Court File No. CV-21-00666251-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JOEL BAKAN, COOL WORLD TECHNOLOGIES, INC., GRANT STREET PRODUCTIONS, and ETHEL KATHERINE DODDS

Applicants (Responding Parties)

and

ATTORNEY GENERAL OF CANADA

Respondent (Moving Party)

MOTION RECORD OF THE RESPONDING PARTIES

Date: November 7, 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: **Attorney General of Canada**
Department of Justice, Ontario Regional Office
120 Adelaide Street West
Suite 400
Toronto, Ontario M5H 1T1

Gail Sinclair
LSO#: 23894M
(647) 920-4708
Gail.Sinclair@justice.gc.ca

Andrea Bourke
LSO#: 45892K
(416) 562-6820
Andrea.Bourke@justice.gc.ca

Jennifer L. Caruso
LSO#: 79321K
(647) 542-5921
Jennifer.L.Caruso@justice.gc.ca

Counsel for the Respondent

INDEX

Court File No. CV-21-00666251-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JOEL BAKAN, COOL WORLD TECHNOLOGIES, INC., GRANT STREET PRODUCTIONS, and ETHEL KATHERINE DODDS

Applicants (Responding Parties)

and

ATTORNEY GENERAL OF CANADA

Respondent (Moving Party)

FACTUM OF THE RESPONDING PARTIES

Date: November 7, 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: **Attorney General of Canada**
Department of Justice, Ontario Regional Office
120 Adelaide Street West
Suite 400
Toronto, Ontario M5H 1T1

Gail Sinclair
LSO#: 23894M
(647) 920-4708
Gail.Sinclair@justice.gc.ca

Andrea Bourke
LSO#: 45892K
(416) 562-6820
Andrea.Bourke@justice.gc.ca

Jennifer L. Caruso
LSO#: 79321K
(647) 542-5921
Jennifer.L.Caruso@justice.gc.ca

Counsel for the Respondent

TABLE OF CONTENTS

I. OVERVIEW

1. This Application comes at a moment of revolutionary change in communications in Canada and worldwide. Over the last two decades, the social media platform ("**online platform**") operated by Twitter, with over 400 million 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.[1] It claims to be, and functions as, the world's "town square."

2. Twitter is widely regarded, and markets itself, as a forum for expressive activity, open to all. It is where heads of state, politicians, public institutions, and courts make significant statements, communicate with citizens and media, and relay critical information.[2] 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 privately owned media and communications companies, including other online platforms.

3. Canada, through its governmental and public institutions, uses Twitter as a key online platform for *democratic engagement with citizens*. Unlike *any* other private actor, Twitter has become a key part of *Canada*'s democratic infrastructure because the Government of Canada, along with all other federal public institutions, including, *inter alia*, Parliament, courts, regulators, commissions and agencies, use Twitter as their principal online platform for *engaging* Canadians in democratic deliberation – to debate, inform, and deliberate over politics and social issues, receive and disseminate communications, and engage in dialogue and debate relevant to governmental decisions and public policy in general. Those Canadian institutions have collectively *made* Twitter a key public arena for Canadian democracy despite it being privately owned. Prime Minister Justin Trudeau has 5.8M Twitter followers and makes *all* important announcements on Twitter.[3]

4. The Responding Parties ("**Applicants**") attempted to purchase an advertising service from Twitter, a "**Promoted Tweet**" featuring a trailer ("**Trailer**") for *The New Corporation*, a documentary film ("**Film**") that is critical of contemporary capitalism, including the political

[1] *Bakan et al. v. Attorney General of Canada*, Court File CV-21-00666251-0000, Amended Amended Notice of Application ["*Bakan (Charter) NOA*"], issued February 16, 2022, para. 2(a).
[2] *Bakan (Charter) NOA*, para. 2(a).
[3] *Bakan (Charter) NOA*, para. 2(hhh)c (as of 26 July 2021).

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**").

5. Despite Twitter's function as Canada's "town square," Canada has adopted no measures to ensure that this crucial public arena, in which it is a major participant, is open to the kinds of social and political expression that the *Charter* would clearly prohibit Canada and any other level of government from banning. The Applicants claim Canada has a positive duty under section 2(b) of the *Charter* to take appropriate steps to protect high value non-harmful speech on Twitter's online platform, that it has breached that duty through inaction, and that that inaction is not justified under section 1.

6. The Moving Party, the Attorney General of Canada ("**AGC**"), has brought a motion to strike under Rule 21.01(1)(b). It argues that section 2(b) of the *Charter* imposes no duty whatsoever on Canada to ensure that a privately-owned platform which it and federal public institutions use intensively to engage with citizens, is open to diverse viewpoints. The AGC's position is that to the extent Canada chooses to conduct engagement with citizens in privately-owned arenas, those private owners can effectively strip citizens of all rights to expression, including those they would otherwise have if the platform were publicly owned or statutory.

7. The AGC's position contravenes the very core of the protection afforded by section 2(b) , as well as a fundamental principle of Canada's constitutional order – namely, that, as the Supreme Court states in the *Quebec Secession Reference*, "Canada shall be a constitutional democracy."[4] The Court explains what precisely a "constitutional democracy" means:[5]

> [A] functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, 'resting ultimately on public opinion reached by discussion and the interplay of ideas'…. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to

[4] *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 62 ["*Quebec Secession Reference*"].
[5] *Quebec Secession Reference*, para 68.

considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

5. The Supreme Court's jurisprudence under section 2(b) is based upon the same principles. The Applicants claim Canada infringes section 2(b) because it chooses to engage in "a continuous process of discussion" *with* Canadian citizens on a privately-owned online platform, but fails to ensure the platform does not, arbitrarily and for its own purposes, bar high value and non-harmful political and social speech, like the Promoted Tweet featuring the Trailer.

6. Canada's use of Twitter as a public arena *while at the same time* failing to protect the right to freedom of high-value and non-harmful political and social expression on Twitter, is a substantial interference with the Applicants' section 2(b) rights, for two reasons. *First*, the combined operation of Twitter's Ad Policies, which prohibited the Promoted Tweet featuring the Trailer, and the preference given by Twitter's algorithm to paid "Promoted Tweets" over unpaid "Organic Tweets," exacerbate unequal access to expressive opportunities because they bar users like the Applicants from using products like Promoted Tweets that mitigate inequality-producing limits and biases inherent to organic domains. *Second*, Twitter acted arbitrarily and discriminatorily in applying its Ads Policies to refuse to promote *The New Corporation* Tweet because it routinely permits advertisements that have the same kinds of "political undertones" the platform claimed were the reason the Trailer violated its policies. Had Canada discharged its constitutional duty, it would have had in place measures that would have prohibited Twitter from refusing to accept the Promoted Tweet featuring the Trailer.The AGC's motion is based on the claim that the *Bakan (Charter) NOA* "fails to disclose a reasonable cause of action and falls outside the bounds of justiciability in terms of the issues upon which the courts have the capacity to adjudicate."[6] This Honourable Court should dismiss the AGC's motion and allow this matter to proceed to be argued on the merits based on a full factual record ("**Record**").

7. The test under Rule 21.01(1)(b) is whether it is "plain and obvious" that the Notice "discloses no reasonable cause of action".[7] It is "plain and obvious" that the *Bakan (Charter) NOA does* disclose a reasonable cause of action. The Applicants' claim builds upon a well-established

[6] AGC Factum, para. 1.
[7] *Hunt v. Carey*, [1990] 2 SCR 959, pp. 972, 980 ["*Hunt*"].

line of Supreme Court of Canada authority that positive obligations may arise under section 2 of the *Charter*: *Haig*, *Dunmore*, *Baier*, and *Toronto* (as explained further below).[8]

8. It is also "plain and obvious" that the Applicants' claim falls well *within* the bounds of justiciability, based on *Dunmore* and *Mounted Police*.[9] Those cases held that there was a positive duty under section 2(d) of the *Charter* to provide access to a labour relations regime but left to the legislature the details of how to satisfy that constitutional duty. The Court's remedies in those cases are closely analogous to the relief the Applicants seek here.

9. This Honourable Court is concurrently hearing a motion to strike under Rule 21.01(1)(b) in the companion Application of *Cool World et al. v. Twitter et al*.[10] Two of the Applicants in this matter, Katherine Ethel Dodds ("**Dodds**") and Cool World Technologies Inc. ("**Cool World**") claim in *Cool World (Contract) NOA* that Twitter's Ad Policies breach the contract law doctrines of public policy and unconscionability because they operate to ban high value non-harmful speech on the Twitter platform, and that its decisions to refuse to promote Tweets breach its contractual duty of good faith because of the arbitrary manner in which it has administered the Ad Policies. Twitter responds by claiming that contract law does not curb its absolute discretion over content.

10. If Twitter and Canada succeed in their respective Rule 21.01(1)(b) motions, Twitter can unilaterally ban, at its absolute discretion, any Canadian political party, politician, journalist, media organization, activist group, or speaker, or any content or viewpoint, without any legal restraints whatsoever under Canadian law. Twitter's new status as of October 30, 2022 as a private company, in effect, leaves the power over all content decisions in the hands of the world's richest man, Elon Musk. The stakes in these paired Applications could not be higher, not only for the Applicants but for all Canadians. Moreover, these Application 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 in the face of what has, to this point, been profound inaction on the part of governments and legislatures.

II. FACTS

---

[8] *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 [*"Haig"*]; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 ["*Dunmore*"]; *Baier v. Alberta*, 2007 SCC 31 ["*Baier*"]; *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 ["*Toronto*"].

[9] *Dunmore*; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ["*Mounted Police*"].

[10] *Cool World et al. v. Twitter et al*., Court File CV-21-00666255-0000, Amended Amended Notice of Application ["*Cool World (Contract)*"], issued March 1, 2022.

A. Background

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

12. This Application arises out of Twitter's refusal to post on its online platform advertisements featuring the Trailer promoting the Film. The Film was commissioned by Bell Media's Crave streaming platform, produced by the Third Applicant, Grant Street Productions ("**GSP**"), written and co-directed by the First Applicant, Joel Bakan, and marketed by the Second Applicant, Cool World, and the Fourth Applicant, Dodds.[11] 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."[12]

13. Promoted Tweets enable users to reach audiences at scale.[13] Organic Tweets reach only a very small portion of a user's followers, and they do not reach any non-followers.[14] For Twitter users like Cool World and Dodds (and many others), who depend on the Twitter platform to reach audiences at scale, Promoted Tweets are an essential part of Twitter's services.[15] Twitter encourages users to use Promoted Tweets to "broaden your reach," "open up your reach on Twitter to more people," and "connect to the most valuable and receptive conversations and audiences."[16] To facilitate their use, Twitter seamlessly integrates Promoted Tweets into Organic Tweets.[17] Moreover, users can start an ad campaign by simply clicking on a button.[18]

14. Cool World and Dodds followed this procedure to promote a Tweet of the Trailer.[19] Twitter refused to promote that Tweet because of its content, claiming the content offended the Ad Policies.[20] 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",

[11] *Bakan (Charter) NOA*, para. 2(i).
[12] *Bakan (Charter) NOA*, para. 2(q).
[13] *Bakan (Charter) NOA*, para. 2(u).
[14] *Bakan (Charter) NOA*, paras. 2(s), (t).
[15] *Bakan (Charter) NOA*, para. 2(u).
[16] *Bakan (Charter) NOA*, para. 2(u).
[17] *Bakan (Charter) NOA*, para. 2(jjj)a.
[18] *Bakan (Charter) NOA*, para. 2(w), footnote 11.
[19] *Bakan (Charter) NOA*, para. 2(gg).
[20] *Bakan (Charter) NOA*, paras. 2(hh) to (ss).

"Twitter Rules and Policies", and all incorporated policies.[21] 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."

B. The Applicants

15. Cool World is incorporated under the *Canada Business Corporations Act*.[22] Cool World was founded in 2019 by Dodds, who is also Cool World's Chief Executive Officer.[23] 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 the Tweets featuring the Trailer that Twitter refused to promote.[24] Cool World does not accept purely commercial projects.[25] 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.[26] In 2020-21 Fiscal Year (running from April 2020 to March 2021), Cool World had net income of $5,785.38.[27] 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 its work is performed by Dodds and sub-contractors. Dodds operates Cool World out of her rental apartment.

16. GSP is a film production company incorporated under *the British Columbia Companies Act*.[28] Cool World contracted with GSP to, *inter alia*, "deploy[] Direct outreach campaigns" to promote the Film. GSP is a single-purpose company and has no plans to produce another film.[29] In the 2020 Fiscal Year, it had a net income of $66,147.

---

[21] *Bakan (Charter) NOA*, para. 2(ee). The remaining factual propositions in this paragraph are drawn from para. 2(ee) of the *Bakan (Charter) NOA*.
[22] RSC 1985, c C-44.
[23] *Bakan (Charter) NOA*, para. 2(e).
[24] *Bakan (Charter) NOA*, para. 2(f).
[25] *Bakan (Charter) NOA*, para. 2(d).
[26] *Bakan (Charter) NOA*, para. 2(d).
[27] *Bakan (Charter) NOA*, para. 2(f). The remaining factual propositions in this paragraph are drawn from para. 2(f) of the *Bakan (Charter) NOA*.
[28] RSBC 1996, c 62. *Bakan (Charter) NOA*, para. 2(g). Every factual proposition in this paragraph is drawn from para. 2(g) of the *Bakan (Charter) NOA*.
[29] *Bakan (Charter) NOA*, para. 2(g).

17. Bakan is a leading public intellectual.[30] Since the release of his book and film, *The Corporation*, Bakan has earned an international reputation as a scholar and commentator on social and political issues, especially those related to the legal and institutional nature of corporations, and their impact on society and democracy. *The New Corporation* is Bakan's third major work on these themes; the second was his book *Childhood Under Siege*. Bakan is a regular media commentator on social, political and legal issues, appearing on numerous broadcast and online platforms, and writing for, featured in, and reviewed by numerous print outlets, including, the *Globe and Mail*, *New York Times*, *The Economist*, and *The Guardian*.

C. Course of Events

18. In the fall of 2020, Cool World, entered into an agreement with GSP to, *inter alia*, "deploy[] Direct outreach campaigns" to promote the Film (the "**Marketing Agreement**").[31] Under the Marketing Agreement, Cool World undertook to manage all advertising for the film.

19. 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.[32] Dodds had created that account on June 26, 2010 (to promote *The Corporation*) by entering into the User Agreement with Twitter.[33] Twitter requires anyone seeking to purchase a Promoted Tweet to be a party to the User Agreement.[34]

20. Six of the Applicants' attempts to purchase Promoted Tweets were rejected by Twitter on the basis of the three Ad Policies at issue.[35] The first attempt was made on November 18, 2020 by 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.[36] On the same day Twitter refused the request through an automated reply ("**Rejection No. 1**").[37]

---

[30] *Bakan (Charter) NOA*, para. 2(j). Every factual proposition in this paragraph is drawn from para. 2(j) of the *Bakan (Charter) NOA*.
[31] *Bakan (Charter) NOA*, para. 2(p). Every factual proposition in this paragraph is drawn from para. 2(p) of the *Bakan (Charter) NOA*.
[32] *Bakan (Charter) NOA*, para. 2(q).
[33] *Bakan (Charter) NOA*, para. 2(v).
[34] *Bakan (Charter) NOA*, paras. 2(dd), (ee), (ff).
[35] *Bakan (Charter) NOA*, para. 2(ii).
[36] *Bakan (Charter) NOA*, para. 2(gg)
[37] *Bakan (Charter) NOA*, para. 2(hh).

Tattersall requested an explanation through Twitter's internal complaints procedure.[38] 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**").[39]

21. 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?"[40]

22. 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**").[41]

23. 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 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."[42]

24. 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**").[43]

[38] *Bakan (Charter) NOA*, para. 2(jj).
[39] *Bakan (Charter) NOA*, para. 2(kk).
[40] *Bakan (Charter) NOA*, para. 2(ll).
[41] *Bakan (Charter) NOA*, para. 2(mm).
[42] *Bakan (Charter) NOA*, para. 2(nn).
[43] *Bakan (Charter) NOA*, para. 2(oo).

25. 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."[44] 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**").[45]

26. 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….".[46]

27. 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 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**").[47]

[44] *Bakan (Charter) NOA*, para. 2(pp).
[45] *Bakan (Charter) NOA*, para. 2(qq).
[46] *Bakan (Charter) NOA*, para. 2(rr).
[47] *Bakan (Charter) NOA*, para. 2(ss).

III. ISSUE

28. The sole issue on this motion is:

Should the Notice of Application 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)

29. 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 legal framework for motions to strike under Rule 21.01(1)(b). [48] The Applicant submits that:

a. The "plain and obvious" test is a stringent one that must be applied generously to the *Bakan (Charter) NOA*; permit the evolution of the law; and be applied on the basis that the facts as plead are true.

b. The "plain and obvious" test must be applied to the *Bakan (Charter) NOA* to enable the law to adapt to enormous technological and economic change, and in a manner consistent with this Honourable Court's decisions in *Mathur* and *Toussaint*, which rejected Rule 21.01(1)(b)'s motions on novel positive rights claims under the *Charter*.

The "plain and obvious" test

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

31. *First*, the test is whether it is "plain and obvious" that the Notice "discloses no reasonable cause of action."[49] 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'."[50] Moreover, "the motion to strike is a tool that must be used with care," and "[t]he approach must be generous"[51] to the Applicants. The reason for the "stringent test" and "generous approach" is that the proceeding "is

---

[48] *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.
[49] *Hunt*, p. 972, p. 980.
[50] *Odhavji Estate*, para. 15, quoting *Hunt*, p. 980.
[51] *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."[52]

32. *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."[53] 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."[54] 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."[55] It is common cause among the parties that there is no decided case directly on point from Ontario or Canada. 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 of the "plain and obvious" test "err on the side of permitting a novel but arguable case to proceed to trial".[56]

33. *Third*, under the "plain and obvious" test, the court "proceeds on the basis that the facts pleaded are true, unless they are incapable of proof" or are "patently ridiculous."[57] The Applicants note that the AGC's motion to strike proceeds based on the facts as pled and does not seek to dispute them in *any* respect.

The "plain and obvious" test must be applied to enable the law to adapt to enormous technological and economic change, in a manner consistent with Mathur and Toussaint

34. In applying the "plain and obvious" test to the *Bakan (Charter) NOA*, this Honourable Court should be guided by *three* considerations.

35. *First*, this Honourable Court should follow its approach in *Mathur* and *Toussaint*, in which it recently dismissed Rule 21.01(1)(b) motions to novel *Charter* positive rights claims under

[52] *Nevsun*, para. 131.
[53] *Imperial Tobacco*, para. 21.
[54] *Hunt*, pp. 990 to 991.
[55] *Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463 (S.C.), para. 6, cited by *Mathur v Ontario*, 2020 ONSC 6918, para. 39 ["*Mathur*"].
[56] *Imperial Tobacco*, para. 21.
[57] *Operation Dismantle*, p. 455; *Nash v. Ontario*, 1995 CanLII 2934 (ON CA).

section 7.[58] In *Mathur*, the issue is whether section 7 of the *Charter* imposes a positive duty on Ontario to adopt policies to reduce greenhouse gas emissions to address climate change. The "plain and obvious" test was not met because the claim was based on the Supreme Court's dictum in *Gosselin* that section 7 might impose a positive obligation to sustain life and security of the person "in special circumstances".[59] The Divisional Court denied leave to the Attorney General of Ontario to appeal its loss on the Rule 21.01(1)(b) motion.[60] In October 2022, this Honourable Court held a three-day hearing to consider the merits of the *Charter* challenge, and its decision is under reserve. In *Toussaint*, the issue is whether section 7 of the *Charter* imposes a positive duty on Canada to provide health care essential to prevent a reasonably foreseeable risk of loss of life or irreversible negative health consequences, to comply with a decision of the United Nations Human Rights Committee ("**UNHRC**") ordering it to do so.[61] The "plain and obvious" test was again not met because the claim was based on the Court's dictum in *Nevsun* that decisions of the UNHRC might bind Canada as a matter of public international law.[62]

36. Although this Application arises under section 2(b), it too is a positive rights *Charter* claim. Moreover, it is also, in part based on a *dictum* – that of Justice L'Heureux-Dubé in *Haig*, where she held that "positive governmental action might be required" by section 2(b) "aimed at preventing certain conditions which muzzle expression".[63] Such conditions might arise, for example, when a *private* party muzzles expression, like Twitter. Moreover, *Dunmore* adopted and applied Justice L'Heureux-Dubé's dictum in *Haig* to section 2(d), to find that Ontario had a positive duty to protect the right of agricultural workers to create a trade association to protect themselves from the economic power of *private sector* employers.[64] *Baier* then affirmed both *Dunmore* and Justice L'Heureux-Dubé's dictum in *Haig*.[65] The roots of the Applicant's *Charter* claim in precedent is *at least* as strong as the claims in *Mathur* and *Toussaint*. Moreover, as

[58] *Mathur; Toussaint v. Canada (Attorney General)*, 2022 ONSC 4747 ["*Toussaint*"].
[59] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, para. 83; *Mathur*, paras. 192, 212, 229, 234 and 235.
[60] *Mathur v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1624.
[61] 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.
[62] *Nevsun*, para. 119; *Toussaint*, para. 189.
[63] *Haig*, pp. 1039.
[64] *Dunmore*, para. 23.
[65] *Baier*, para. 26.

explained below (paras. 74 to 88), the Applicants' claim falls well *within* the bounds of justiciability, and, despite being novel, relies on settled law.

37. *Second*, this Honourable Court must bear in mind that the underlying 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, *especially* in relation to Twitter. Because of Twitter's role as a key public arena for Canadian democracy, through, *inter alia*, the actions of Canadian public institutions, answering the question is of crucial importance to Canadian society and democratic life. The Applicants reiterate (see para. 13 above) that this Application and *Cool World (Contract)* 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.

38. One of the most important cases in the 20th century on the law of torts in the Commonwealth – *Donoghue* – illustrates the importance of applying 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.[66] 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 *Cool World (Contract)*, in relation to platform governance.

39. *Third*, the AGC incorrectly interprets "a reasonable cause of action" to require that any novel *Charter* challenge be an "incremental" development in the law. This is decidedly not true for *Charter* claims against governments. If it were, many *Charter* cases which have significantly expanded *Charter* protection, sometimes overturning precedent in relation to large and weighty policy issues (for example, *Carter*, *Bedford*, *Health Services*, and *Saskatchewan Federation of Labour*), would have failed to survive a Rule 21.01(1)(b) motion to strike, and consequently would not have been heard on the merits.[67] The fact that the Supreme Court not only heard these cases, but decided them in favour of the *Charter* claimants, is a definitive rejection of the AGC's position

[66] *Donoghue v. Stevenson*, [1932] AC 562, pp. 563, 566, 578, 601, 606, and 609.
[67] *Carter v. Canada (Attorney General)*, 2015 SCC 5; *Canada (Attorney General) v. Bedford*, 2013 SCC 72; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 ["*Health Services*"]; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4.

that non-incremental changes in *Charter* interpretation should be struck out for failing to disclose a reasonable cause of action.

B. It is *not* "plain and obvious" that the *Bakan (Charter) NOA* does not disclose a reasonable cause of action.

40. It is *not* "plain and obvious" that the *Bakan (Charter) NOA* does not disclose a reasonable cause of action, for the following reasons:

a. The *Bakan (Charter) NOA* meets the test in *Toronto* that a positive claim under section 2(b) must be "grounded in the fundamental *Charter* freedom of expression" and requires that the government has "substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression" either "by denying access to a statutory platform or by otherwise failing to act."[68]

b. The Applicant's positive claim under section 2(b) is "grounded in the fundamental *Charter* freedom of expression", because the Trailer targeted by Twitter's Ad Policies is social and political commentary that is undoubtedly "core expression," as defined by the Supreme Court.

c. Canada has "otherwise fail[ed] to act" by using Twitter as its principal online platform to engage Canadians, *while at the same time* failing to protect high value and non-harmful social and political expression on Twitter.

d. Canada's "failure to act" has "substantially interfered with freedom of expression", because:

i. The combined operation of the Ad Policies that prohibited the Trailer, and the preference given by its algorithm to paid "Promoted Tweets" over unpaid "Organic Tweets", exacerbates unequal access to expressive opportunities because they bar users like the Applicants from using products like promoted Tweets that mitigate the severely limited reach of organic Tweets and inequality-producing limits and biases inherent to organic domains.

[68] *Toronto*, para. 25.

ii. Twitter acted discriminatorily and arbitrarily in applying its Ads Policies and refusing to promote *The New Corporation Tweet* because it routinely permits advertisements with the same kinds of "political undertones" the platform relied upon to justify its determination that the Trailer violated its policies.

iii. *Baier* and *Toronto* are distinguishable, because the laws and government inactions at issue in those cases was content-neutral and did not "substantially interfere" with social and political expression.

***The test for positive claims under section 2(b) of the* Charter *laid down by* Toronto**

41. *Toronto* confirmed that section though 2(b) *generally* imposes a negative obligation, that section "may, in certain circumstances, impose positive obligations on the government to facilitate expression" – i.e., to "compel the distribution of megaphones."[69] *Toronto* also restated a test for positive claims under section 2(b) of the *Charter* with *four* components.

42. *First,* a positive claim under section 2(b) must be "grounded in the fundamental *Charter* freedom of expression," as opposed to "merely seek[ing] access to a statutory regime."[70]

43. *Second,* the government must have "substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression."[71] To meet the "substantial interference" test, the government's inaction must have "the effect of radically frustrating expression to such an extent that meaningful expression is 'effectively precluded'."[72] While, the "expression need not be rendered absolutely impossible … effective preclusion represents an exceedingly high bar that would only be met in extreme and rare cases."[73]

44. *Third,* the government's substantial interference with freedom of expression must be either "by denying access to a statutory platform *or by otherwise failing to act*."[74] Although *Baier* and *Toronto* were cases of denial of access to a statutory platform, the Court in *Toronto* went out of its

[69] *Toronto*, paras. 16 and 17 (quoting *Baier*, para. 21, in turn quoting *Haig*, p. 1035).
[70] *Toronto*, paras. 25, 24.
[71] *Toronto*, para. 25.
[72] *Toronto*, para. 27, quoting *(Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, at para. 33.
[73] *Toronto*, para. 27.
[74] *Toronto*, para. 25 (emphasis added).

way to confirm that positive section 2(b) claims are "not confined" to "cases of underinclusion," and "extend[] beyond cases of underinclusion or exclusion."[75] As explained below, the AGC ignores this aspect of *Toronto* entirely.

45. *Fourth*, if "[d]espite being a positive claim, the claimant has demonstrated a limit to its section 2(b) right," then "subject to justification of such limit under section 1 – government action or legislation may be required."[76]

The positive claim is "grounded in the fundamental* Charter *freedom of expression"

46. A positive section 2(b) claim must be grounded in the fundamental *Charter* freedom of expression, "rather than access to a particular statutory regime."[77] The expression at issue in this Application is of the highest constitutional value and exists *entirely* independently of any statutory regime. The Applicants' claim is based on the Trailer. The Trailer is a one minute and fifty second précis of the Film, which in turn is based on and grows out of Bakan's scholarly research and writing. The Film is educational, informational, designed to stimulate democratic debate, and lauded by critics worldwide as an important contribution to public discourse about corporate capitalism and democracy. Like the Film, the Trailer canvases social and political issues, featuring thought-leaders from the academy, business, government and civil society. The Trailer and Film are about ideas, taking aim at the dangerous excesses of corporations, and criticizing government policies that increase corporations' power and impunity. They single out big tech companies for posing particular threats to democracy because of their monopolistic tendencies and their persistent push against government regulation.[78]

47. The content of the Trailer is best described as social and political commentary and therefore lies at the "core" of section 2(b), because it is linked to the "core values" of "seeking the truth and the common good" and "ensuring that participation in the political process is open to all persons".[79] Any possible *profit motive* is entirely irrelevant to the question of whether the Trailer is "core expression." As Justice McLachlin explained in *RJR MacDonald*:

---

[75] *Toronto*, para. 19.
[76] *Toronto*, para. 26.
[77] *Dunmore*, para. 24.
[78] *Bakan (Charter) NOA*, para. 2(m).
[79] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 31, para. 75 ["*Sierra Club*"].

> 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.[80]

48. 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."[81] The same holds true here.

Canada has "otherwise fail[ed] to act"

Hypothetical: Toronto City Council meetings at the Eaton Centre

49. The Applicants abandon their argument that Canada has failed to act because the *Election Modernization Act* is underinclusive.[82] Rather, their *Charter* claim is that Canada has "otherwise fail[ed] to act" because it has not taken steps to protect social and political expression on Twitter, *while at the same tim*e deploying Twitter as, and in effect making it, a key part of *Canada*'s democratic infrastructure. Canadian public institutions use Twitter as their principal online platform for engaging Canadians in democratic deliberation – to debate, inform, and deliberate over politics and social issues, receive and disseminate communications, and engage in dialogue and debate relevant to governmental decisions and public policy in general.[83]

50. The nature of the constitutional problem created by the combination of Canada's inaction in failing to protect freedom of expression on Twitter and its use of Twitter as a public arena to engage Canadians is illustrated by the following hypothetical. Suppose Canadian Heritage (the federal government department that has taken the lead on developing legislation to regulate online

---

[80] *RJR-MacDonald Inc v. Canada (Attorney General)*, [1995] 3 SCR 199, para. 171.
[81] *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, para. 31 ["*Greater Vancouver Transportation Authority*"].
[82] *Bakan (Charter) NOA*, para. 2(ddd); SC 2018, c 31.
[83] *Bakan (Charter) NOA*, paras. 2(c), (eee).

platforms) decides to hold public hearings across the country on potential legislation to regulate online platforms to protect political and social speech. The hearings are led by the Minister of Canadian Heritage, the Honourable Pablo Rodriguez. Wanting to ensure broad accessibility to public hearings, Canadian Heritage enters an informal arrangement with Cadillac Fairview, a private owner of malls, to hold its meetings in that company's malls across the country, to permit large audiences to attend hearings.

51. Cadillac Fairview decides to monetize public attendance at these hearings. Any member of the public can stand and watch those hearings from a large public viewing area, for free. But members of the public can also purchase seats closer to the dais, which gives them access to microphones to pose questions to Minister Rodriguez . Their questions are easily heard by Minister Rodriguez and all attendees. By contrast, the standing attendees, who enter the shopping malls for free, have to shout their questions from afar, and are much less likely to be heard and recognized. Finally, as a condition for purchasing a seat, an attendee must comply with policies that prohibit questions that are "political," "inappropriate," or "target sensitive categories." Further, assume, to be up to date, that Cadillac Fairview, a publicly traded company, is then acquired by the world's wealthiest individual, based outside of Canada, and is taken private.

52. Cadillac Fairview's restrictions on content would clearly violate section 2(b) if promulgated by the Canadian Heritage as a regulation. The question, then, is: does Canadian Heritage, having chosen to hold its meetings at Cadillac Fairview-owned sites, have a section 2(b) positive duty to exercise its regulatory authority to ensure Cadillac Fairview's content restrictions to accord with section 2(b)? The Applicants submit the answer is 'yes'. By analogy, the decision of Canada's public institutions confer on Twitter, through their use of that platform, a central, and increasingly indispensable, role in engaging with and communicating to citizens, while at the same time refusing to regulate Twitter to prevent restrictions on the right to social and political expression that it would be unconstitutional for Canada itself to promulgate, triggers an analogous *Charter* obligation.

Twitter is key public arena for Canadian democracy and social and political speech

53. Twitter is a key public arena that Canada uses, *inter alia*, as a major platform for engaging with citizens, informing them of policies and positions, soliciting and hearing their opinions and concerns, and purveying information. One study states that approximately 35% of Canadian adults

(approximately 10 million persons) report having a Twitter account, and approximately 46% of those users use Twitter to get political information. Another study estimates that 6.45 million Canadians have a Twitter account. [84] Canadians perceive Twitter as a key place to participate in the public sphere, and those who are active in Canadian politics are particularly drawn to Twitter. A Canadian study found that Twitter users are more interested and knowledgeable about politics and feel more capable of influencing the political world than both a nationally representative population and those who use Facebook. [85]

54. Twitter is the principal online media platform for Canadian government communications.[86] Prime Minister Trudeau's 5.8M Twitter followers are twice the number of Canadians who watched the 2021 English-language Leaders' Debate. Prime Minister Trudeau makes all of his important announcements on Twitter. Official Twitter accounts now exist for the House of Commons, the Senate, provincial legislative assemblies, federal, provincial and territorial ministers and departments, and courts across Canada.

55. Of the 338 currently elected federal Members of Parliament, 325 have an active Twitter presence (96 percent).[87] Of the 92 current Senators, 70 have Twitter accounts (76 percent). Generally Twitter is the preferred medium for politicians to comment on contemporary political events, while Facebook and other platforms have different emphases. Canadian parliamentarians are followed by 6,964,027 unique users for a total of 12,871,649 follow decisions (as some followers follow more than one politician). 402,006 of these users follow five or more Canadian parliamentarians.

56. The Canadian courts have institutional presences on Twitter.[88] The Supreme Court of Canada (@SCC_eng and @CSC_fra), the Ontario Court of Appeal (@ONCA_en), and the Superior Court of Justice (Ontario) (@SCJOntario_en) all have Twitter accounts. The COVID-19 pandemic has cemented Twitter's role as the online platform of choice for Canadian public institutions, including courts: the Ontario Superior Court of Justice relied, and continues to rely,

[84] *Bakan (Charter) NOA*, para. (hhh)a.
[85] *Bakan (Charter) NOA*, para. (hhh)b.
[86] *Bakan (Charter) NOA*, para. 2(hhh)c. Every factual proposition in this paragraph is drawn from para. 2(hhh)c of the *Bakan (Charter) NOA*, para. 2(hhh)c.
[87] *Bakan (Charter) NOA*, para. 2(hhh)e. Every factual proposition in this paragraph is drawn from para. 2(hhh)c of the *Bakan (Charter) NOA*, para. 2(hhh)e.
[88] *Bakan (Charter) NOA*, para. 2(hhh)d. Every factual proposition in this paragraph is drawn from para. 2(hhh)c of the *Bakan (Charter) NOA*, para. 2(hhh)d.

on Twitter to announce to the legal profession and the public an historically unprecedented number of Notices to the Profession to adapt court operations and procedures.

57. During the 2019 and 2021 Canadian federal elections, the three main election and politics-related hashtags as defined by Twitter (#elxn44, #cdnpoli and #polcan) were used as part of an original tweet by at least 73,770 Canadians, with at least 981,209 original Tweets posted.[89] These Tweets contained original content explicitly about Canadian politics. They were amplified and carried across the Twitter platform, with at least 5,517,875 retweets of the original Tweets. In addition, keyword-searching during the 2021 writ period yielded 305,329 distinct users who collectively produced 2,183,916 election-related Tweets which were retweeted 6,143,053 times.

58. Twitter is also used extensively for political discourse in Canada outside elections.[90] Between September 21, 2021 (the date of the last federal election) and January 1, 2022, Members of Parliament collectively produced 31,957 Tweets which have been liked 3,703,598 times and retweeted 626,836 times.

Judicial recognition of Twitter as a public arena

59. Increasingly courts recognize that online platforms like Twitter, though privately-owned, are similar to the kind of public arenas the Court has held must be "constitutionally open to the public for engaging in expressive activity".[91] *Douez* 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 "[h]aving the choice to remain 'offline' may not be a real choice in the Internet era".[92]

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

---

[89] *Bakan (Charter) NOA*, para. 2(hhh)f. Every factual proposition in this paragraph is drawn from para. 2(hhh)c of the *Bakan (Charter) NOA*, para. 2(hhh)f.
[90] *Bakan (Charter) NOA*, para. 2(hhh)g. Every factual proposition in this paragraph is drawn from para. 2(hhh)c of the *Bakan (Charter) NOA*, para. 2(hhh)g.
[91] *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139, p. 198; *Ramsden v. Peterborough (City)*, [1993] 2 SCR 1084, p. 196-198.
[92] *Douez v. Facebook*, 2017 SCC 33, para 56.

> 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".[93]

The AGC's submissions on "otherwise fail[ed] to act" are irrelevant

61. The AGC's submissions on this branch of the *Toronto* test for positive section 2(b) claims are irrelevant, because they focus *entirely* on the absence of a statutory platform to which the Applicants' have been denied access or suffered diminished access.[94] Although the AGC quotes *Toronto*'s reframing of the test for positive section 2(b) claims, including the phrase "denying access to a statutory platform *or by otherwise failing to act*", it *completely* fails to consider whether the Applicants can make out a claim on the basis of Canada "otherwise failing to act."[95]

62. Instead, the AGC mischaracterizes the Applicants' claim as an attempt to apply the *Charter* directly to Twitter, notwithstanding that Twitter is a private actor that is neither controlled by Canada nor implementing a program on behalf of the government,[96] and that the Applicant's *Bakan (Charter) NOA* states explicitly: "Twitter is a private actor and therefore, by virtue of section 32, the *Charter* does not apply to it."[97] The Applicant's *Charter* argument is that *Canada*, not Twitter, is under a *Charter* duty to take measures to protect freedom of expression that has been muzzled by Twitter. The direct analogy is *Dunmore*, which held that Ontario was under a *Charter* duty to take measures to protect the section 2(d) right to freedom of association of agricultural workers from agricultural employers who, like Twitter, were also not bound by the *Charter*. *Dunmore* was subsequently followed in *Health Services* and *Ontario Mounted Police Association*.

Canada's "failure to act" has "substantially interfered with freedom of expression"

The combined effect of the Ad Policies and the Twitter algorithm

---

[93] *Packingham v. North Carolina*, 582 US (2017), at pp. 4 and 5.
[94] AGC Factum, para. 29.
[95] AGC Factum, para. 16, quoting *Toronto*, at para. 25 (our emphasis).
[96] AGC Factum, para. 31.
[97] *Bakan (Charter) NOA*, para. 2(bbb).

63. Canada's "failure to act" has "substantially interfered with freedom of expression", because the combined operation of the Ad Policies that prohibited the Trailer, and the preference given by its algorithm to paid "Promoted Tweets" over unpaid "Organic Tweets," bar users like the Applicants from using products like promoted Tweets that mitigate inequality-producing limits and biases inherent to organic domains.

64. Twitter controls how content reaches users through its algorithm, in ways that amplify certain Tweets and users.[98] Control is exercised through two key mechanisms: (a) the algorithmic curation of users' "Home timeline" (which users may opt out of); and (b) the algorithmic curation and prominent presentation of lists of "trending" topics (which users may not opt out of). Twitter's algorithm also generates a personalized and frequently updated list of trending topics (news events, celebrity gossip, viral Tweets, etc.). The net effect of these algorithmic structures is, first, that organic Tweets reach only small proportions of users' followers, and, second, that the platform disproportionately muzzles users like the Applicants.

65. 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.[99] The Trailer lies on the left wing side of the political spectrum. Twitter's organic domains also magnify the reach of powerful and wealthy actors.[100] Celebrities, major brands, and well-known political actors all have substantial reach due to their already being known and influential. Moreover, Twitter's organic Tweets can be manipulated by users who pay other users to amplify their content in ways that would violate the platform's paid advertising policies (including those relied upon by Twitter to block the Trailer).[101] Finally, Twitter 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 in in the form of paid advertisements.[102]

66. As a result of these elements of Twitter's organic domains, policies barring high-value social and political speech like *The New Corporation* trailer from being promoted through Ad

[98] *Bakan (Charter) NOA*, para. 2(jjj)a. Every factual proposition in this paragraph is drawn from para. 2(jjj)a of the *Bakan (Charter) NOA*, para. 2(jjj)a.
[99] *Bakan (Charter) NOA*, para. 2(jjj)b.
[100] *Bakan (Charter) NOA*, para. 2(jjj)c. The proposition in the next sentence is drawn from para. 2(jjj)c of the *Bakan (Charter NOA)*.
[101] *Bakan (Charter) NOA*, para. 2(jjj)d.
[102] *Bakan (Charter) NOA*, para. 2(jjj)e.

Services exacerbate inequalities inherent to those domains by depriving those without power and influence means to express criticism, on equal – or at least more equal – terms, of those with power and influence.[103]

Twitter acted arbitrarily in applying its Ads Policies

67. Canada's "failure to act" has also "substantially interfered with freedom of expression" because Twitter routinely permits advertisements that have the same kinds of "political undertones" the platform relied upon to determine that the Trailer violated its policies, making its decisions against the Applicants arbitrary, capricious, and discriminatory.[104]

68. For example, Twitter has permitted, *inter alia*, the following Promoted Tweets and advertisements, arguably equally, if not more, 'political' than the Trailer:[105]

a. 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."

b. ExxonMobil: "We're supporting the goals of the Paris Agreement."

c. 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"

d. J.P. Morgan: "J.P. Morgan's David Freedman shares how to prepare for activist campaigns."

69. Twitter also permits Promoted Tweets and advertisements for political documentary films, like the Film.[106] For example, Twitter has permitted, *inter alia*, the following Promoted Tweets and advertisements:

a. @TheDocSociety: A documentary film, *Knock Down the House* about US Congressional representative Alexandria Octavio-Cortez's campaign for office.

[103] *Bakan (Charter) NOA*, para. 2(jjj)f.
[104] *Bakan (Charter) NOA*, para. 2(lll).
[105] *Bakan (Charter) NOA*, para. 2(lll)c.
[106] *Bakan (Charter) NOA*, para. 2(lll)d.

b. @BoysStateMovie: A documentary film, *Boys State*, an expose of political divisions and machinations in the United States.

c. @PrimeVideo's (Amazon): A documentary film, *All In: The Fight for Democracy*, featuring Stacy Abrams, a leading Democratic politician and commentator, among others, criticizing voter suppression by Republican administrations.

Baier and Toronto are distinguishable because the denial of access to statutory platforms was content-neutral

70. *Baier* and *Toronto* are distinguishable on the "substantial interference" branch of the *Toronto* test, because in neither case did the denial of access to a statutory platform "effectively preclude" or "radically frustrate" freedom of expression. That is because the restrictions in those cases were *content-neutral*, not as, in this case, *content-based*. Thus, in *Baier* the Court held that denying teachers access to the statutory platform of school board elections did not rise to the threshold of "substantial interference" because "there was no interference, substantial or otherwise, with the appellants ability to express views on matters relating to the education system."[107] Likewise, in *Toronto* it held that the reduction of the number of wards during a municipal election campaign did not rise to that threshold, *inter alia* because it "[i]t imposed no restrictions on the content or meaning of the messages that participants could convey".[108]

71. By contrast, in this case Canada's "failure to act" is in relation to *content-based*, not content neutral, restrictions – Twitter's Political Content Policy, Inappropriate Content Policy, and Targeting of Sensitive Categories Policy. Pursuant to these policies, Twitter can prohibit "core expression" – namely, informational and educational speech about social and political ideas that causes no judicially recognized harm. Twitter could, subject to any common law duties this Court recognizes in *Cool World (Cotract)*, ban from its platform the Conservative Party of Canada, the Prime Minister, the *Globe and Mail*, the Supreme Court of Canada, the Women's Legal Education and Action Fund – indeed, any political party, politician, journalist, media organization, viewpoint, activist group, any content or speaker whatsoever – and not run afoul of legislation or regulation.

72. The *Charter* would prohibit a state actor from imposing restrictions like those contained in Twitter's Ad Policies. In *Greater Vancouver Transportation Authority*, for example, the Court

[107] *Toronto*, para. 28.
[108] *Toronto*, para. 37.

struck down bans on political and controversial advertisements on transit vehicles, and emphasized that in the absence of harmful effects, speech cannot be restricted merely because it is political or controversial.[109] In similar spirit, as Chief Justice McLachlin and Justice Major J noted in *Harper*: "This Court has repeatedly held that liberal democracy demands the free expression of political opinion, and affirmed that political speech lies at the core of the *Canadian Charter of Rights and Freedoms* guarantee of free expression."[110] In *Keegstra*, Chief Justice Dickson similarly stated "[a]t the core of freedom of expression lies the need to ensure that truth and the common good are attained, whether in scientific and artistic endeavours or in the process of determining … political affairs….[T]he connection between freedom of expression and the political process is perhaps the linchpin of the section 2(b) guarantee and… is largely derived from the Canadian commitment to democracy."[111]

C. The Applicants' *Charter* claim is justiciable

73. The underlying Application falls well within the institutional capacity of the courts, contrary to the three reasons advanced by the AGC that it does not. That is because: the underlying Application does *not* seek to direct the development and enactment of legislation in a manner that is impermissible in positive rights claims; the underlying Application seeks decidedly *legal*, not political remedies and has a *strong* legal nexus; and the underlying Application seeks remedies that are bounded in scope and are judicially manageable. In addition, the *Bakan (Charter) NOA* pleads that the Applicant may refine the relief sought and ultimately leaves the question of the appropriate remedy to the discretion of this Honourable Court.

The Application does not seek to direct the development and enactment of legislation in a manner that is impermissible in positive rights claims

74. In *Mounted Police Association of Ontario*, the Court struck down, as violations of section 2(d), provisions excluding RCMP members from the federal public sector collective bargaining regime created by the *Public Service Labour Relations Act* ("***PSLRA***") and the *RCMP Regulations*.[112] The AGC objected to this remedy because it "would go against the proposition, which we accept, that section 2(d) does not guarantee a right to a particular labour relations process" and "striking down the offending provision of the *PSLRA* would constitutionalize the

[109] *Greater Vancouver Transportation Authority*, para. 7.
[110] *Harper v. Canada (Attorney General)*, 2004 SCC 30, para. 1 (dissenting, but not on this point) ["*Harper*"].
[111] *R. v. Keegstra*, [1990] 3 SCR 697, pp. 762 ["*Keegstra*"].
[112] *Mounted Police*, para. 154.

labour relations process set out in that Act." The Court rejected the AGC's objection as fundamentally misconceived, holding that, far from being constrained to include RCMP members in the *PSLRA* regime, "Parliament remains free to enact any labour relations model it considers appropriate to the RCMP workforce, within the constitutional limits imposed by the guarantee enshrined in section 2(d) and section 1 of the *Charter*."[113]

75. By analogy, if Canada's failure to regulate Twitter to protect political and social speech is unconstitutional, the *Charter* requires Canada to take appropriate measures. The Applicants' submissions on the merits will argue that such measures must consist of legislation and regulations that comply with section 2(b). The correct stage of these proceedings for the AGC to raise its concerns regarding the appropriate remedy is at the *merits* stage – just as the AGC did in *Mounted Police Association of Ontario*. These concerns should not serve as the basis for striking out the *Bakan (Charter) NOA*.

76. Moreover, the relief set out in the *Bakan (Canada) NOA* presupposes the same division of labour between this Honourable Court and Parliament that was the basis of *Mounted Police Association of Ontario*. This Honourable Court would find that Canada's failure to regulate Twitter to protect social and political expression is unconstitutional. Its detailed reasons setting out the basis for this conclusion would provide the legal framework for Canada to comply with section 2(b). The details of the relief sought appropriately assume that this Honourable Court would accept the particular arguments that the Applicants currently intend to advance and set out principles that draw on these arguments.[114]

The Application seeks legal, not political remedies and has a strong legal nexus

77. The Application seeks legal remedies, in the form of a declaration. A declaration is the quintessential public law remedy, that long predates the advent of the *Charter*. The AGC's concern appears to be that a declaration in this context is somehow "political" and not legal, and/or lacks a legal nexus. It claims that "in the absence of any particular law or government action that can be reviewed by this Court, the broad question of whether and how Canada should regulate expression on Twitter and other online private platforms is unsuited for adjudication."[115] This statement is

[113] *Mounted Police*, para. 154.
[114] *Bakan (Charter) NOA*, para. 1(b).
[115] AGC Factum, para. 54.

flawed because it suggests that claims that a government is duty-bound to take positive action under section 2(b) must be based on action that government has already taken. *Toronto* decisively rejects that argument in contemplating a positive duty in the absence of a statutory platform or other government action, and in holding that positive rights claims are not limited to ones about inclusion and exclusion in relation to extant legislation .[116]

78. The AGC also argues that online platforms lie beyond the domain of *Charter* adjudication because they involve complex policy. The Court has long rejected that argument. As it stated in relation to similar arguments in regard to labour relations, "to declare a judicial "no go" zone for an entire right on the ground that it may involve the courts in policy matters is to push deference too far. Policy itself should reflect *Charter* rights and values."[117] The AGC's argument, *at best*, is one for deference under section 1, not for this Honourable Court to decline to adjudicate a *Charter* claims regarding Canada's positive obligations to protect freedom of expression on online platforms. It does not provide *any* basis for this motion to strike at a preliminary stage.

79. Next, the AGC argues that "the Applicants' preferred policy choice… is one amongst many choices from which it is open to Parliament to choose, but not the courts." [118] As noted already, like in *Mounted Police Association of Ontario*, the Applicants seek a declaration on general principles to guide a *Charter*-compliant legislative response from Parliament, not a detailed policy blueprint. Parliament would still have ample scope for policy choice. The AGC's argument here is really nothing more than the trite observation that a successful constitutional challenge often requires a legislative response, and, to that extent, requires Parliament to act in some way. This cannot be an argument against the adjudication of a positive rights claim, because *negative* rights claims frequently have precisely the same effect. The AGC's argument, taken to its logical conclusion, is essentially an argument against *Charter* adjudication itself. It too must fail.

80. *La Rose* and *Tanudjaja* are distinguishable.[119] The Applicants' particular and legally-informed argument could not be more different than the diffuse policy-driven claims in those cases. In *La Rose* and *Tanudjaja* the claim was that an entire network of government actions and inactions, constituting a holistic domain of government policy (relating to climate change and

[116] *Toronto*, para. 19.
[117] *Health Services*, para. 26.
[118] AGC Factum, para. 55.
[119] *La Rose v. Canada*, 2020 FC 1008; *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852.

housing, respectively), violated *Charter* rights. There was no definable nexus between the claims and particular laws or state actions or inactions, and the remedies sought were broad, multifaceted, and beyond courts' institutional capacities. In sharp contrast, the Applicants focus on one issue – protecting high value non-harmful speech on social media platforms. There is state action, in the form of Canada relying on Twitter as a key platform for engagement with citizens while failing to provide legal protection against platform restrictions on high value non-harmful speech. Moreover, every aspect of this case has a direct nexus to law – the jurisprudence under section 2(b) *Charter* that defines "core" and high value expression as social and political speech that is non-harmful and creates a test for positive rights; and a remedy sought in the form of a particular law and/or regulation that protects high value non-harmful speech on social media platforms. Finally, *Mathur* distinguished *La Rose* on the basis that the challenge was directed at a discrete law or policy, and in that respect is more similar to the underlying Application.[120]

The Application seeks remedies that are bounded in scope and are judicially manageable

81. The Application proposes a remedy that is bounded in scope and judicially manageable. It is bounded, because it is limited to online platforms, such as Twitter.

82. Moreover, the terms in the proposed remedy are judicially manageable. The AGC argues the phrase "Twitter and other platforms" is incapable of judicial enforcement. But in 2018, the *Elections Modernization* Act amended section 319 of the *Canada Elections Act* to add the following definition: "*online platform* includes an Internet site or Internet application whose owner or operator, in the course of their commercial activities, sells, directly or indirectly, advertising space on the site or application to persons or groups."[121] Since "online platforms" are in substance the *same* as "Twitter and other platforms," this term in the proposed remedy is not judicially unmanageable.

83. The AGC also argues that the term "high value expression" is unmanageable. That ignores the Applicants' definition of that term as expression that "lies at the core of the *Charter*'s guarantee of freedom of expression, aligning with its underlying purposes of individual self-fulfilment, social and political participation, and marketplace of ideas."[122] That definition is drawn *directly* from the

[120] *Mathur*, para. 35.
[121] *Elections Modernization Act*, S.C. 2018, c C-31, s 206(2), amending section 319 of the *Canada Elections Act*.
[122] *Bakan (Charter) NOA*, para. 1(b)i.

Supreme Court's decision in *Sierra Club*, which held that [u]nderlying freedom of expression are the core values of (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons."[123] It therefore cannot be judicially unmanageable. The remedy also defines "high value expression" by reference to the term "reasonable apprehension of harm," which was first used by the Supreme Court thirty years ago in *Butler*, and, along with the concept it operationalizes, has been subsequently relied on by the Court in *Thomson Newspapers*, *Little Sisters*, *Sharpe*, *Harper*, *Bryan*, and *Whatcott*.[124] Since "reasonable apprehension of harm" is not judicially unmanageable, it reinforces the conclusion that "high value expression" is also not judicially unmanageable.

The Applicant may refine the relief sought and ultimately leaves the question of the appropriate remedy to the discretion of this Honourable Court

84. In addition to, and in the alternative to, the above, the *Bakan (Charter) NOA* pleads that the Applicants seek "[s]uch relief as may be sought by the Applicants and as this Honourable Court may deem just" – i.e., relief in addition to that expressly set out.[125] This is standard language in any Notice of Application, which acknowledges that the Applicant may refine the relief sought, including seeking additional relief, once the parties have created the Record. At this preliminary stage, the full scope and precise content of the Record are not yet unknown. The Record will include affidavits from the Applicant's two expert witnesses, Professor Taylor Owen and Professor Fenwick McKelvey, two of Canada foremost experts on online platforms. Their anticipated affidavits form the basis of the facts pleaded in the *Bakan (Charter) NOA*. The Record may also include evidence from Canada, providing, *inter alia*, information regarding the use by Canada's public institutions of Twitter as a principal online platform for engaging Canadians, and existing and proposed regulatory frameworks governing Twitter and other online platforms.

85. Moreover, the *Bakan (Charter) NOA* ultimately leaves the appropriate remedy to the discretion of this Honourable Court. It pleads "[t]he Applicants make application for … Such

---

[123] *Sierra Club*, para. 75; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927; *Keegstra*, pp. 762-64.
[124] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 SCR 877, para. 72; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, para. 62; *R. v. Sharpe*, 2001 SCC 2; *Harper*; *R. v. Bryan*, 2007 SCC 12, para. 20; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, para. 134.
[125] *Bakan (Charter) NOA*, para. 1(d).

further and other relief as to this Honourable Court may deem just."[126] This is standard language in any Notice of Application, which acknowledges this Honourable Court's inherent remedial discretion, including in relation to *Charter* claims. Moreover, this phrase impliedly incorporates sections 24(1) of the *Charter* and 52(1) of the *Constitution Act*, since they confer remedial discretion on this Honourable Court. Section 24(1) of the *Charter* expressly confers on this Honourable Court the power to issue "such remedy as the court considers appropriate and just" and *recognizes* this Honourable Court's remedial discretion, but does not create it. Furthermore, the Supreme Court recently recognized in *Ontario (Attorney General) v. G.* that notwithstanding the categorical language of section 52(1) that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect," there is remedial discretion under this provision as well.[127]

V. ORDER

86. The Applicants request this this Honourable Court:

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

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of November, 2022

Sujit Choudhry
Counsel for the Applicants

Joel Bakan
Counsel for the Applicants

[126] *Bakan (Charter) NOA*, para. 1(e).
[127] *Ontario (Attorney General) v. G*, 2020 SCC 38, paras. 86, 92 to 94, 96.

JOEL BAKAN, COOL WORLD TECHNOLOGIES, INC., GRANT STREET PRODUCTIONS, and ETHEL KATHERINE DODDS
Applicants (Responding Parties)

– AND –

ATTORNEY GENERAL OF CANADA
Respondent (Moving Party)

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

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19
2. *Baier v. Alberta*, 2007 SCC 31
3. *Carter v. Canada (Attorney General)*, 2015 SCC 5
4. *Canada (Attorney General) v. Bedford*, 2013 SCC 72
5. *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139
6. *Dalex Co. v. Schwartz Levitsky Feldman*, (1994), 19 O.R. (3D) 463 (S.C.)
7. *Donoghue v. Stevenson*, [1932] AC 562
8. *Douez v. Facebook*, 2017 SCC 33
9. *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94
10. *Gosselin v. Québec (Attorney General)*, 2002 SCC 84
11. *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31
12. *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 SCR 995
13. *Harper v. Canada (Attorney General)*, 2004 SCC 30
14. *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27
15. *Hunt v. Carey*, [1990] 2 SCR 959
16. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927
17. *La Rose v. Canada*, 2020 FCC 1008
18. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69
19. *Mathur v Ontario*, 2020 ONSC 6918
20. *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1
21. *Nash v. Ontario*, 1995 CanLII 2934
22. *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5
23. *Odhavji Estate v. Woodhouse*, 2003 SCC 69
24. *Ontario (Attorney General) v. G*, 2020 SCC 38
25. *Operation Dismantle v. The Queen*, [1985] 1 SCR 441
26. *Packingham v. North Carolina*, 582 US __ (2017)

27. *R. v. Bryan*, 2007 SCC 12
28. *R. v. Imperial Tobacco*, 2011 SCC 42
29. *R. v. Keegstra*, [1990] 3 SCR 697
30. *R. v. Sharpe*, 2001 SCC 2
31. *Ramsden v. Peterborough (City)*, [1993] 2 SCR 1084
32. *Reference re Secession of Quebec*, [1998] 2 SCR 217
33. *RJR-MacDonald Inc v. Canada (Attorney General)*, [1995] 3 SCR 199
34. *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4
35. *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11
36. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 31
37. *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852
38. *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 SCR 877
39. *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34
40. *Toussaint v. Canada (Attorney General)*, 2022 ONSC 4747

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

Elections Modernization Act, (S.C. 2018, c. 31), s. 206(2)

206 (1) The definitions *election advertising* and *election survey* in section 319 of the Act are repealed.

- **(2) Section 319 of the Act is amended by adding the following in alphabetical order:**

  online platform includes an Internet site or Internet application whose owner or operator, in the course of their commercial activities, sells, directly or indirectly, advertising space on the site or application to persons or groups. (*plateforme en ligne*)

JOEL BAKAN, COOL WORLD TECHNOLOGIES, INC.,
GRANT STREET PRODUCTIONS,
and ETHEL KATHERINE DODDS
Applicants (Responding Parties)

– AND –

ATTORNEY GENERAL OF CANADA
Respondent (Moving Party)

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

MOTION RECORD
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