

AMENDED THIS March 1, 2022 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À

RULE/LA RÈGLE 26.02 (A)

THE ORDER OF _____
L'ORDONNANCE DU _____
DATED / FAIT LE _____

REGISTRAR GRÉFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE OF JUSTICE

Court File No. CV-21-00666255-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN

COOL WORLD TECHNOLOGIES, INC.

First Applicant

and

ETHEL KATHERINE DODDS

Second Applicant

and

TWITTER, INC.

First Respondent

and

TWITTER CANADA ULC

Second Respondent

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

AMENDED AMENDED NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicants. The Application made by the Applicants appears on the following page.

THIS APPLICATION will come on for a hearing (*choose one of the following*)

- In person
- By telephone conference
- By video conference

on a day and time to be set by the registrar.

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

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

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

Date: July 28, 2021

Issued by "Matthew Wallace"
Local Registrar

Address of court office

<u>SUPERIOR COURT</u>	<u>COUR SUPÉRIEURE</u>
OF JUSTICE	DE JUSTICE
330 UNIVERSITY AVE.	330 AVE. UNIVERSITY
8TH FLOOR	8E ÉTAGE
TORONTO, ONTARIO	TORONTO, ONTARIO
M5G 1R7	M5G 1R7

TO:
TWITTER CANADA
901 King St W.
Toronto ON M5V 3H5
Canada

TWITTER
1355 Market Street Suite 900
San Francisco, CA 94103
United States

APPLICATION

1. The Applicants make application for:

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

2. The grounds for the application are:

Overview and Applicants

(a) This case arises at a moment of revolutionary change in communications in Canada and worldwide. Over the last two decades, the social media platform operated by the Respondents (collectively referred to as “Twitter”), which hosts hundreds of millions of users across the globe, has become a central **public arena** for democratic dialogue and debate among citizens, organizations, and governments, including in Canada. Twitter is widely regarded, and promotes itself, as a forum for expressive activity, open to all. It is where heads of state, politicians, and public institutions make significant statements, communicate with citizens and media, and relay critical information. Moreover, Twitter is a platform for citizens to engage with political decision-makers and each other. Because of its role as a public arena for political and social speech, Twitter is unique among companies, including traditional media outlets and other social media platforms.

(b) [Deleted paragraph¹]

(c) [Deleted paragraph²]

(d) [Deleted paragraph³]

¹ Within Canada, Twitter is the principal social media platform for government communications. Prime Minister Trudeau has 5.6M Twitter followers (@JustinTrudeau), and makes all of his important announcements there. Official accounts now exist for federal, provincial and territorial ministers and departments. The Supreme Court of Canada (@SCC_eng and @CSC_fra), the Ontario Court of Appeal (@ONCA_en), the Superior Court of Justice (Ontario) (@SCJOntario_en) and the Ontario Court of Justice (@OntarioOn) all have accounts on Twitter. The COVID-19 pandemic has cemented Twitter’s role as the social media platform of choice for Canadian public institutions: for example, the Superior Court relied on Twitter to issue a historically unprecedented number of Notices to the Profession to adapt court operations and procedures.

² Twitter’s substantial power over democratic dialogue and debate is widely regarded as a matter of urgent public concern that is intrinsically tied to the fate of democracy itself. The reason is the absolute power of Twitter to censor at will the political and social expression which takes place on its platform, through exercise of its ownership rights. Twitter wields its power as owner to ban (“de-platform”) users, suspend Tweets, hide Tweets, and refuse to promote Tweets at its discretion. There is little to no transparency to the processes that lead to these decisions, many of which are automated through the use of artificial

³ As the Supreme Court has observed, “access to ... social media platforms, including the online communities they make possible, has become increasingly important for the exercise of free speech, freedom of association and for full participation in democracy.” (*Doez v. Facebook*, 2017 SCC 33 at para. 56). The United States Supreme Court has likewise stated that social media platforms are a “quintessential forum for the exercise of First Amendment rights,” and that “[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular” (*Packingham v. North Carolina*, 582 US __ (2017) at 5).

(b) ~~Nevertheless, Canada has not regulated Twitter to protect freedom of expression. Twitter's unregulated decisions to censor speech in Canada are made mainly from its corporate headquarters in California. It can ban ("de-platform") users, suspend users' posts ("Tweets"), label Tweets as misleading, hide Tweets, and refuse to promote Tweets at its discretion with complete impunity. There is little to no transparency to the processes that lead to these decisions, many of which are automated through the use of artificial intelligence. Twitter can, in short, publish or decline to publish anything it wishes, for any reason. No external guardrails, no oversight, no accountability measures govern its decision-making about the kinds of content it can bar from its platform.~~

(c) ~~By default,~~ In the absence of government regulation, Twitter is governed in relation to free speech by the online standard form agreement (the "**User Agreement**"), a contract of adhesion in relation to which there is no negotiation, that it has entered with its hundreds of millions of users worldwide, including millions of users in Canada.

(~~¶~~) [Deleted paragraph⁴]

(d) The **First Applicant**, Cool World Technologies Inc. ("**Cool World**"),² is a marketing firm incorporated under the *Canada Business Corporations Act*, RSC 1985, c C-44. Cool World is a start-up entity. It is 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. Cool World does not accept purely commercial projects. It is a mission-driven, social enterprise. Its mission is to improve the engagement experience for politically progressive filmmakers, producers, and non-profit organizations and their audiences and members. Cool World specializes in campaigns and strategies on social media platforms, particularly the Respondents'. Its main project has been the promotion of *The New Corporation* film.

(e) Cool World was founded in 2019 by ~~the~~ **Second Applicant**, Ethel Katherine Dodds ("**Dodds**"), who is also Cool World's CEO and co-founder of Cool World. Dodds is an

⁴ The fundamental question raised by this Application is: how must the common-law of contracts evolve to respond to Twitter, a platform that, while privately owned, has become a public arena for democratic dialogue and debate in Canada, and has powerful sway over core constitutional values of freedom of expression and democracy in our country?

expert in social branding and engaging audiences as well as brokering partnerships with non-profits, with a special focus on health equity issues, harm reduction and peer-empowerment. Prior to founding Cool World, she had worked in these areas for over two decades. All of her work is dedicated to social and environmental justice, Indigenous solidarity, health promotion, and harm reduction.

(f) At all relevant times, Cool World was functionally a sole proprietorship with Dodds as the sole shareholder. Cool World was effectively under the sole control of Dodds at all relevant times. In 2020-21 Fiscal Year (running from April 2020 to March 2021), Cool World had \$121,958.58 in income, and after expenses, net income of \$5,785.38. Dodds has never drawn a salary or dividends from Cool World – i.e., she has received no compensation from Cool World. Cool World has no employees. All of its work is performed by Dodds and sub-contractors. Dodds operates Cool World out of her rental apartment. By contrast, the First Respondent’s market capitalization is approximately USD \$31 Billion.

(g) As fully elaborated below, this Application originates with Twitter’s refusal to allow Dodds and/or Cool World to promote on its platform a Tweet of a trailer (the “Trailer”) for a feature documentary film, *The New Corporation: The Unfortunately Necessary Sequel*.

The New Corporation

(h) In the fall of 2020, Cool World entered into a contract with Grant Street Productions (“GSP”), a film production company, to, *inter alia*, “deploy[] Direct outreach campaigns” to promote GSP’s newly released feature documentary film, *The New Corporation: The Unfortunately Necessary Sequel*. *The New Corporation* film was commissioned by the Canadian broadcaster Crave (Bell Media), and funded by, among others, the Rogers Documentary Fund, Telefilm Canada, and the Canada Media Fund. *The New Corporation* film is a sequel to the award-winning 2003 documentary film, *The Corporation*. Both films are based on award-winning books by University of British Columbia law professor Joel Bakan (“**Bakan**”), published in North America by Simon and Schuster and Penguin Random House. Both the books and films have been translated into dozens of languages.

Bakan is co-director (with Jennifer Abbott), writer, and executive producer of *The New Corporation* film.

- (i) Bakan is a leading public intellectual. Since the release of his book and film, *The Corporation*, he 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 social media 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*.
- (j) *The New Corporation* film premiered at the Toronto International Film Festival in September 2020 and was released in Canada by Crave in February 2021. It has played at numerous international film festivals, been nominated for awards, and continues to be lauded by critics, including in reviews appearing in (among many other outlets) the *Globe and Mail* (“searing, clever and essential...the film is right up to the minute, including COVID-19 and Black Lives Matter”); *Variety* (“what you want from a film like this one is for it to touch the metaphysics of how corporations now work. ‘The New Corporation’ does that. It shakes up your perceptions. And it makes you suck in your breath”); and *Forbes Magazine* (“The must-see documentary of the year”). Noam Chomsky describes *The New Corporation* as, “a very important book, an arresting study directed to a central issue of the times.”
- (k) Based upon rigorous research and analysis, ~~the~~ *The New Corporation* film features interviews with leading scholars (such as Michael Sandel, Klaus Schwab, and Wendy Brown), business people (such as Lord John Brown, Jamie Dimon, and Richard Edelman), and activists (such as Vandana Shiva, Grand Chief Stewart Phillip, and Mayor Ada Colau). Universities, business groups, and civil society organizations have held (and continue to hold) special screenings of the film, and the film and book have been featured and discussed at international scholarly conferences.

- (l) Although *The New Corporation* film and book are based on and grow out of Bakan’s scholarly research and writing, they are designed to be widely accessible beyond the academy and thus broadly impactful on societal debates about social and political issues. The film and book are about ideas, taking aim at the dangerous excesses of corporations and the wrong-headedness of government policies that increase their 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.
- (m) The content of *The New Corporation* film and Trailer (which can be viewed at <https://youtu.be/Dde4Qo0Xfno>) is best described as social and political commentary. Such content is afforded the highest level of *Charter* protection, regardless of whether there is commercial intent behind it, or whether commercial means are used for its dissemination. Neither the fact that *The New Corporation* film and Trailer were produced, broadcast and theatrically-distributed in Canada by for-profit companies (Grant Street Productions [“GSP”], Crave, and Elevation Pictures, respectively), nor that the promoted Tweet of the Trailer took the form of an advertisement, change their contents from being social and political commentary; in particular, critiques of contemporary capitalism.
- (n) The full transcript of the Trailer can be found below.

<u>VOICE OF:</u>	<u>DIALOGUE</u>	<u>ON SCREEN “TEXT” and (IMAGES)</u>
		<u>“Official Selection, tiff, Toronto International Film Festival”</u>
		<u>(corporate logos: e.g., Siemens, Apple)</u>
<u>HEATHER MCGHEE</u> <u>former President of Demos,</u> <u>political commentator</u>	<u><i>The greed economy is killing us.</i></u>	<u>(interview clip with McGhee;</u> <u>environmental devastation)</u>
<u>MICHAEL SANDEL</u> <u>Harvard University Professor of</u> <u>Government, author</u>	<u><i>We are so steeped in this commodification that it's hard to distinguish between being a consumer and being a citizen.</i></u>	<u>(environmental devastation and hyper-consumerism)</u>
		<u>“ ‘The must-see documentary of the year’ – <i>Forbes</i>”</u>
<u>CHRIS BARRETT</u> <u>Political activist,</u> <u>Bernie Sanders volunteer</u>	<u><i>Seeing the documentary, <i>The Corporation</i>, it opened my eyes.</i></u>	
		<u>“The Sequel to the International hit <i>the Corporation</i>”</u>
		<u>(corporate logos: e.g., Cisco; environmental devastation)</u>
<u>JOHN COYNE</u> <u>VP Legal and Regulation,</u>	<u><i>Calling corporations psychopaths absolutely had an impact.</i></u>	<u>(interview clip with Coyne)</u>

Unilever Canada		
BILL GATES Business person, Philanthropist	<i><u>Can we take the resources of corporations, and get them to focus on the needs of the poorest?</u></i>	(interview clip with Bill Gates; Gates hugging a globe; Jamie Dimon in Detroit; school children at Gates-backed Bridge school; Bill Gates interview clip)
ROBERT REICH Economist U of California, Berkeley	<i><u>There is no such thing as corporate social responsibility.</u></i>	(interview clip with Reich)
VANDANA SHIVA Scientist, author and activist	<i><u>They're literally playing casino with life on Earth.</u></i>	(environmental devastation)
		“ ‘Chillingly Relevant’ – <i>Variety Magazine</i> ”
ABRAHM LUSTGARTEN Journalist, Pro Publica	<i><u>The changes that we fear are coming faster than anybody thought.</u></i>	(Tornados, hurricanes, other climate change-led devastation)
GRAND CHIEF STEWART PHILLIP President, BC Union of Indian Chiefs	<i><u>It's completely out of control.</u></i>	(interview clip with Phillip)
		“ ‘Well reasoned and undeniably urgent’ – <i>Indie Wire</i> ”
ROBERT WEISSMAN President, Public Citizen	<i><u>Corporations have figured out that there are really big business opportunities in these public sectors.</u></i>	(privatization of military, water, schools, Google Classroom logo, hospitals)
JAY KIMMELMAN Education entrepreneur, CEO, Bridge Int'l Academies	<i><u>Private schools for the poor is a \$51-billion-a-year market.</u></i>	(continued)
PAUL MASON Author, political commentator	<i><u>Take the education system, take the health care system.</u></i>	(continued)
STACY MITCHELL Co-Director, Institute for Local Self-Reliance	<i><u>That's a direct threat to democracy.</u></i>	(interview clip with Mitchell)
HEIDI BOGHOSIAN Author, Executive director, A.J. Muste Memorial Institute	<i><u>Their reach cannot be underestimated. They know everything about us.</u></i>	(addiction to digital screens; interview clip with Boghosian)
		(corporate logos: e.g., Amazon; scenes of Amazon warehouse)
ANAND GIRIDHARADAS Author, political commentator	<i><u>If we don't push back, we're going to live in a world in which they are governing us privately through the profit motive.</u></i>	(President Trump signing a bill)
ALEXANDRIA OCASIO-CORTEZ US Representative, 14 th Congressional District, NY	<i><u>One of the largest corporate bailouts, with as few strings as possible, in American history. Shameful!</u></i>	“U.S. House coronavirus emergency aid \$3 Trillion package C-Span”
		(U.S. Capitol building, JP Morgan building, Delta Airlines plane, Amazon protest, Detroit homeless man, NY stock exchange)

		“ ‘Couldn’t be more pertinent to the current moment’ – <i>The Daily Beast</i> ”
<u>TIM RYAN</u> US Representative, 13 th Congressional District, OH	<u><i>Global pandemic! “What do we do now? Let’s do a tax cut!”</i></u>	(Tim Ryan on floor of House of Representatives: COVID victims’ bodies being loaded into trucks)
<u>STACY MITCHELL</u> Co-director, Institute for Local Self-Reliance	<u><i>The pandemic revealed that we need to contain corporate power.</i></u>	(Wide-shot of Trump addressing State of the Union, trio walking in COVID masks, COVID patient in hospital)
		“ ‘Sure to provoke righteous outrage’ – <i>Salon</i> ”
<u>WILLIAM BARBER</u> Minister, social activist, Co-chair Poor People’s Campaign	<u><i>The democracy is just trying to breathe. Breathe. Because of the way the poverty is on our neck.</i></u>	(protests and police violence against protestors in wake of George Floyd’s murder; image of police officer with boot on neck of indigenous protestor)
<u>GRETA THUNBERG</u> Youth climate activist	<u><i>We have not come here to beg world leaders to care. Change is coming, whether you like it or not.</i></u>	(environmental protests)
		“ <u>The New Corporation: The Unfortunately Necessary Sequel</u> ”
		(Environmental devastation, environmental protests, COVID patients, Indigenous protests and land defenders, women’s protests, police violence)
<u>PAUL MASON</u> Author, political commentator	<u><i>Are you actually going to challenge the power of corporations? This is what the 2020s will be about.</i></u>	
		“ ‘Abbott and Bakan are back with an even better picture’ – <i>The Progressive</i> ”
		“VIFF Vancouver International Film Festival Selection 2020”
<u>ANAND GIRIDHARADAS</u> Author, political commentator	<u><i>You have to really ask yourself, what was your role in this moment in history?</i></u>	
		“AFI Fest Official Selection”
		Credits

The Applicants’ decision to use promoted Tweets featuring the Trailer

- (o) In the fall of 2020, Cool World entered into a contract with GSP, a film production company which owns *The New Corporation* film, to, inter alia, “deploy[] Direct outreach campaigns” to promote *The New Corporation* film (the “marketing agreement”). GSP is a single-purpose company that has produced only one film: *The New Corporation Film*. It has no plans to produce another film. In the 2020 Fiscal Year, it had a net income of

\$66,147. GSP is obligated by multiple contracts with Telefilm Canada and the Canada Media Fund, and with private broadcast entities (Bell Canada and the Rogers Group of Funds), as well as private investors, to return revenues made from the film's commercial exploitation to these funders under a recoupment agreement. \$899,900 in revenues is contractually assigned to these partners, with any additional profit to be shared as well. In fact, the estimated revenues from the film are very unlikely to amount to half of this amount. GSP has no corporate office or other capital assets and is managed by the individual shareholders from their respective rental and home locations. Under the marketing agreement, Cool World undertakes to manage all advertising for *The New Corporation* film, while payment for advertising is by GSP or the film's distributor.

(p) In partial fulfilment of its contractual obligations to GSP under the marketing agreement, Cool World, through Jane Tattersall (“Tattersall”) of SqueezeCMM, a Toronto-based marketing firm, the Applicants sought to purchase promotion of Tweets and advertising services from the Respondents that featured a the Trailer on a Twitter account, @CorporationFilm, owned by Dodds, @CorporationFilm, of *The New Corporation*. They chose to purchase promoted Tweets, one type of advertising service offered by Twitter, which, according to Twitter “are ordinary Tweets purchased by advertisers who want to reach a wider group of users or spark engagement from their existing followers.”⁵ It did this based on its knowledge that Tweets which are not promoted reach only a small fraction (3 to 5%) of an account holder's followers, and do not reach any non-follower users.

(q) Promoting *The New Corporation* film on Twitter was an important part of the Applicants' marketing strategy, based on their knowledge, rooted in experience with the platform, that Twitter is a social media platform where users mobilize quickly around posted content, which can go “viral” and reach large audiences in a short time frame.

(r) The Applicants chose to purchase promoted Tweets, in addition to relying on free (what Twitter calls “organic”) Tweets, based on their knowledge that only a small fraction of posts from a Twitter account (like @CorporationFilm) appear in followers' feeds (“Home

⁵<https://business.twitter.com/en/help/overview/what-are-promoted-ads.html>

timelines,” as Twitter describes them). Therefore, the Applicants knew, for them to reach a significant number of followers – and non-followers as well – they would have to pay to promote ~~her~~ Tweets of the Trailer.

(s) The Applicants’ knowledge of the much smaller audience for organic Tweets relative to promoted Tweets was based, in part, on Twitter’s own claims concerning the advantages of paid advertising on its platform, relative to organic Tweets, and the fact its advertising services bypass mechanisms that can limit “discoverability” of Tweets in organic domains.

(t) For example, Twitter claims its advertising features allow users to “connect to the most valuable and receptive conversations and audiences with a Twitter Ads campaign”;⁶ that “the most successful brands on Twitter have both paid and organic strategies”;⁷ and that its advertising products increase audience size and reach immediately upon placement. Twitter encourages users “to broaden your reach” with its advertising services, and offers metrics to monitor the impact of advertisements, including extent of reach, and numbers of clicks, video views, and account followers.⁸ Twitter also features “success stories” on its website that provide case studies and testimonials about the efficacy of its advertising services.⁹ In the Analytics section of ads.twitter.com, Twitter exhorts users to advertise in order to “open up your reach on Twitter to more people.”¹⁰

(u) Beyond Twitter’s own claims, the Applicants’ were aware of and motivated by various tangible advantages of promoted Tweets. For example, promoted Tweets offer users the abilities to select a campaign’s objective, including user impressions (or reach), behavioural outcomes such as video views (crucial for the Trailer), installing an app, visiting a website, engagements and generating new followers. Twitter Promoted Tweets also allow users to target demographic characteristics, such as age, sex, location and language, and offer multiple other ways to customize the audience, such as by importing an existing list of customers (accounts may also ask Twitter to find additional users with

⁶ <https://business.twitter.com/en/campaign/welcome-to-twitter-ads.html>.

⁷ Quoted from <https://business.twitter.com/en/basics/organic-best-practices.html>.

⁸ <https://business.twitter.com/en/campaign/welcome-to-twitter-ads.html>

⁹ <https://business.twitter.com/en/basics/organic-best-practices.html>

¹⁰ ads.twitter.com

similar profiles), or by choosing from among a list of targeting features, including keywords, follower look-alikes, interests, movies and TV shows, events, and conversation topics. None of the above-noted options are available for organic Tweets.

- (v) Twitter further offers three non-exclusive options for where ads, including promoted Tweets, are placed: within Home timelines, when users visit another user's profile page, or within search results. As Twitter describes it, "the more ad placements you select, the greater your potential reach."¹¹ These options are not available for organic Tweets. A final advantage of promoted Tweets is that, unlike for organic Tweets, targeted users have little choice over what promoted Tweets they see initially. Once a promoted tweet has appeared in a user's timeline, that user may choose to block the account, report the advertisement for violating one of Twitter's content policies, or inform Twitter that they are not interested in the ad, but those options are only available once the advertisement has loaded and been seen by the targeted user.

The @CorporationFilm Twitter account

- (w) The Tweets and ads were comprised mainly of a link to a one minute and fifty second trailer for *The New Corporation*. Dodds, at the time the sole shareholder and owner of Cool World, decided to ~~used a~~ use the Twitter account that she owned, @CorporationFilm, to create the Tweets featuring the Trailer that she the Applicants wished ~~Cool World~~ to promote. ~~and to solicit the ads.~~
- (x) The @CorporationFilm Twitter account was created by Dodds on 26 June 2010, with account ID 159919974, as a Twitter account for *The Corporation* film and book. Dodds' personal cell phone number, 604 722 3004, is the number on file for this Twitter account. On 17 September 2020, Mark Achbar (producer of *The Corporation*) confirmed in writing that Dodds was the owner of web properties associated with *The Corporation* film, including the @CorporationFilm Twitter account, and was therefore free to promote *The New Corporation* film on these channels.

¹¹ <https://business.twitter.com/en/advertising/campaign-types.html> [click the "start a campaign" button; click the "start a campaign" button; under the Ad Groups menu on the left side of your screen, select "Placements"; find statement in "Placements" box.]

- (y) When *The New Corporation* film was ready to launch in September 2020, a channel-share-use agreement was drawn up among Dodds, Cool World, and GSP, acknowledging Dodds as owner of the channel, laying out the shared use terms, and stating that Cool World would manage ads. At this time the @CorporationFilm Twitter account was renamed “The New Corporation” (although the Twitter handle remained the same). The channel-share-use agreement named Jane Tattersall (“Tattersall”), co-owner of SqueezeCMM, a Toronto-based marketing firm, as a manager of the editorial calendar within the channel agreement.
- (z) By an oral sub-contract agreement between the Applicants and SqueezeCMM, Tattersall was designated as manager of all advertising buys on the @CorporationFilm Twitter account on behalf of Dodds and Cool World. Also, according to that agreement, Tattersall was to use the @CorporationFilm Twitter account to purchase promoted Tweets on behalf of the Applicants. As a consequence, that agreement authorized Tattersall to accept Twitter’s Terms of Service, and to use Twitter’s services, including advertising services, on behalf of the Applicants, and also to bind the Applicants to those Terms of Service.
- (aa) Under its agreement with GSP, Cool World undertakes to manage all advertising for *The New Corporation*, while payment for advertising is by GSP or the film’s distributor. In partial fulfilment of its Cool World’s contractual obligations to GSP, the Applicants, through Tattersall, sought to purchase promotion of Tweets and advertising from the Respondents that featured the Trailer of *The New Corporation* film and that would run on Dodds’ @CorporationFilm Twitter account.
- (bb) The attempt to purchase promotion of Tweets and ads on Dodds’ @CorporationFilm account was made on 18 November 2020 by Tattersall, on the basis of an oral agreement between Dodds and SqueezeCMM. Dodds’ @CorporationFilm Twitter account is, like all Twitter accounts, governed by the Twitter User Agreement (“**User Agreement**”). Article 1 of the User Agreement establishes a contractual relationship between Dodds and the first Respondent. Article 4 of the User Agreement incorporates by reference the “Twitter Rules and Policies”, which include the Twitter Ads policies. Article 4 also provides that a Twitter account holder that wishes to advertise on Twitter (including

~~through promoted Tweets) must agree to the Twitter Master Services Agreement (“Master Services Agreement”). Article 3 of the Master Services Agreement subjects advertising to compliance with the Twitter Ads policies. This flows as a consequence of the opening sentence of the Twitter Terms of Service (the “Terms”), which provides:~~

Terms, opening sentence: If you live outside the European Union, EFTA States, or the United Kingdom [i.e. in Canada], including if you live in the United States, the Twitter User Agreement comprises these Terms of Service, our Privacy Policy, the Twitter Rules and Policies, and all incorporated policies.¹²

Article 6 of the Terms, in turn, provides:

These Terms are an agreement between you and Twitter, Inc., 1355 Market Street, Suite 900, San Francisco, CA 94103 U.S.A.

The combination of Article 6 and the opening sentence of the Terms confirms that Dodds is a party to the User Agreement by virtue of her ownership of the @CorporationFilm Twitter account.

(cc) In addition, or in the alternative, Cool World is a party to the Twitter User Agreement by virtue of the fact Dodds, in operating the @CorporationFilm account in relation to *The New Corporation* film campaign, was accepting the Terms and using its Services on behalf of Cool World, with authority to do so and to bind Cool World to the Terms, on the basis of Article 1 of the Terms (emphasis added):

Terms, Article 1: You may use the Services only if you agree to form a binding contract with Twitter and are not a person barred from receiving services under the laws of the applicable jurisdiction. In any case, you must be at least 13 years old, or in the case of Periscope 16 years old, to use the Services. *If you are accepting these Terms and using the Services on behalf of a company, organization, government, or other legal entity, you represent and warrant that you are authorized to do so and have the authority to bind such entity to these Terms, in*

¹² <https://twitter.com/en/tos>.

which case the words “you” and “your” as used in these Terms shall refer to such entity

- (dd) When the Applicants sought to purchase promoted Tweets, through Squeeze CMM’s Tattersall, they were exercising their rights under the User Agreement. That is because: (a) the “Introductory Article” of Terms states that access to and use of Twitter’s services (including “ads,” which include promoted Tweets) are governed by Terms, and thereby, according to the opening sentence of Terms, by the User Agreement; and (b) in exchange for access to the “Services,” which include Promoted Tweets, the Applicants provided consideration to Twitter as set out, *inter alia*, in Articles 3 and 4 of Terms. For greater clarification (emphasis added):

Terms, Introductory Article: These Terms of Service (“Terms”) govern your access to and use of our services, including our various websites, SMS, APIs, email notifications, applications, buttons, widgets, *ads*, commerce services, and our other covered services (<https://help.twitter.com/en/rules-and-policies/twitter-services-and-corporate-affiliates>) that link to these Terms (collectively, the “Services”), and any information, text, links, graphics, photos, audio, videos, or other materials or arrangements of materials uploaded, downloaded or appearing on the Services (collectively referred to as “Content”). By using the Services you agree to be bound by these Terms. (emphasis added)

Terms, Article 3: ... By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods now known or later developed (for clarity, these rights include, for example, curating, transforming, and translating). This license authorizes us to make your Content available to the rest of the world and to let others do the same. You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals for the syndication, broadcast, distribution, Retweet, promotion or publication of such Content on other

media and services, subject to our terms and conditions for such Content use. Such additional uses by Twitter, or other companies, organizations or individuals, is made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services as the use of the Services by you is hereby agreed as being sufficient compensation for the Content and grant of rights herein. ...

Terms, Article 4: ... In consideration for Twitter granting you access to and use of the Services, you agree that Twitter and its third-party providers and partners may place advertising on the Services or in connection with the display of Content or information from the Services whether submitted by you or others.

(ee) When Twitter refused the Applicants' (through Tattersall) several requests to promote Tweets and purchase advertisements (as described in the following section) it was purporting to exercise its User Agreement rights to enforce Twitter's Ad Policies, which are incorporated into the User Agreement by virtue of the combined effect of the opening sentence of Terms (*supra*), and the Twitter Rules and Policies: Content Monetization Standards, Platform Use Guidelines, which provide in relevant part, "All people who advertise on Twitter must follow Twitter's Ads Policies".¹³ The Twitter Ads Policies ("Ads Policies") are therefore also part of the User Agreement.

(ff) In summary, and for greater clarification: By virtue of the User Agreement between the Applicants and Twitter, Applicants were exercising existing contractual rights when attempting to purchase Ad Services from Twitter, and Twitter was purporting to exercise existing contractual rights when refusing those attempts.

Twitter refuses to sell promoted Tweets featuring the Trailer to the Applicants

(gg) On 18 November 2020, Tattersall attempted to purchase a promoted Tweet featuring the Trailer, using the @CorporationFilm Twitter account, pursuant to the User Agreement, on behalf of the Applicants.

¹³ <https://help.twitter.com/en/rules-and-policies/content-monetization-standards>

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

- (oo) On 28 November 2020, Twitter replied: “Our team manually reviewed your content and confirmed that it violates our Inappropriate Content policy. Some examples of content that violate this policy include but are not limited to: inflammatory or demeaning content; misleading or misrepresentative content; dangerous or violent content; using or referring to COVID-19/coronavirus terms; sale of face masks and hand sanitizer” (“**Rejection No. 4**”).
- (pp) On 1 December 2020, Tattersall reached out to a Twitter staff member to discuss Rejection No. 4: “Can we connect on this? I’ve received a 4th rejection for a third (different) reason now and it is getting very frustrating.”
- (qq) On 1 December 2020, Twitter’s Abigail Scott responded: “Taking another look, I am confirming that it seems that the Tweets have been halted for violating our sensitive/inappropriate content as well as our political policy. Based on the content of the trailer, it is likely that this will continue to be flagged. You are able to tweet the content to share organically, but unfortunately it will not be able to be promoted on the platform through our ads” (“**Rejection No. 5**”).
- (rr) On 1 December 2020, Tattersall wrote to Scott in response to Rejection No. 5: “Can you please clarify this a little further? This is a documentary that has been recognized by numerous mainstream media outlets as credible, along with the documentary film community. It was partly funded by one of Canada’s largest governmental arts funding partners. A couple of other points from the policy cited below: 1) *‘Twitter restricts the promotion of and requires advertiser certification for ads that educate, raise awareness, and/or call for people to take action.’* In Canada, advertiser certification for political ads is no longer available, effectively making it impossible for Canadian creators to leverage twitter as an ad platform for exposure while at the same time permitting non-Canadian entities to advertise to a Canadian audience. 2) *‘Advertising should not be used to drive political, judicial, legislative or regulatory outcomes.’* The film examines the prevalence of corporate influence on democratic institutions, but does not advocate for specific outcomes on any of these fronts, aside from holding corporations accountable....”.
- (ss) On 1 December 2020, Scott responded to Tattersall: “Regardless of whether or not a film is acclaimed or whether or not it’s a documentary, the same policies must be adhered to.

One of the reasons here is that Twitter does not have the resources to deem all of the content on our platform as ‘credible’ as many areas are quite nuanced and subjective. As mentioned on our policy page, Twitter *globally* prohibits the promotion of political content. We have made this decision on our belief that political message should be earned, not bought. This as well as the sensitive content policy are applicable in all regions, not just the US as these policies apply to **all** of Twitter’s advertising products. Looking at the trailer it does seem that there are some political undertones to the content. We encourage you to promote organically, but unfortunately we are not able to allow it to be promoted” (“Rejection No. 6”).

Twitter’s Ad policies

(tt) Twitter invoked ~~four~~ three different Twitter Ads policies to justify refusing to promote *The New Corporation* ~~tweet~~ containing the Trailer.

(uu) Twitter’s “Political Content Policy” provides that “Twitter globally prohibits the promotion of political content.”¹⁴ This policy defines political content as “content that references a candidate, political party, elected or appointed government official, election, referendum, ballot measure, legislation, regulation, directive, or judicial outcome” and states that “Ads that contain references to political content, including appeals for votes, solicitations of financial support, and advocacy for or against any of the above-listed types of political content, are prohibited under this policy”.

(vv) [Deleted paragraph¹⁵]

(vv) Twitter’s “Inappropriate Content Policy” is global and states simply: “Twitter prohibits the promotion of inappropriate content.”¹⁶ Inappropriate content, includes, *inter alia*, “content that refers to a sensitive event or topic (e.g. deaths, natural/industrial disasters, violent attacks, civil disorder, etc.) and contains any of the following: personal attacks,

¹⁴ <https://business.twitter.com/en/help/ads-policies/ads-content-policies/political-content.html>.

¹⁵ Twitter’s “Cause-Based Advertising Policy” applies globally to “ads that educate, raise awareness, and/or call for people to take action in connection with civic engagement, economic growth, environmental stewardship, or social equity causes.”¹⁵ The policy “requires advertiser certification.” for such advertisements. As well, cause-based advertisements run by for-profit organizations (which include Cool World) “should not have the primary goal of driving political, judicial, legislative, or regulatory outcomes,” and “ads must be tied to the organization’s publicly stated values, principles, and/or beliefs.”

¹⁶ <https://business.twitter.com/en/help/ads-policies/ads-content-policies/inappropriate-content.html>.

hashtag appropriation, the selling of goods/services, political campaigning, solicitation of followers, or other inappropriate content.”

(ww) Twitter’s “Targeting of Sensitive Categories Policy” prohibits ~~ads~~ advertisements that target or exclude users based on designated “sensitive categories.”¹⁷ One such category is “political affiliation and/or beliefs.”

(xx) Finally, Twitter states that “Twitter Ads can be reviewed prior to running in campaigns. They are submitted for approval on an automatic basis, based on an account’s advertising status, its historical use of Twitter, and other evolving factors. Review generally takes into consideration how an account uses Twitter, its profile, its content, and targeting included in any active or draft advertising campaigns.”¹⁸ Twitter’s reference to “approval on an automatic basis” means that prior review of advertising is automated.

Contract Law and the Charter

(yy) Twitter is a private actor. By virtue of s. 32, the *Canadian Charter of Rights and Freedoms* (“*Charter*”) does not apply to Twitter.

(zz) However, when Twitter deployed its Ad Policies to refuse the Applicants’ promoted Tweets and advertisements, it purported to exercise its powers under contract law, which, by virtue of s. 52 of the *Constitution Act, 1982*, must comply with *Charter* values. Section 52 of the *Constitution Act, 1982* provides that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” The words “any law” include the common law of contract. As a consequence of s. 52, the common law of contract must be interpreted and developed to comport with *Charter* values (parallel to how courts have interpreted and developed the common law of torts, and other common law areas, to comport with *Charter* values), in relation to: first, the doctrine of public policy; second, the duty of good faith; ~~and~~ third, the doctrine of unconscionability; and fourth, the principle of freedom of contract.

¹⁷ <https://business.twitter.com/en/help/ads-policies/campaign-considerations/targeting-of-sensitive-categories.html>

¹⁸ <https://business.twitter.com/en/help/ads-policies/about-twitter-ads-approval.html>

(aaa) [Deleted paragraph¹⁹]

The Doctrine of Public Policy in Contract Law

- (aaa) Courts may refuse to enforce otherwise valid contractual provisions when “the existence of an overriding public policy ... outweighs the very strong public interest in the enforcement of contracts” (*Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para. 123). The constitutionally protected rights and freedoms in the *Charter* are sources of public policy in the common law of contract law. ~~The Twitter Ad policies offend an “overriding public policy” because they are overbroad and in relation to section 2(b) values (i.e., they prohibit high value expression without any reasonable apprehension of harm), and because Twitter uniquely functions as a public arena.~~
- (bbb) The Twitter Ad policies restrict non-harmful speech aimed at addressing social and political ideas and issues. Such speech lies at the heart of democratic discourse and debate, and has been long recognized as highly valued, being at the core of the *Charter* freedom of expression values, and therefore deserving the highest level of *Charter* protection.
- (ccc) The Twitter Ads Policies 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.
- a. Twitter controls how content reaches users through its algorithm, in ways that amplify certain Tweets and users. 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). The Home timeline does not list Tweets from accounts that users follow in chronological order. Rather, as Twitter explains (emphasis added):

¹⁹ In the circumstances of this Application, two contextual factors should shape the development of the common law of contract to comport with the *Charter*: first, Twitter’s role as a public arena, and second the fact that Twitter’s policies and/or actions have banned high value social and political expression.

An algorithmic Home timeline displays a stream of Tweets from accounts you have chosen to follow on Twitter, as well as recommendations of other content we think you might be interested in based on accounts you interact with frequently, Tweets you engage with, and more. As a result, what an individual sees on their Home timeline is a function of how they interact with the algorithmic system, as well as how the system is designed.²⁰

Twitter's algorithm also generates a personalized and frequently updated list of trending topics (news events, celebrity gossip, viral Tweets, etc.). Twitter states that trending topics vary for each individual user, and are (emphasis added):

determined by an algorithm and, by default, are tailored for you based on who you follow, your interests, and your location. This algorithm identifies topics that are popular now, rather than topics that have been popular for a while or on a daily basis, to help you discover the hottest emerging topics of discussion on Twitter.²¹

- b. According to Twitter's own research, its algorithmic amplification of Tweets and users is biased towards accounts on the right-wing side of the political spectrum, including in Canada. On 21 October 2021, a research team at Twitter published the results of a 2020 study concluding that "in six out of seven countries [including Canada]...Tweets posted by accounts from the political right received more algorithmic amplification than the political left when studied as a group."²² The Trailer lies on the left wing side of the political spectrum.
- c. Twitter's organic domains magnify the reach of powerful and wealthy actors. Celebrities, major brands, and well-known political actors all have substantial reach due to their already being known and influential. Former President Trump, who had 88,936,841 followers before being banned from Twitter, is a prime example.

²⁰ <https://help.twitter.com/en/using-twitter/twitter-timeline>

²¹ <https://help.twitter.com/en/using-twitter/twitter-trending-faqs>.

²² https://blog.twitter.com/en_us/topics/company/2021/rml-politicalcontent. The full report can be found at: https://cdn.ems-twtdigitalassets.com/content/dam/blog-twitter/official/en_us/company/2021/rml/Algorithmic-Amplification-of-Politics-on-Twitter.pdf.

Twitter (@Twitter) has 60.6 million followers. Disney (@Disney) has 8.2 million followers. Prime Minister Justin Trudeau (@JustinTrudeau) has 5.8 million followers. In contrast, @CorporationFilm has 1911 followers, Joel Bakan (@joelbakan) has 1902 followers, and Cool World has 98 followers.

- d. 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). For example, influential users are often paid to promote messages or products – i.e., influencer marketing²³ – a practice encouraged by Twitter,²⁴ and which is impossible for users to detect because disclosure of promotional relationships is not required.
- e. Twitter also hosts automated accounts, known as “bots,” which amplify Tweets or engage in other ways to improve a Tweet’s reach, often in relation to political content that would be banned in in the form of paid ads.²⁵ Both the Russian and Chinese governments have notoriously deployed bots in these ways in relation to elections and other political issues.²⁶ Twitter’s Political Content Policy thus rewards accounts that resort to these hidden methods and punishes those that do not or cannot.
- f. 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 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.

²³ <https://business.twitter.com/en/blog/why-goals-matter-to-influencer-marketing-success.html>.

²⁴ <https://business.twitter.com/en/blog/5-tips-more-effective-influencer-marketing.html>;
<https://business.twitter.com/en/blog/secrets-of-social-media-influencers.html>.

²⁵ Dubois, E., & McKelvey, F. (2018). Canada: Building Bot Typologies. In S. Woolley & P. N. Howard (Eds.), *Computational propaganda: Political parties, politicians, and political manipulation on social media* (pp. 64–85). Oxford University Press. Dubois, E., & McKelvey, F. (2019). Political Bots: Disrupting Canada’s Democracy. *Canadian Journal of Communication*, 44(2), 27–33.

<https://doi.org/10.22230/cjc.2019v44n2a3511>.

²⁶ <https://www.nytimes.com/interactive/2021/12/20/technology/china-facebook-twitter-influence-manipulation.html>.

- (ddd) The Twitter Ads Policies operate to restrict high value political and social speech in a key public arena for Canadian democracy and freedom of expression as evidenced by (described in the following paragraphs) first, its own claims, and second its actual operations.
- (eee) Twitter holds itself out as a public arena for free democratic discourse and debate, claiming, *inter alia*:
- a. “Twitter’s purpose is to serve the public conversation.”²⁷
 - b. “The public conversation occurring on Twitter is never more important than during elections and other civic events.”²⁸
 - c. “During important news and civic events, people come to Twitter to find information and to join conversations about pressing issues in real time.”²⁹
 - d. “Twitter is what’s happening and where cultural conversations play out.”³⁰
 - e. “In 2020, more and more Canadians than ever before turned to Twitter to participate in the public health conversation and follow what was happening in real time. With a critical mass of expert organizations, official government accounts and health professionals on our service, our goal is to elevate and amplify authoritative health information as far as possible. Twitter introduced search prompts for Canadians looking for information on COVID-19 and vaccines. Through it all, Canadian health experts and organizations made masterful use of Twitter. Their innovative approaches to keeping us informed made Twitter the vital resource for real-time updates and information on the pandemic.”³¹
 - f. “For the first half of 2021, the #cdnpoli hashtag was the undisputed champion as the most Tweeted made-in-Canada hashtag by Canadians. In fact, only #COVID19 had more Canadian mentions amongst all hashtags in 2021. Once again, we worked

²⁷ <https://help.twitter.com/en/rules-and-policies/twitter-rules>.

²⁸ https://blog.twitter.com/en_ca/topics/events/2021/inside-the-44th-canadian-general-election-on-twitter.

²⁹ https://blog.twitter.com/en_ca/topics/events/2021/inside-the-44th-canadian-general-election-on-twitter.

³⁰ <https://business.twitter.com/en/blog/how-to-create-and-use-hashtags.html>.

³¹ https://blog.twitter.com/en_ca/topics/events/2020/-thishappened-in-canada-2020.

with our partners at Elections Canada (@ElectionsCan_E and @ElectionsCan_F) to launch a custom Twitter emoji for the election. During the campaign, people who use Twitter can Tweet any of these hashtags [listed] to unlock the emoji and add some extra colour to their Twitter conversations.”³²

(fff) Within Canada, Twitter operates as a key public arena for Canadian democracy and social and political speech.

- a. 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.³³ Another study estimates that 6.45 million Canadians have a Twitter account.³⁴
- b. 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.³⁵
- c. Twitter is the principal social media platform for government communications. 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 and makes all of his important announcements on Twitter. Official accounts now exist for the House of Commons, the Senate, provincial legislative assemblies, federal, provincial and territorial ministers and departments. Public services and utilities use Twitter to communicate with citizens. For example,

³² https://blog.twitter.com/en_ca/topics/events/2021/inside-the-44th-canadian-general-election-on-twitter.

³³ Gruzd, Anatoliy, and Philip Mai. 2020. The State of Social Media in Canada 2020. Ryerson University Social Media Lab. Version 5. DOI: [10.5683/SP2/XIW8EW](https://doi.org/10.5683/SP2/XIW8EW)

³⁴ <https://www.statista.com/statistics/649539/canada-twitter-gender-distribution/>.

³⁵ Owen, Taylor, Peter Loewen, Derek Ruths, Aengus Bridgman, Robert Gorwa, Stephanie MacLellan, Eric Merkley, and Oleg Zhilin. 2020. “Lessons in Resilience: Canada’s Digital Media Ecosystem and the 2019 Election.” Public Policy Forum. <https://ppforum.ca/articles/lessons-in-resilience-canadas-digital-media-ecosystem-and-the-2019-election/>.

the Toronto Transit Commission maintains an account that alerts riders of the Toronto transit system to outages – it has approximately 400,000 followers.

- d. The Canadian courts have institutional presences on Twitter. The Supreme Court of Canada (@SCC eng and @CSC fra), the Ontario Court of Appeal (@ONCA_en), the Superior Court of Justice (Ontario) (@SCJOntario_en) and the Ontario Court of Justice (@OntarioOn) all have Twitter accounts. The COVID-19 pandemic has cemented Twitter’s role as the social media platform of choice for Canadian public institutions, including courts: the Ontario Superior Court of justice relied, and continues to rely, 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.
- e. Of the 338 currently elected federal Members of Parliament, 325 have an active Twitter presence (96 percent).³⁶ Of the 92 current Senators, 70 have Twitter accounts (76 percent).³⁷ Generally Twitter is the preferred medium for politicians to comment on contemporary political events, while Facebook and other platforms have different emphases.³⁸ 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.
- f. 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. 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

³⁶ <https://twitter.com/i/lists/864088912087715840/members>.

³⁷ <https://twitter.com/i/lists/834840537970651136/members>.

³⁸ Stier, Sebastian, Arnim Bleier, Haiko Lietz, and Markus Strohmaier. 2018. “Election Campaigning on Social Media: Politicians, Audiences, and the Mediation of Political Communication on Facebook and Twitter.” *Political Communication* 35 (1): 50–74. <https://doi.org/10.1080/10584609.2017.1334728>.

collectively produced 2,183,916 election-related Tweets which were retweeted 6,143,053 times.

- g. Twitter is also used extensively for political discourse in Canada outside elections. Between 21 September 2021 (the date of the last federal election) and 1 January 2022, Members of Parliament collectively produced 31,957 Tweets which have been liked 3,703,598 times and retweeted 626,836 times.
- h. Statements by Ministers and Members of Parliament attest to Twitter's (and other platforms') centrality to Canada's political system. Karina Gould, Minister of Democratic Institutions when the *Election Modernization Act*, SC 2018, c 31 [EMA] became law, stated in a speech (outside Parliament) that the EMA responds to challenges to democracy raised by the fact "social media is, as Cass Sunstein asserts, the new public square," and that social media play a "significant role" in elections, "connect citizens directly," and "their impact on campaigns will continue to increase." In the House, Minister Gould stated, in support of Bill C-76 (which would become the EMA) that social media would have a "heavy presence" in the 2019 federal election, while Pam Goldsmith-Jones (Lib), Parliamentary Secretary to Minister of International Trade, stated that "social media... is the world in which we live."
- i. The Twitter activity of politicians, and the platform's response to it, is so significant a part of political discourse that it is, in itself, a significant part of political life in Canada and newsworthy as such. During the 2021 federal election, for example, Barack Obama³⁹ and Hilary Clinton⁴⁰ endorsed Justin Trudeau. Bernie Sanders endorsed Jagmeet Singh.⁴¹ The original endorsements happened on Twitter and were covered widely in the press, with at least 12 articles published about them in other media outlets.⁴²

³⁹ <https://twitter.com/BarackObama/status/1438541175607242766>.

⁴⁰ <https://twitter.com/HillaryClinton/status/1438902448442195971>.

⁴¹ <https://twitter.com/BernieSanders/status/1438936022159593474>.

⁴² Examples include : <https://www.ctvnews.ca/politics/federal-election-2021/do-endorsements-from-obama-clinton-constitute-election-interference-1.5590093>; <https://nationalpost.com/news/politics/obama-endorsement-of-his-friend-trudeau-might-not-prove-helpful-politics-professor-say>;

- j. In a second illustrative instance, on 22 August 2021, during the first week of the 2021 federal election, Finance Minister and Deputy Prime Minister Chrystia Freeland posted a video on Twitter of Erin O’Toole which suggested that the leader of the Conservative Party supported the privatization of national Healthcare. Twitter labelled the tweet as “manipulated media.”⁴³ An enormous volume of media coverage followed, with at least 42 articles published in outlets, including *LaPresse*, *Toronto Star*, the *Globe and Mail*, and the *National Post*, in the three days following the Tweet. Survey data collected during that week showed that one-third of Canadians reported seeing the information. By the post-election period, that number had grown to 47% of Canadians. When asked where they were exposed to the information, media outlets (60%), friends and family (16%), and even Facebook (14%) were more likely to be the first contact with the information, significantly more than Twitter itself (only 10%), which means that the Tweet and Twitter’s response to it were highly significant during the election campaign, despite Twitter not being the main carrier of news about it.
- k. Journalists pay substantial attention to Twitter in Canada. Numerous studies show that the press often reports online sentiments and trends as a form of public opinion.⁴⁴ This has become so normalized that, for example, in an experiment with U.S.-based journalists, Tweets were deemed equally newsworthy to headlines from the Associated Press wire.⁴⁵ Elsewhere, Twitter has been shown to lead traditional media during periods of breaking news.⁴⁶

<https://www.thestar.com/politics/federal-election/2021/09/17/bernie-sanders-hillary-clinton-and-barack-obama-notable-figures-share-their-endorsements-for-pm-as-canadians-head-to-the-polls.html>.

⁴³ <https://twitter.com/cafreeland/status/1429429537012658178>.

⁴⁴ McGregor, Shannon C. 2019. “Social Media as Public Opinion: How Journalists Use Social Media to Represent Public Opinion.” *Journalism* 20 (8): 1070–86. <https://doi.org/10.1177/1464884919845458>.

⁴⁵ McGregor, Shannon C, and Logan Molyneux. 2020. “Twitter’s Influence on News Judgment: An Experiment among Journalists.” *Journalism* 21 (5). <https://doi.org/10.1177/1464884918802975>.

⁴⁶ Su, Yan, and Porismita Borah. 2019. “Who Is the Agenda Setter? Examining the Intermedia Agenda-Setting Effect between Twitter and Newspapers.” *Journal of Information Technology & Politics* 16 (3): 236–49. <https://doi.org/10.1080/19331681.2019.1641451>.

The Duty of Good Faith in Contract Law

(ggg) Contracting parties owe each other duties of good faith in the performance of contractual obligations and in the exercise of contractual rights. Twitter breached its duty of good faith toward the Applicants by refusing to promote *The New Corporation* Tweet because it exercised its discretion in a manner that was unreasonable, arbitrary and capricious (*Wastech Services v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7), in at least four ways: first, it made its decision initially through automation; second, it provided shifting reasons with minimal justification; third, it refused to substantively respond to reasoned arguments made, and questions raised, by Tattersall; and, fourth, it did all these things operating as a central public arena and in relation to restricting high value social and political expression (see above).

(hhh) Moreover, Twitter acted arbitrarily in applying its Ads Policies and refusing to promote *The New Corporation* Tweet because it routinely permits advertisements that have the same kinds of “political undertones” the platform relied upon to determine that the Trailer violated its policies. For example:

- a. Twitter features advertisements with “political undertones” in a section of its website, Success Stories, designed to encourage users to deploy its advertisement services.⁴⁷ A campaign featured on the site is described as follows: “The Penguin Random House Publishing Group wanted to publicise a new book by Manuel Rivas ‘Un manifiesto rebelde’ and created a Twitter campaign to do so.”⁴⁸ Un manifiesto rebelde can be translated to “a rebel manifesto,” and the book’s left-leaning political bent is unmistakable. Another highlighted campaign, for women’s clothing retailer M.M. LaFleur, touches on issues of women’s rights, power, and equity. As Twitter relates, “M.M. LaFleur specifically targeted women 25+ in the United States for this campaign. They also targeted keywords related professional women (i.e. “women in power”, “working women”), gender equality

⁴⁷ <https://business.twitter.com/en/success-stories.html>.

⁴⁸ <https://business.twitter.com/en/success-stories/penguin-random-house.html>.

(i.e. “IWD”, “women’s rights”, “gender equity”), and voting (i.e. “women voters”, “election2020”).”⁴⁹

- b. Twitter ran an ExxonMobil advertisement on 26 January 2021 – the day before President Biden released Executive Orders on Climate – that included a video titled: “See how natural gas is helping shape a cleaner world around us.” According to Harvard science historian, Naomi Oreskes, who has researched Exxon’s communications, this advertisement is political because its “goal is to prevent political action on climate.”⁵⁰ Geoffrey Supran, Oreskes’ research collaborator, said of the ads: “There is not a product to sell. So what purpose do these advertisements conceivably serve other than to promote a political narrative on climate change and energy that protects [the industry’s] business interests?”⁵¹
- c. Many corporations make similar use of Twitter advertisements as ExxonMobil, propagating messages about key policy issues, and also about themselves as providers of solutions to social and environmental problems. In fact, many of the companies criticized in *The New Corporation* film for such posturing routinely use Twitter’s advertisement services (themselves or through third party contractors) to propagate such views, with unmistakable “political undertones.” For example:

i. **Amazon**

1. “There would be 10 times more LGBTQ entrepreneurs in the U.S. if everyone had equal access to funding and resources.”⁵²
2. “Amazon offers at least \$15/hour across the U.S. – more than double the federal minimum wage.”⁵³

ii. **British Petroleum**

⁴⁹ <https://business.twitter.com/en/success-stories/mmlafleur.html>.

⁵⁰ <https://www.msnbc.com/opinion/twitter-thinks-ads-about-climate-change-are-bad-big-oil-n1256661>.

⁵¹ <https://heated.world/p/twitters-big-oil-ad-loophole>.

⁵² <https://twitter.com/amazonnews/status/1421124993530925058>

⁵³ <https://twitter.com/amazonnews/status/1362908089419108352?lang=en>

1. “Hydrogen could play a big role in lowering global emissions, by decarbonizing energy-intensive industries that are hard or expensive to electrify – heavy transport. Take a closer look at how hydrogen can be used on the path to net zero.”⁵⁴
2. “In a crisis, everyone needs to pull together. The planet’s carbon budget is finite and it is running out. Some people say green companies are the answer. And they’re right, the world does need more green and carbon zero companies.”⁵⁵
3. “‘bp really just opened their arms and let me talk about trans awareness and wider diversity issues.’ Throwback to Transgender Awareness Week 2020 where Bobbi, co-chair of our transgender network bravely shared her experience coming out at bp.”⁵⁶

iii. 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.”⁵⁷

iv. ExxonMobil

1. “We’re supporting the goals of the Paris Agreement.”⁵⁸
2. “See how natural gas is helping shape a cleaner world around us.”⁵⁹
3. “Certified natural gas brings customers the energy they need while helping them meet their environmental goals. Learn how an independent standard offers a more transparent approach to

⁵⁴ https://twitter.com/bp_plc/status/1433440319065018369

⁵⁵ https://twitter.com/bp_plc/status/1433440319065018369

⁵⁶ https://twitter.com/bp_plc/status/1409463979454439424

⁵⁷ <https://twitter.com/cocacola/status/1268235977614655488?lang=en>

⁵⁸ <https://twitter.com/exxonmobil/status/1402361002667261964>

⁵⁹ <https://twitter.com/exxonmobil/status/1354197361812250630>

assessing methane emission management in natural gas production.”⁶⁰

4. “It’s no pipe dream: Carbon capture and storage can effectively reduce emissions. We’ve been doing it for decades – and want to continue collaborating with others to help bring this technology to scale. Learn more.”⁶¹

v. **General Electric**

1. “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.”⁶²
2. “@gehnuclear has raised its hand to help Canada reach its pledge of reducing net carbon emissions to zero by 2050. How? By deploying the world’s first grid-scale small modular reactor (SMR).”⁶³
3. “We believe that diversity, inclusion, and representation are key to building a world that works. Today – and every day – we’re proud to stand by our employees and the LGBTQAI+ community. #PrideDay.”⁶⁴
4. “#DYK power sector emissions in the US have decreased over 30% in the past decade? This is largely due to replacing coal plants with natural gas energy sources, like the H-Class gas turbines with HA technology you see here.”⁶⁵

vi. **J.P. Morgan**

⁶⁰ <https://twitter.com/exxonmobil/status/1443982745038991362>

⁶¹ <https://twitter.com/exxonmobil/status/1441141033090236417>

⁶² <https://twitter.com/generalelectric/status/1352032533085638657>

⁶³ <https://mobile.twitter.com/generalelectric/status/1429914931370070028>

⁶⁴ <https://twitter.com/generalelectric/status/1408831196000231427>

⁶⁵ <https://twitter.com/generalelectric/status/1395817021141626887>

1. “What does a post-Brexit world look like? Five years after the historic UK referendum, part I of our two-part podcast explores the resulting policy, economy, and political forces.”⁶⁶
2. “J.P Morgan’s David Freedman shares how to prepare for activist campaigns.”⁶⁷
3. “The Advancing Black Pathways fellowship is a paid, professional development program aimed at increasing diversity.”⁶⁸

vii. **Johnson & Johnson**

1. “Over 40% of Michiganders who have died from #COVID19 were Black, although the Black community represents only 14% of the states’ [sic] population, according to the @mhealth lab. If you have any ideas, join the quest to help eliminate racial health inequities like this.”⁶⁹
2. “Black & Hispanic people in the U.S. have been disproportionately impacted by a wide range of diseases due to healthcare inequities caused by centuries of systemic racism. Join an initiative aiming to help right these systemic wrongs by accelerating innovative community solutions.”⁷⁰
3. “Nearly 1 in 10 #LGBTQIA+ people are unemployed and more likely to live in poverty than straight and cisgender people, meaning they cannot always afford the healthcare they need, according to @HRC. Apply by November 12 to help address health inequities like this.”⁷¹

⁶⁶ <https://twitter.com/jpmorgan/status/1408460587982524416>

⁶⁷ <https://twitter.com/jpmorgan/status/1447562636309274630>

⁶⁸ <https://twitter.com/jpmorgan/status/1372503196871053315>

⁶⁹ <https://twitter.com/JNJNews/status/1455572863705141263>

⁷⁰ <https://twitter.com/JNJNews/status/1443198246055288839>

⁷¹ <https://twitter.com/JNJNews/status/1458079633937735691>

viii. Unilever

1. “In the third year of our United We Stand campaign, we’re working with local groups across the US to advocate for policy change and LGBTQI+ equality. The mission: Ensuring more people can find – and become – their own heroes in life.”⁷²
 2. “Happy #WorldEnvironmentalDay. In line with the United Nations Decade on Ecosystem Restoration, we’re proud to share that our brand @Dove has partnered with @conservationorg to protect and restore 20,000 hectares of forest in North Sumatra – the equivalent of +3 million trees.”⁷³
- d. Twitter Ad Services are also used to promote documentary and narrative films and television shows that, like *The New Corporation* film and Trailer, have “political undertones.” For example:
- i. @TheDocSociety advertisement for the documentary film, *Knock Down the House* about US Congressional representative Alexandria Octavio-Cortez’s campaign for office.⁷⁴
 - ii. @BoysStateMovie’s advertisement for the documentary film, *Boys State*, an expose of political divisions and machinations in the United States.⁷⁵
 - iii. @PrimeVideo’s (Amazon) advertisement for the 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.⁷⁶

⁷² <https://twitter.com/Unilever/status/1430167687045558274>

⁷³ <https://mobile.twitter.com/unilever/status/1400864155192680453>

⁷⁴ <https://mobile.twitter.com/thedocsociety/status/1198231495934201858?lang=bg>

⁷⁵ <https://twitter.com/boysstatemovie/status/1293244922678525957?lang=ca>

⁷⁶ <https://twitter.com/primevideo/status/1306664175695847425> and

<https://twitter.com/primevideo/status/1304140489193472000>

- iv. @thegoodfight advertisements for the Paramount television series *The Good Fight*, a satirical program taking aim at hot button political issues during Donald Trump's presidency, and the Trump presidency itself.⁷⁷

Unconscionability

- (iii) Court's may refuse to enforce otherwise valid provisions of a contract that they find unconscionable. Twitter's user agreement is a contract of adhesion between parties of grossly disproportionate bargaining power. The three Ads Policies relied upon by the Respondent to refuse the Applicants' attempts to promote a Tweet of the Trailer constitute sweeping powers to curtail, through arbitrary decisions and without providing reasons, Applicants' high-value social and political speech. Moreover, they can only be accessed by navigating a complicated path through different parts of the User Agreement and its referentially incorporated documents, which it is unreasonable to expect users to do.

Freedom of Contract

- (iii) The Respondents cannot defend their actions by invoking the principle of freedom of contract. Though freedom of contract is the overarching principle of contract law, courts are clear and consistent in holding it must, in some contexts, give way to weightier competing values. This is one of those contexts, because, as stated and described above: first, the Tweet is social and political speech that lies at the heart of the *Charter's* freedom of expression guarantee and would clearly be protected by courts from government intrusion; second, the lack of any reasonable apprehension of harm caused by the Tweet; and third, the central role Twitter plays as a public arena.

3. The Applicants relies rely on the following legal instruments:

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

⁷⁷ <https://twitter.com/thegoodfight/status/1407399550835257345>

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

- (a) The affidavits of directors, officers, employees and/or subcontractors of Cool World, and affidavit of Katherine Dodds; and
- (b) The affidavit of Joel Bakan;
- (c) The affidavit of Jane Tattersall;
- (d) The affidavit of Elizabeth Alice Carson;
- (e) The affidavit of Fenwick McKelvey;
- (f) The affidavit of Taylor Owen; and
- (g) Such further and other evidence as counsel may advise and this Honourable Court may permit.

28 July 2021 ~~28 February 2022~~

July 28, 2021



Sujit Choudhry
LSO#: 45011E
~~Huron Chambers~~ **choudhry.law**
1 King Street W., Suite 4800
Toronto ON M5H 1A1
Tel: (416) 436-3679
Email: ~~suji@huronchambers.com~~ suji@choudhry.law



Joel Bakan
LSO#: 82093M
~~3622 West 7th Avenue~~
~~Vancouver, BC, V6R1W4~~
1 King Street W., Suite 4800
Toronto, ON M5H 1A1
Email: bakan@law.ubc.ca

Counsel for the Applicants

COOL WORLD TECHNOLOGIES, INC. et al. -AND- TWITTER, INC. et al.
Applicants Respondents

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

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SUPERIOR COURT OF JUSTICE
Proceeding Commenced at Toronto

AMENDED AMENDED
NOTICE OF APPLICATION

choudhry.law
Sujit Choudhry
LSO#: 45011E
1 King Street W., Suite 4800
Toronto ON M5H 1A1
Tel: (416) 436-3679
Email: sujit@choudhry.law

Joel Bakan
LSO#: 82093M
3622 West 7th Avenue 1 King Street W., Suite
4800
~~Yankeeer, BC V6R 1V4~~ Toronto ON M5H
1A1 Tel: (778) 855-3955
Email: bakan@law.ubc.ca

Laetitia Borg