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 MOVING PARTIES, TWITTER, INC. AND TWITTER CANADA ULC

Date: October 17, 2022

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PART I – OVERVIEW

1. The applicants claim that they have a right to advertise a film on Twitter by means of a paid promotion of a Tweet encapsulating the trailer for a documentary film that they have been hired to promote. The Application seeks a finding that certain of Twitter's policies violate the "doctrine of public policy" under contract law, are "unconscionable" and that Twitter's enforcement of such policies is a breach of the duty of good faith under contract law.

2. There is no basis for these claims. Twitter is entirely within its rights to refuse to promote an advertisement when it determines that the relevant advertisement does not comply with its policies, or indeed for any reason it chooses. That is a matter of Twitter's own freedom of expression.

3. This motion is being brought concurrently with a motion brought by the Attorney General of Canada on a related application against the Government of Canada that seeks to require the government to legislate an obligation on the part of entities like Twitter to provide services of the type in issue in this proceeding.

4. The Respondents also do not waive jurisdictional objections should the matter proceed.

5. No contract that requires Twitter to sell the Applicants any paid advertising product exists, and the Applicants seek to misapply common law doctrines that are inconsistent with the basic contract principles that apply to the only contract that does exist between the parties: Twitter's Terms of Service.

6. The Applicants' position facially contravenes the doctrines of public policy and their invocation of *Charter* values (there being no pleaded basis that could sustain their

unconscionability position). Asking this Court to order that Twitter sell the Applicants an advertising product is antithetical to the freedom of expression protected by section 2(b) of the *Charter*. The Applicants seek to compel speech, which is anathema to the *Charter* values the applicants invoke.

7. The Applicants' allegations cannot support the claims advanced, nor can they be amended to do so. This Application should be dismissed, without leave to amend.

PART II - FACTS

8. Twitter, Inc. ("**Twitter**") is a California-based corporation that owns and operates the website Twitter.com (the "**Platform**").

9. Twitter Canada ULC ("**Twitter Canada**" and collectively with Twitter, the "**Twitter Respondents**"), is a British Columbia corporation and a subsidiary of Twitter. Twitter Canada does not operate Twitter's services in Canada and thereby had no involvement in the matters described in the Second Amended Notice of Application (the "**Application**"). Twitter Canada appears to have been improperly named as a defendant to gain some jurisdictional advantage, the appropriateness of which is denied.

10. The Twitter Respondents do not attorn to the jurisdiction of this Honourable Court, and appear only to have the within Application dismissed in its entirety for failing to disclose any cause of action as against the Twitter Respondents, reasonable or otherwise. They intend to rely on the forum and jurisdiction clauses contained in the Terms set out below, should this motion be dismissed.

11. The corporate applicant, Cool World Technologies, Inc. ("**Cool World**"), is a corporation incorporated under the laws of Canada. The individual applicant, Ethel Katherine Dodds ("**Dodds**", and collectively with Cool World, the "**Applicants**"), appears to be the CEO of Cool World and the owner of the Twitter account @CorporationFilm.

12. Twitter is a real-time global communications platform that allows its users to create and share ideas and information instantly, and to facilitate conversations on matters of public interest through various product features, including Tweets and Retweets.

13. The only contract that binds Twitter and its users are the Terms of Service (the "**Terms**")[1], which govern users' access to and use of the Twitter Platform. By using the Twitter Platform, users agree to be bound by the Terms.

14. The Terms as they existed at the material time are found here: https://twitter.com/en/tos/previous/version_15. See attached Schedule "C".

15. Section 4 of the Terms states: If you use advertising features of the Services, you must agree to our Twitter Master Services Agreement (https://ads.twitter.com/terms) (the "**MSA**"), thereby incorporating it by reference. See attached Schedule "D".

16. The MSA states at section 5: "None of the Twitter Entities will have any liability for your Twitter Ads or Materials and **may refuse**, reject, cancel, suspend, or remove **any Twitter Ad**, Materials, or space reservation **at its discretion at any time**." [emphasis added]

[1] https://twitter.com/en/tos. The Twitter User Agreement comprises the Twitter Terms of Service, its Privacy Policy, the Twitter Rules and Policies, and all incorporated policies.

17. The Terms also state in section 4: "We may suspend or terminate your account **or cease providing you with all or part of the Services at any time for any or no reason**" [emphasis added].

18. By creating the @CorporationFilm account, the Applicants agreed to and are bound by the Terms.

19. Users may seek to purchase one of Twitter's paid advertising products, including Promoted Tweets.

20. Promoted Tweets are ordinary Tweets purchased by advertisers in exchange for placement on the Platform in order to reach a wider audience and to spark engagement from the advertiser's existing followers.

21. Twitter retains absolute discretion to decide which Tweets can and cannot be promoted. Twitter has issued policies that apply to all paid advertising on Twitter's Platform.

22. Users do not have an absolute right to purchase promoted Tweets, nor can they bind Twitter to a contract concerning a promoted Tweet simply by making a request to purchase an advertising product.

23. The request to promote a Tweet by a user is an offer made to Twitter. If Twitter accepts the offer, the purchaser pays the fee and the Tweet is promoted, subject to the MSA's terms.

24. To purchase an advertising product from Twitter, advertisers must agree to the MSA's terms (such as may be applicable). The MSA states that Twitter may refuse any Twitter Ad at its discretion.

25. The creation of a contract between Twitter and an advertiser to promote a Tweet is thus contingent on Twitter accepting the advertiser's request to purchase the promoted Tweet after assessing the proposed Promoted Tweet, including within the applicable policies.

26. While Twitter reserves an absolute right to decide whether or not to promote a Tweet, Twitter issues policies that apply to all paid advertising, including the policies cited in the Application – the Political Content Policy, the Targeting of Sensitive Categories Policy, and the Inappropriate Content Policy (collectively, the "**Policies**"). Those Policies do not create rights on the part of potential advertisers.

27. The Political Content Policy prohibits the paid promotion of political content on the basis that it is Twitter's "belief that political message reach should be earned, not bought."

28. The Targeting of Sensitive Categories Policy prohibits the paid promotion of advertisements that target certain categories of personal customer data that Twitter deems to be sensitive in nature. Sensitive categories include, but are not limited to, political affiliation and/or beliefs.

29. The Inappropriate Content Policy prohibits paid advertisements that contain inappropriate content. Categories of content deemed inappropriate for the purposes of the policy include, but are not limited to, dangerous or exploitative content, personal attacks, misrepresentative content, and profanity and vulgarity.

30. These Policies do not prohibit users from posting the same content as a Tweet rather than as a paid advertisement. Twitter has other policies that govern standard or "organic" Tweets.

31. The Applicants made a request to promote on the Website a tweet featuring a trailer for the documentary film, *The New Corporation: The Unfortunately Necessary Sequel* (the "**Trailer**").

32. Twitter denied the Applicants' request to promote the Trailer through a promoted Tweet, which was within its rights to do pursuant to the common law, the MSA and its own policies regarding paid advertisements.

PART III - ISSUES

33. The issues on this motion are:

Issue 1: Should the Application be struck for failing to disclose a reasonable cause of action? *It should.*

Issue 2: Should the Applicants be granted leave to amend the Second Amended Application a third time? *They should not.*

PART IV – ARGUMENT

Issue 1: The Application Should be Struck for Not Disclosing a Reasonable (Or Any) Cause of Action

34. A judge may strike out a pleading on the ground that it discloses no reasonable cause of action under Rule 21.01(1)(b) of the *Rules of Civil Procedure* (the "**Rules**"), including applications.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194 at Rules 14.09, 21.01(1)(b).

35. A claim will be struck out if it is "plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action". *McCreight v Canada (Attorney-*

General) affirms that striking claims under Rule 21.01(1)(b) serves an important housekeeping function of weeding out "hopeless claims" "in the interest of efficiency and correct results".

***McCreight v Canada (Attorney-General),* 2013 ONCA 483 at para 39.**

36. The failure to plead a reasonable cause of action generally arises in one of two ways: (1) the allegations made do not come within the scope of a recognized cause of action, or (2) the allegations fail to plead all of the elements essential to a recognized cause of action. The claims advanced in the within Application are precisely the types of claims that Rule 21.01(1)(b) is intended to weed out.

***Del Giudice v Thompson,* 2021 ONSC 5379 at para 121.**

No Contract to Promote the Trailer

37. The "doctrine of public policy", the "doctrine of unconscionability" and the duty of good faith do not apply to the Policies and Twitter's proper exercise of its discretion to refuse an advertiser's request to promote a Tweet, including the Trailer, under the common law, the Terms and the MSA.

38. Any request to purchase a promoted Tweet under the Terms and therefore the MSA does not constitute a contract between Twitter and the Applicants or even offers capable of acceptance. The Terms and the MSA include an invitation to potential advertisers to negotiate an agreement with Twitter to promote a specific Tweet. The MSA and Terms are thereby beyond a mere invitation to treat.

39. A fundamental criterion of the formation of a contract is the intention of the parties to create legal relations. In *M.J.B. Enterprises Ltd. v Defence Construction (1951) Ltd.* ("***M.J.B.***"),

the Supreme Court of Canada explained the difference between an offer capable of acceptance and an invitation to treat in the context of invitations to tender. This is directly analogous to the present situation.

40. The Court in *M.J.B.* explained that the fundamental feature for determining whether an offer to submit tenders goes beyond an invitation to treat and becomes an offer capable of acceptance is whether the parties intended to form a binding contract simply by submitting a tender.

> ***M.J.B. Enterprises Ltd. v Defence Construction (1951) Ltd.,*** **[1999] 1. S.C.R. 619 at para 19.**

41. In the seminal case of *Carlill v Carbolic Smoke Ball Company,* the Court explained why advertisements often constitute invitations to treat rather than offers capable of acceptance:

> It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate - offers to receive offers - offers to chaffer, as I think some learned judge in one of the cases has said.
>
> ***Carlill v Carbolic Smoke Ball Company,*** **[1892] EWCA Civ 1 at para 16.**

42. In line with *Carlill,* Twitter's making available the possibility of purchasing promoted Tweets to its users, and by providing terms around the process for users to propose Tweets for promotion, constitutes an invitation to treat. After the user requests to purchase a promoted Tweet, Twitter retains absolute discretion to refuse promotion of the Tweet, including on the basis that Twitter finds the Tweet does not to comply with one or more of its policies.

43. Accordingly, a contract only arises if Twitter deems the proposed Tweet for promotion to comply with all policies, and it further then elects, at its discretion, to accept the user's request.

44. In this case, Twitter refused the Applicants' request to purchase promoted Tweets including the Trailer, negating any argument that such a contract existed between Twitter and the Applicants to advertise the Trailer through a Promoted Tweet.

Public Policy and Unconscionability Are Not Pleaded or Established at Law

45. Application of the doctrines of public policy and unconscionability is predicated on the existence of a contract. They cannot apply where a contract does not exist, and therefore cannot extend to invitations to treat.

> ***Tercon Contractors Ltd. v British Columbia (Transportation and Highways),*** **2010 SCC 4 at paras 113 and 116.**

46. Even if the submission of a Tweet for promotion to Twitter somehow formed a contract (which it does not), the "doctrine of public policy" could only give rise to a cause of action on the basis of illegality, immorality, restraint on trade, injury to the state or injury to the justice system (assuming an extant contract between arms' length commercial actors). None of these elements exist or are alleged in the Application.

> ***Niedermeyer v Charlton,*** **2014 BCCA 165 at para 44.**

47. There is no breach of "public policy under contract law" in Twitter implementing and enforcing its policies, including the Terms and the MSA. Rather, public policy favours Twitter in terms of its right not to be compelled to promote certain messages and to control access to its Platform:

> The World Wide Web industry itself has recognized that the owners of websites have the right to restrict access to some or all of the information on their site. For this reason protocols designed to enable a search engine to determine what it is permitted to be included and what it is not have been created. Implicit in

> such standards is the recognition that the information on the Internet is not open to all. In addition, it is an acknowledgment that restrictions do not in fact inhibit or negatively affect the operation of the Internet to an unacceptable degree.

***Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.,* 2011 BCSC 1196, at para 112.**

48. In seeking to force Twitter to promote the Trailer against its will, the Applicants advocate for compelled speech, under the common law, based on alleged values under the *Charter of Rights and Freedoms* (the "***Charter***"). Compelled speech is antithetical to *Charter* values, but is the undeniable objective of this Application.

49. *Charter* values, if they are relevant to this matter, directly militate against the Applicants' position. Freedom of expression encompasses the right not to express views, as the Supreme Court of Canada has held and maintained. It is compelled speech that can result in a breach of section 2(b) of the *Charter*. If compelled speech deprives one of the ability to speak one's mind or associates one with a position they disagree with, there is an imperilment of free expression.

***Slaight Communications Incorporated v. Davidson,* 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038 at paras 39, 95.**
***Lavigne v. Ontario Public Services Employees Union et al.* (1991), 1991 CanLII 68 (SCC) at para 81.**

Good Faith/Bad Faith Neither Applicable Nor Pleaded

50. The duty of good faith in contract law does not extend to the negotiation of a contract. The Ontario Court of Appeal in *978011 Ontario Ltd. v Cornell Engineering Co.* stated that "[g]enerally, parties negotiating a contract expect that each will act entirely in the party's own interests." Therefore, the duty of good faith performance does not extend to invitations to treat.

***Bhasin v Hrynew,* 2014 SCC 71 at para 33.**
***Martel Building Ltd. v Canada,* 2000 SCC 60 at para 73.**
***978011 Ontario Ltd. v. Cornell Engineering Co*., 2001 CanLII 8522 (ONCA), at para 32.**

51. Even if a contract existed between Twitter and the Applicants with respect to the promotion of the Trailer (which there was not), Twitter discharged its duty – in spades – based on the facts alleged in the Application, and there are no facts pleaded to the contrary.

52. The 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.

***Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196, at paras 115-118, 123.**

53. The Applicants therefore cannot pick and choose which terms apply to the use of the Website, including the Terms that include the MSA's stipulation that the decision whether or not to promote a Tweet proposed for same by a user is at its discretion.

***Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196, at paras 115-116.**

54. Neither has there been a breach of any duty Twitter may be found to owe to the Applicants to promote the Trailer (the existence of any such duty being expressly denied). There are no contractual terms alleged that could create such an obligation.

55. In *Value Industries Ltd. v. Pacific Press Ltd.* the plaintiff furniture company had a "retail advertising contract' with the defendant newspaper. When the plaintiff was lawfully subject to strike action by one of its unions, the defendant's employees refused to handle the plaintiff's advertisements, the right to do being then upheld by the Labour Relations Board. The plaintiff sued the defendant for breach of contract, alleging that the refusal to publish its advertisements resulted in a loss of profits. The action was dismissed because there was no express or implied obligation that the defendant would publish all advertisements submitted by the plaintiff, as what

was contracted for was only the pre-setting of advertising rates and additional terms which governed in the event advertisements were placed:

> An examination of all the terms and conditions of the agreement of 1st September 1979 satisfies me that there is no where stated a positive obligation that the defendant will publish all advertisements that the plaintiff submits during the one-year term …
>
> The essence of the document is only an agreement fixing the rates to be paid over the term if the plaintiff chooses to place advertising with the defendant and the defendant in fact publishes and distributes the paper containing the advertising. Whatever consideration does flow at the agreed rates only is payable after the advertisement has been published and those charges are to be paid only after the monthly billing.
>
> In my view, this contract can stand and it has business efficacy without the inferring or implying of an absolute obligation to print everything that the plaintiff tenders to the defendant. If I ask the question, "Would the parties have intended the plaintiff be under an absolute obligation to print?" my answer is "No". In my judgment, what has been contracted for in this agreement is the pre-setting of advertising rates, plus the additional terms which the parties agreed that they would be bound by when each and every advertisement was placed and published in the future.
>
> I, accordingly, find that there was no express or implied obligation on the defendant to publish the plaintiff's advertisement on 13th June 1980 or subsequent thereto and, accordingly, the plaintiff's action will be dismissed.

***Value Industries Ltd. v. Pacific Press Ltd*., 1981 CanLII 663 (BCSC) at paras 22, 28-30.**

56. The principle of good faith does not produce a different result (even if it could apply, which it does not). The good faith standard does not impose positive obligations on contracting parties.

***C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at para 86.**

57. In *Maxam Opportunities Fund Limited Partnership v. 729171 Alberta Inc.*, it was held that the good faith principle did not require a defendant debtor to borrow money from the plaintiff creditor under the terms of the credit agreement:

> The applicability of Bhasin in this case as argued by the plaintiffs is dependent on the finding that there existed a contractual obligation upon 893 to draw upon the credit facility. In establishing *the* duty of honesty in the performance of a contract, the Supreme Court of Canada did not alter the principles for contract interpretation nor did it permit the reading in of terms into a contract of obligations which do not exist. As I have found, the performance on the part of 893 did not oblige it to draw down on the credit facility. The actions of 893 to find alternate financing in this case is consistent with the pursuit of economic self-interest endorsed in Bhasin. The actions of 893 in any event do not approximate the level of negative conduct found in Bhasin. (emphasis added)

***Maxam Opportunities Fund Limited Partnership v. 729171 Alberta Inc*., 2015 BCSC 271 at para 168, aff'd 2016 BCCA 53.**

58. This Application relies entirely on Twitter's alleged breach of the "doctrine of public policy", the "doctrine of unconscionability" and the duty of good faith in advancing causes of action for breach of a contract that does not exist. The Application pleads no reasonable, or in fact any, cause of action and must be struck entirely on this basis.

The Charter is Inapplicable

59. The *Charter* exclusively governs acts of government that affect the rights and freedoms of individuals. As the Supreme Court of Canada affirmed in *McKinney v University of Guelph* ("***McKinney***"), the *Charter* "is essentially an instrument for checking the powers of government over the individual". This limited application of the *Charter* is clearly set forth in section 32(1):

> 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 the 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.

Canadian *Charter* of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11 at s. 32(1).

***McKinney v University of Guelph,* [1990] 3 S.C.R. 229 (SCC) at para 21.**

60. As the Supreme Court of Canada explained in *McKinney,* it would "significantly undermine the obvious purpose of s. 32 to confine the application of the *Charter* to legislative and government action to apply it to private corporations, and it would fly in the face of the justification for so confining the *Charter*".

***McKinney v University of Guelph,* [1990] 3 S.C.R. 229 (SCC) at para 30.**

61. The confining purpose of section 32 of the *Charter* will only be upheld in extending *Charter* scrutiny to non-government bodies when that body is carrying out "government action" such that it can be accurately described as acting in a government capacity. A private body engages in government action, and thus attracts the *Charter*, when the action constitutes the exercising of a power conferred on them by the government or the action is performed to implement a government objective, which is not alleged in this Application.

***Godbout v Longueuil (City),* [1997] S.C.J. No. 95 (SCC) at para 49.**
***Eldridge v British Columbia (Attorney General),* [1997] 3 S.C.R. 624 at para 51.**
***McKinney v University of Guelph,* [1990] 3 S.C.R. 229 (SCC) at para 21.**

62. In implementing the MSA and the Policies and exercising its discretion to refuse the promotion of Tweets, Twitter is plainly not carrying out government action. Twitter's actions amount exclusively to Twitter's right to control access to its own Platform.

63. Even if there was a contract between Twitter and the Applicants with respect to the paid promotion of any specific Tweet (which there is not), the *Charter* does not apply to any such contract, nor to the MSA, the Terms, or the Policies. The *Charter* cannot be invoked, whether to found a cause of action or to establish a defence, in private litigation wholly divorced from any connection with government. The nature of the MSA, the Terms, and the Policies are strictly commercial in nature, and do not pertain to the execution of a government function nor the

application of a government policy. The actions of Twitter in implementing and performing under the MSA, the Terms, and the Policies are therefore exempt from scrutiny under the *Charter*.

> ***Dolphin Delivery Ltd., v. Retail, Wholesale and Department Store Union, Local 580*, [1986] S.C.J. No. 75, [1986] 2 SCR 573 at paras 40-41.**

64. In the context of civil litigation involving private parties it is only to the extent that the common law is found to be inconsistent with *Charter* values that the *Charter* becomes relevant to the common law. The Supreme Court of Canada in *Hill v Church of Scientology* affirmed that it is imperative not to import into private litigation the analysis which applies in cases involving government action:

> Private parties owe each other no constitutional duties and cannot found their cause of action upon a *Charter* right. The party challenging the common law cannot allege that the common law violates a *Charter* right because, quite simply, *Charter* rights do not exist in the absence of State action. The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will "apply" to the common law only to the extent that the common law is found to be inconsistent with *Charter* values.
>
> ***Hill v. Church of Scientology*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 at para 95.**

65. There is nothing inconsistent with *Charter* values in Twitter relying on its rights under the common law and in accordance with the MSA, the Terms, and the Policies. To find otherwise is to transcend the principle which limits the scope of the application of the *Charter* to disputes as between private parties, and risks effecting a change to the common law so radical as to be properly within the exclusive function of the Legislature.

> ***Hill v. Church of Scientology,* [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 at para 99.**

Issue 2: The Applicants Should Not be Granted Leave to Amend

66. Pursuant to Rule 26.01, the court shall grant leave to amend a pleading, unless prejudice would result that could not be compensated for by costs or an adjournment.

> ***Rules of Civil Procedure,*** **R.R.O. 1990, Reg. 194 at Rule 26.01.**

67. Leave to amend will be refused where there is no reason to suppose that the party could improve its case by any amendment or if an entirely new cause of action would have to be set up by way of amendment.

> ***Sheridan v Ontario*****, 2014 ONSC 4970 at para 77, aff'd 2015 ONCA 303.**
> ***Piedra v Copper Mesa Mining Corp*****., 2011 ONCA 191 at para 96.**

68. Leave to amend should not be granted. The deficiencies in the Application cannot be remedied. Granting the Applicants the opportunity to further amend the Application will still not result in any claims that are viable at law. The Applicants have thrice availed themselves of the opportunity to amend the notice of application and have been unable to plead a coherent and viable claim. Any further amendments will "ultimately serve no purpose".

> ***Best v Ranking,*** **2015 ONSC 6269 at paras 133-138.**

PART V - ORDER

69. Twitter requests that this Honourable Court:

a. strike the Second Amended Notice of Application in its entirety without leave to amend;

b. award Twitter its costs of this motion on a substantial indemnity scale, including taxes and disbursements; and

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October, 2022.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *McCreight v Canada (Attorney-General),* 2013 ONCA 483.
2. *Del Giudice v Thompson,* 2021 ONSC 5379.
3. *M.J.B. Enterprises Ltd. v Defence Construction (1951) Ltd.,* [1999] 1. S.C.R. 619.
4. *Carlill v Carbolic Smoke Ball Company,* [1892] EWCA Civ 1.
5. *Tercon Contractors Ltd. v British Columbia (Transportation and Highways),* 2010 SCC 4.
6. *Niedermeyer v Charlton,* 2014 BCCA 165.
7. *Century 21 Canada Ltd. Partnership v Rogers Communications Inc.,* 2011 BCSC 1196.
8. *Slaight Communications Incorporated v Davidson,* 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038.
9. *Lavigne v Ontario Public Services Employees Union et al.* (1991), 1991 CanLII 68 (SCC).
10. *Bhasin v Hrynew,* 2014 SCC 71.
11. *Martel Building Ltd. v Canada,* 2000 SCC 60.
12. *978011 Ontario Ltd. v. Cornell Engineering Co*., 2001 CanLII 8522 (ONCA).
13. *Value Industries Ltd. v. Pacific Press Ltd.,* 1981 CanLII 663 (BCSC).
14. *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45.
15. *Maxam Opportunities Fund Limited Partnership v. 729171 Alberta Inc*., 2015 BCSC 271, aff'd 2016 BCCA 53.
16. *McKinney v University of Guelph,* [1990] 3 S.C.R. 229 (SCC).
17. *Godbout v Longueuil (City),* [1997] S.C.J. No. 95 (SCC).
18. *Eldridge v British Columbia (Attorney General),* [1997] 3 S.C.R. 624 (SCC).
19. *Dolphin Delivery Ltd., v. Retail, Wholesale and Department Store Union, Local 580*, [1986] S.C.J. No. 75, [1986] 2 SCR 573.
20. *Hill v. Church of Scientology*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130.
21. *Sheridan v Ontario*, 2014 ONSC 4970, aff'd 2015 ONCA 303.
22. *Piedra v Copper Mesa Mining Corp*., 2011 ONCA 191.
23. *Best v Ranking,* 2015 ONSC 6269.

SCHEDULE "B"

TEXT OF RELEVANT STATUTES

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

Rule 14.09

Striking out or Amending

14.09 An originating process that is not a pleading may be struck out or amended in the same manner as a pleading. R.R.O. 1990, Reg. 194, r. 14.09.

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).

Rule 26.01

General Power of Court

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. R.R.O. 1990, Reg. 194, r. 26.01.

***Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11 at s. 32(1).**

Section 32(1)

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.

SCHEDULE "C"

TWITTER TERMS OF SERVICE

Court File No.: CV-21-00666255-0000

COOL WORLD TECHNOLOGIES, INC., et al.
Applicants (Responding Party)

-and-

TWITTER, INC., et al.
Respondents (Moving Parties)

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE MOVING PARTIES,
TWITTER, INC. AND TWITTER CANADA ULC**

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