v. Woodhouse*, 2003 SCC 69

32. *Operation Dismantle v. The Queen*, [1985] 1 SCR 441

33. *Packingham v. North Carolina*, 582 US (2017)

34. *Pearce v. 4 Pillars Consulting Group Inc*., 2021 BCCA 198

35. *Plas-Tex Can. Ltd. v. Dow Chemical*, 334 WAC 139

36. *R. v. Imperial Tobacco*, 2011 SCC 42

37. *R. v. Keegstra*, [1990] 3 SCR 697

38. *R. v. Salituro*, [1991] 3 SCR 654

39. *R.W.D.S.U v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573

40. *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8

41. *Ramsden v. Peterborough (City)*, [1993] 2 SCR 1084

42. *Reference re Secession of Quebec*, [1998] 2 SCR 217

43. *RJR-MacDonald Inc v. Canada (Attorney General)*, [1995] 3 SCR 199

44. *Royal Trust Corporation of Canada v. The University of Western Ontario et al.*, 2016 ONSC 1143

45. *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11

46. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 31

47. *Spence Estate, Re*, 2016 ONCA 196

48. *Tercon Contractors v. British Columbia (Transportation and Highways)*, 2010 SCC 4

49. *Toussaint v. Canada (Attorney General)*, 2022 ONSC 4747

50. *Uber v. Heller*, 2020 SCC 16

51. *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage Dist*, 2021 SCC 7

52. *WIC Radio Ltd. v. Simpson*, 2008 SCC 40

SCHEDULE "B"

RELEVANT STATUTORY PROVISIONS

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Rule 21.01(1)(b)

Where Available
To Any Party on a Question of Law 21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, section 52

Constitution Act
Section 52

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Canadian Charter of Rights and Freedoms, s. 1, s. 2, s. 7, s. 24(1), s. 32

Canadian Charter of Rights and Freedoms
Section 1

Rights and freedoms in Canada

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Canadian Charter of Rights and Freedoms
Section 2

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

- **(a)** freedom of conscience and religion;
- **(b)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- **(c)** freedom of peaceful assembly; and
- **(d)** freedom of association.

Canadian Charter of Rights and Freedoms
Section 7

Life, liberty and security of person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Canadian Charter of Rights and Freedoms
Section 24(1)

Enforcement of guaranteed rights and freedoms

- **24 (1)** Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Canadian Charter of Rights and Freedoms
Section 32

Application of Charter

32 (1) This Charter applies

- **(a)** to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- **(b)** to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
-

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force

SCHEDULE "C"

LIST OF SECONDARY SOURCES

1. Barak, Aharon, 'Constitutional Human Rights and Private Law', in Daniel Friedmann and Daphne Barak-Erez, *Human Rights in Private Law* (Hart Publishing, 2001), pp. 13-42.
2. Belli, Lucia, 'Structural Power as a Critical element of Social Media Platforms' Private Sovereignty', in Edoardo Celeste et al. (eds.), *Constitutionalising Social Media* (Hart Publishing, 2022), ch. 6, pp. 81–99.
3. Celeste, Edoardo et al., 'Digital Constitutionalism: In Search of a Content Governance Standard', in Edoardo Celeste et al. (eds.), *Constitutionalising Social Media* (Hart Publishing, 2022), ch. 16, pp. 267–87.
4. De Gregorio, Giovanni and Roxana Radu, 'Digital constitutionalism in the new era of Internet governance', *International Journal of Law and Information Technology*, 30:2022, pp. 68–87.
5. Frantziou, Eleni, 'The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle', *Cambridge Yearbook of European Legal Studies*, 22:2020, pp. 208–232.
6. Heldt, Amelie P., 'Content Moderation by Social Media Platforms: The Importance of Judicial Review', in Edoardo Celeste et al. (eds.), *Constitutionalising Social Media* (Hart Publishing, 2022), ch. 15, pp. 252–65.
7. Pollicino, Oreste, 'Digital Private Powers Exercising Public Functions: The Constitutional Paradox in the Digital Age and its Possible Solutions', European Court of Human Rights [draft article]
8. Pollicino, Oreste, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism* (Hart Publishing, 2021), chs. 2 and 5.
9. Suzor, Nicolas P., *Lawless: The secret rules that govern our digital lives* (Cambridge University Press, 2019), chs. 6, 7, 8, and 9.
10. Theil, Stefan, 'Private Censorship and Structural Dominance: Why Social Media Platforms Should have Obligations to their Users Under Freedom of Expression', *The Cambridge Law Journal*, August 2022, pp. 1–28.
11. Waddams, Stephen M., *The Law of Contracts* (1984), p. 24.
12. Weinrib, Ernest, *Reciprocal Freedom: Private Law and Public Right* (2022), ch. 6.
13. Weinrib, Lorraine and Weinrib, Ernest, *Constitutional Values and Private Law in Canada*, in Daniel Friedmann and Daphne Barak-Erez, *Human Rights in Private Law* (Hart Publishing, 2001), pp. 43-72.

COOL WORLD TECHNOLOGIES, INC.,
and ETHEL KATHERINE DODDS
Applicants (Responding Parties)

– AND –

TWITTER INC.
and TWITTER CANADA ULC
Respondents (Moving Parties)
Court File No.: CV-21-00666255-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

FACTUM OF THE RESPONDING PARTIES

Hāki Chambers Global
www.hakichambers.com
c/o Sujit Choudhry Professional Corporation
319 Sunnyside Avenue
Toronto ON M5H 1A1

Sujit Choudhry
LSO#: 45011E
Tel: 416-436-3679
suj@choudhry.law
sujit.choudhry@hakichambers.com

Joel Bakan
LSO#: 82093M
Tel: 778-855-3955
bakan@law.ubc.ca
joel.bakan@hakichambers.com

Counsel for the Applicants
(Responding Parties)