

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN

JOEL BAKAN

First Applicant

and

COOL WORLD TECHNOLOGIES, INC.

Second Applicant

and

GRANT STREET PRODUCTIONS

Third Applicant

and

ETHEL KATHERINE DODDS

Fourth Applicant

and

CANADA

Respondent

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

NOTICE OF APPLICATION

TO THE RESPONDENTS

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

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

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

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

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

TO:

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APPLICATION

1. The Applicants make application for:

- (a) An order declaring that section 2(b) of the *Canadian Charter of Rights and Freedoms* (“**the Charter**”) requires Canada to introduce legislation and promulgate regulations that protects constitutional freedom of expression values and interests on Twitter and other social media platforms similarly functioning as **public arenas** for political, social, governmental and democratic expressive activity (“**Twitter and other platforms**”).
- (b) An order declaring that the content of new federal legislation and regulations that protect users’ freedom of expression on Twitter and other platforms be guided by the principles courts have established regarding the interpretation and application of s. 2(b) of the *Charter*, and more particularly that such legislation and regulations should, *inter alia*:
 - (i) prohibit Twitter and other platforms from banning or otherwise restricting political, social, governmental and democratic expression that has been or would be held by Canadian courts to be *high value expression*, because it 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; and that does not give rise to any reasonable apprehension of harm;
 - (ii) permit Twitter and other platforms to ban or restrict speech that does not reasonably fall into the categories described in the previous paragraph; and
 - (iii) account for the fact that Twitter and other platforms have, as private actors, their own section 2(b) rights and interests.
- (c) An order for costs;
- (d) Such relief as may be sought by the Applicants and as this Honourable Court may deem just; and
- (e) Such further and other relief as to this Honourable Court may deem just.

2. The grounds for the application are:

Overview and Applicants

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

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

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

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

- (e) Nevertheless, Canada has not regulated Twitter to protect freedom of expression. By default, in the absence of government regulation, Twitter is governed by the online standard form agreement (the “**User Agreement**”), a contract of adhesion in relation to which there is no negotiation, it has entered with its hundreds of millions of users worldwide, including millions of users in Canada.
- (f) The fundamental question raised by this Application is: what legislative and regulatory action does the *Charter* require Canada to take to protect freedom of expression on platforms that, while privately owned, have become public arenas for democratic dialogue and debate and have powerful sway over core constitutional values of freedom of expression and democracy?
- (g) The Second Applicant, Cool World Technologies Inc. (“**Cool World**”) is a marketing firm incorporated under the *Canada Business Corporations Act*, RSC 1985, c C-44. Cool World specializes in campaigns and strategies on social media platforms, particularly Respondents’. The Fourth Applicant, Ethel Katherine Dodds (“**Dodds**”) is CEO and co-founder of Cool World.
- (h) In the fall of 2020, Cool World entered into a contract with the Third Applicant, Grant Street Productions (“**GSP**”), a film production company incorporated under the *British Columbia Companies Act*, RSBC 1996, c 62, to, *inter alia*, “deploy[] Direct outreach campaigns” to promote GSP’s newly released feature documentary film, *The New Corporation: The Unfortunately Necessary Sequel*.
- (i) *The New Corporation* was commissioned by the Canadian broadcaster Crave (Bell Media), and funded by, among others, the Rogers Documentary Fund, Telefilm Canada, and the Canada Media Fund. *The New Corporation* is a sequel to the award-winning 2003 documentary film, *The Corporation*. Both films are based on award-winning books by the First Applicant, University of British Columbia law professor Joel Bakan (“**Bakan**”), and were published in North America by Simon and Schuster and Penguin Random House. Both the books and films

have been translated into dozens of languages. Bakan is co-director (with Jennifer Abbott), writer, and executive producer of *The New Corporation*.

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

Agreement (“**Master Services Agreement**”). Article 3 of the Master Services Agreement subjects advertising to compliance with the Twitter Ads policies. On 18 November 2020, the Respondents refused Tattersall’s request through an automated reply (“**Rejection No. 1**”).

- (n) From November through December 2020, Tattersall challenged Twitter’s refusals to agree to promote the Tweet through Twitter’s internal complaints procedure. Twitter rejected Cool World’s requests five more times – for a total of six rejections. Each time, Twitter offered a different justification for rejecting Cool World’s requests.
- (o) On 18 November 2020 Tattersall requested an explanation from Twitter for Rejection No. 1.
- (p) 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**”).
- (q) 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?”.
- (r) 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**”).
- (s) 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.”
- (t) 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**”).

- (u) 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.”
- (v) 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**”).
- (w) 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....”.
- (x) 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**”).

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

Canada’s Charter duty to protect freedom of expression on Twitter and other platforms

- (dd) By virtue of s. 91 of the *Constitution Act, 1867*, Canada has jurisdiction to regulate electronic media and communications, including social media platforms such as Twitter. It has exercised its legislative authority to regulate these domains by enacting the *Broadcasting Act* SC 1991,

c11; *Digital Privacy Act*, SC 2015, c32; *Telecommunications Act*, SC 1993, c38; and *Competition Act*, RSC 1985, cC-34. These statutes authorize agencies such as the Canadian Radio-television and Telecommunications Commission (CRTC) and the Competition Bureau to regulate various aspects of electronic media and communications.

- (ee) Canada has not exercised its legislative authority to protect users' freedom of expression on social media platforms. Bills currently before Parliament and legislative proposals do not alter that fact. Bill C-10, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts* (currently under consideration in the Senate) would merely extend elements of the *Broadcasting Act* to digital streaming services and internet providers. Canada's recent proposal for amendments to the *Criminal Code*, RSC 1985, cC-46, and the *Canadian Human Rights Act*, RSC 1985, cH-6 to protect internet users from hate propaganda, hate crimes and hate speech, also fails to include any protection of platform users' freedom of expression.
- (ff) Canada has a constitutional duty under s. 2(b) of the *Charter* to protect high value speech on Twitter and other platforms. As Justice L'Heureux-Dubé held in *Haig v. Canada (Chief Electoral Officer)*, in an appropriate case, "positive governmental action might be required ... for example ... legislative intervention aimed at preventing certain conditions which muzzle expression" ([1993] 2 SCR 995 at 1039). After favourably citing that passage, Justice Rothstein, writing for the majority in *Baier v. Alberta*, 2007 SCC 31, held that *Dunmore v. Ontario (Attorney General)*, 2001 3 SCR 1016, a section 2(d) freedom of association case, created a "positive entitlement to government action" under section 2(b) in exceptional cases. This is such an exceptional case, for three reasons.
- (gg) First, by using Twitter as their principal social media platform for official communication, governments have given Twitter a public character that triggers *Charter* obligations to protect, on that platform, citizens' rights to communicate with government, to receive communications from government, and to engage in dialogue and debate relevant to governmental decisions and public policy in general. The United States Court of Appeals for the Second Circuit held that President Trump's Twitter account created a public forum, and therefore subjected him to First Amendment duties – in that case, the obligation not to block users who disagreed with him: *Knight First Amdt. Inst. at Columbia Univ. v. Trump*, 928 F. 3d 226 (2019). By extension, Canadian public institutions have collectively created on Twitter a digital public arena for

debating and deliberating over politics, which triggers a *Charter* duty on Canada to keep that public arena open to all Canadians to engage in expressive activity that would, if in a public arena on public property, be protected by section 2(b). Because governments in Canada have effectively created a public arena on a privately owned social media platform, Canada is constitutionally obligated under the *Charter* to ensure that arena is open to all, and to all expression that courts would protect from intrusions by government.

- (hh) Second, Twitter's Ad Policies restrict social and political speech, such as *The New Corporation* tweet. This expression lies at the core of s. 2(b), and has been afforded the highest level of constitutional protection by courts. Twitter's blanket restrictions on social and political speech, if rooted in state action, would be struck down on the basis of overbreadth at the minimal impairment stage of the *R v. Oakes*, [1986] 1 SCR 103 s. 1 analysis. By extension, the state has a duty to protect such expression on private social media platforms that serve as public arenas, like Twitter.
- (ii) Third, Twitter's operations, which profoundly impact Canadian expressive activity and democracy, are directed by its parent company in the United States. The effect of Canada's failure to regulate Twitter to protect users' rights of freedom of expression is to cede authority over Canadians' high value expression to a foreign corporation, which operates in the American constitutional system, where governments have limited power to regulate speech on social media platforms (either to restrict or protect), and do not have constitutional duties to do so.

3. The Applicant relies on the following legal instruments:

- (a) The *Canadian Charter of Rights and Freedoms*;
- (b) The *Constitution Act, 1982*;
- (c) The *Constitution Act, 1867*; and
- (d) Such further and other grounds as counsel may advise and this Honourable Court may permit.

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

- (a) Affidavits of Joel Bakan, and the directors, officers, employees and/or subcontractors of Cool World, GSP, and Dodds; and

(b) Such further and other evidence as counsel may advise and this Honourable Court may permit.

19 July 2021



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