IN THE SUPREME COURT OF FLAVELLE

(ON APPEAL FROM THE FALCONER COURT OF APPEAL)

BETWEEN:

CHITCHAT INC.

Appellant

- and -

FLAVELLE (ATTORNEY GENERAL)

Respondent

FACTUM OF THE APPELLANT

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A. OVERVIEW

1. Public discourse thrives in productive, healthy, and inclusive online spaces. Since the inception of social media, thoughtful content moderation has been integral to its success. Without moderation, the constructive free flow of ideas quickly devolves into a destructive free-for-all.

2. Companies like ChitChat have developed delicate content moderation schemes specifically aimed at balancing the need for free expression with the importance of safety. Though a platform's moderation scheme is rarely perfect, most are carefully formed over many years and continually tinkered in response to sophisticated research.

3. With one blunt move, the government has eradicated these nuanced systems. The *Digital Public Squares Act* (*DPSA*) imposes an absolute prohibition on viewpoint-based content moderation, barring platforms from even attempting to foster safe and equal environments. At the dictates of the government, social media platforms must now capitulate to racist, homophobic, transphobic, antisemitic, Islamophobic, and otherwise discriminatory invective.

4. While the *DPSA* purports to facilitate a wider range of expression, its effect is to replace systems that were calibrated to attract the broadest possible userbase with a policy that alienates the most vulnerable members of Flavellian society. The Act's overwhelming reach leaves no room even for platforms whose survival depends on content moderation—those that cater to specific minority groups, special interest groups, or children.

5. The *DPSA* violates ChitChat's right to free expression under section 2(b) of the *Charter of Rights and Freedoms* (*Charter*). It bans ChitChat from creating spaces in accordance with its values and forces it to promulgate even the most vile examples of prejudice. The *DPSA* also violates ChitChat users' right to equality under section 15 of the *Charter* by protecting

discriminatory speech to the detriment of marginalized individuals' wellbeing. Neither of these violations can be saved under section 1 of the *Charter*.

B. STATEMENT OF FACTS

6. ChitChat is a large social media corporation operating exclusively within Flavelle. It counts nearly ten million monthly users, representing over a quarter of the population of Flavelle. ChitChat is open to the public; any Flavellian with an email address can create an account and share content in the form of text, images, or video. As a precondition of creating an account, users agree to be bound by ChitChat's Terms of Service, under which ChitChat reserves the right to take various enforcement actions against content deemed "harmful or abusive."

7. The *DPSA* was enacted by Parliament to circumscribe the influence of social media corporations like ChitChat over the content hosted on their platforms, and to address public complaints about content posted to social media being removed or otherwise restricted. The relevant portions of the legislation are excerpted below:

> **3** A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on:
>
> (a) the viewpoint of the user or another person; or
>
> (b) the viewpoint represented in the user's expression.
>
> **4**(1) This Act does not prohibit a social media platform from censoring expression that:
>
> (a) directly incites criminal activity or consists of specific threats of violence targeted against a person or group;
>
> (b) depicts sexual exploitation or physical or sexual abuse; or
>
> (c) is otherwise unlawful.
>
> (2) A notice which states that a user's expression might have been censored but for the provisions of this Act does not itself constitute censorship.

> **6** Every one who fails to comply with section 3 of this Act is guilty of an offence and on conviction is liable for a fine of $500.00 for each violation.[1]

8. ChitChat vehemently opposed the *DPSA* regime. In the 24 hours after the *DPSA* was enacted, ChitChat continued to moderate content posted to its platforms in keeping with the corporation's Terms of Service. ChitChat removed over one thousand user-generated posts in contravention of the *DPSA*, and was charged with 1,109 counts of violating s. 3 of the *DPSA*. ChitChat responded by challenging the constitutionality of the *DPSA*, arguing that the legislation violated ss. 2(b) and 15 of the *Charter*. The Attorney General of Flavelle conceded that ChitChat has standing to challenge the *DPSA* on both grounds. Pending the disposition of its challenge, ChitChat has agreed to abide by the provisions of the *DPSA*.

C. JUDICIAL HISTORY

a. The Decision of the Application Judge

9. The application judge, Salamat J, held that the *DPSA* infringes ss. 2(b) and 15 of the *Charter* and cannot be justified under s. 1. At trial, Salamat J heard evidence from two witnesses. The first, ChitChat's Director of Compliance, Emily Hean, testified that over the past three years the platform had deleted an average of 110,000 posts daily (approximately 1% of total posts) for violating its policy against "harmful and abusive" content. Much of this deleted content included slurs against minority groups and invoked prejudicial stereotypes.

10. The second witness, Dr. Kathryn Mullins, testified that in her work on the effects of offensive expression, she found that roughly 70% of offensive expression is targeted at minority groups. Further, she found that greater exposure to such offensive expression correlated with heightened stress, anxiety, and depression, drug and alcohol abuse, lowered self-esteem, and other psychological symptoms including pain, fear, and intimidation.

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[1] *DPSA*, ss. 3, 4, 6.

ii. The Decision of the Falconer Court of Appeal

11. The Court of Appeal upheld the constitutionality of the *DPSA*. Justice Grondin held that the *DPSA* does not infringe either ss. 2(b) or s. 15 of the *Charter*. Justice Park held that the *DPSA* infringed ss. 2(b) and 15, but could be justified under s. 1. Justice Rand, dissenting, adopted the reasons of Salamat J in full. The Court of Appeal overturned the decision of the lower court, and reinstated the charges against ChitChat.

PART II – STATEMENT OF ISSUES

12. There are three issues on appeal:

Issue 1: Does the *DPSA* infringe section 2(b) of the *Charter*?

Yes. The *DPSA* prohibits moderation, which is a protected form of expression. It also compels speech by forcing ChitChat to host content.

Issue 2: Does the *DPSA* infringe section 15 of the *Charter*?

Yes. The *DPSA* removes protections for members of minorities, perpetuating harmful discrimination on protected grounds.

Issue 2: If the *DPSA* does infringe either or both of sections 2(b) and 15 of the *Charter*, can such infringement be justified under section 1 of the *Charter*?

No. The *DPSA* is not minimally impairing, as it protects low-value speech which does not further the aims of the legislation, and it applies to platforms not intended to serve as a forum for free expression.

PART III – ARGUMENT

A. THE *DPSA* INFRINGES SECTION 2(B) OF THE *CHARTER*

13. The *DPSA* infringes ChitChat's freedom of expression rights guaranteed by s. 2(b) of the *Flavellian Charter of Rights and Freedoms* by prohibiting viewpoint-based moderation of content

on ChitChat's social media platform.[2] The two-part test to establish a violation of s. 2(b) was set out in *Irwin Toy Ltd. v Quebec*.[3] At the first stage, the claimant must show that the conduct or speech in question falls within the ambit of s. 2(b) protection.[4] If so, at the second stage the claimant must demonstrate that the purpose or effect of the state conduct is to limit expression.[5] In *Lavigne v OPSEU*, Justice Wilson held that the same two-stage inquiry should be applied where the impugned state conduct compels, rather than limits, speech.[6] Here, the *DPSA* does both.

14. Moderation is a form of expression which falls within the ambit of s. 2(b) protection. Through moderation, ChitChat conveys its values and publicly demonstrates its commitment to providing an open and equal forum for civil discourse amongst citizens of Flavelle. The broad and absolute prohibition on viewpoint-based moderation in the *DPSA* therefore constitutes a direct and egregious limit on ChitChat's s. 2(b) freedoms: the legislation is an explicit ban on a protected form of speech.

15. By prohibiting moderation, the *DPSA* has the further effect of compelling ChitChat to host content on its platform which is contrary to its values. As the Supreme Court has held, "freedom of expression necessarily entails the right to say nothing or the right not to say certain things."[7] When ChitChat is required to host content by the *DPSA*, it is being forced to engage in expressive conduct contrary to its wishes and its values. This is compelled speech and is a clear infringement of the corporation's s. 2(b) freedoms.

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[2] *Flavellian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Flavelle Act, 1982* (UK), (1982), c 11 s 2(b) [*Charter*].
[3] *Irwin Toy Ltd v Quebec*, [1989] 1 SCR 927 [*Irwin Toy*], Joint Book of Authorities, Tab 1 [Joint BOA].
[4] *Irwin Toy*, *supra* note 3 at 978, Joint BOA, Tab 1.
[5] *Ibid* at 978–79, Joint BOA, Tab 1.
[6] *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211 at 267 [*Lavigne*], Joint BOA, Tab 2.
[7] *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1080 [*Slaight*], Joint BOA, Tab 3.

16. Despite its purported intent to "promote the marketplace of ideas, thereby facilitating the pursuit of truth, individual self-fulfillment, and democratic participation,"[8] the *DPSA* runs roughshod over ChitChat's s. 2(b) freedoms, and will have a profoundly corrosive impact on the very values and ideals which it was enacted to promote. Moderation is essential to the preservation of online spaces for open and equal discourse and debate. ChitChat is used by over a quarter of Flavellians; their safety and equality, both online and in the real world, depends on the moderation of speech on the internet.

1) <u>The *DPSA* prohibits the expression of ChitChat's values and ethics</u>

17. The *DPSA*'s blanket prohibition on viewpoint-based moderation is an overt violation of ChitChat's s. 2(b) freedoms.[9] Moderation is expressive conduct which falls within the ambit of s. 2(b) protections.[10] The violation is particularly egregious given that the exact purpose of the *DPSA* is to prevent this form of protected expression.

(a) Moderation is expression within the ambit of s. 2(b) protections

18. Moderation is expressive conduct falling within the scope of s. 2(b) protection. At the first stage of the *Irwin Toy* test, it is necessary to establish that the conduct being limited falls within the protections of section. 2(b).[11] Here, the conduct being limited is viewpoint-based moderation. Moderation is clearly expressive conduct falling within the scope of section 2(b) protections. By refusing to host content which discriminates against members of minority groups, or by removing misinformation intended to corrupt public discourse and subvert the pursuit of truth, ChitChat expresses its values and its identity as a corporation—one committed to fostering open and equal

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[8] *DPSA* s.1(1)(c).
[9] *DPSA* s.3.
[10] *Irwin Toy*, *supra* note 3 at 969–70, Joint BOA, Tab 1.
[11] *Ibid* at 978, Joint BOA, Tab 1.

civil discourse and providing a safe and respectful virtual environment for citizens of Flavelle to meet and discuss all manner of issues.

19. The kind of moderation that ChitChat performs is political speech, conveying its political ideals and corporate values of equality and civility. ChitChat is free to decide what kind of expressive forum it wants to create, and to set the terms by which members of the public may engage with its platform. Through moderation, ChitChat expresses its commitment to maintaining a platform for the free exchange of ideas, for the pursuit of truth, and for self-expression. In *R v Keegstra*, the Supreme Court of Canada identified these features of expressive conduct as being at the core of the section 2(b) protections. The close connection between ChitChat's moderation and these values makes it clear that moderation falls well within the scope of section 2(b) protections.[12]

20. Moderation is protected speech notwithstanding the fact that it limits the expression of others. This is made clear by analogy to newspapers, journals, and magazines. Editorial freedom, integral to the freedom of the press which is itself explicitly enshrined in the language of section 2(b), operates similarly to the moderation of social media platforms.[13] Like moderators, editors of newspapers and other media choose which submissions, contributions, or stories to publish and which to reject. A newspaper limits the expression of the author of a rejected story in making the decision to publish one piece over another. Despite this, the editorial intention of the newspaper is itself protected speech. The question at the first stage of the *Irwin Toy* test is entirely about the expressive content and nature of the conduct or speech in question—not about the consequences of that speech on the freedoms of others. That question is reserved for the s. 1 analysis, once a s. 2(b) infringement has been found.

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[12] *R v Keegstra*, [1990] 3 SCR 697 at 803–04 [*Keegstra*], Joint BOA, Tab 4.
[13] *R v National Post*, 2010 SCC 16 at para 78, Joint BOA, Tab 5.

21. The only form of conduct or speech which is inherently excluded from the protections of section 2(b) is violence, notwithstanding its expressive potential.[14] Violence is excluded from section 2(b) protections because it is antithetical to the values which give life to freedom of expression.[15] Violence robs its victims of their dignity and integrity. The prevalence of violence creates conditions under which people fear to speak openly and truthfully, and where the strong may impose their ideas and ideals upon those without the means to defend themselves. Moderation is not violence.

22. Conversely, misinformation and discrimination—precisely what ChitChat's moderators endeavor to remove from its platform—do have similar effects to violence. Moderation operates to foster conditions of security and confidence in virtual spaces. Moderation ensures that users may share their ideas and give voice to their opinions without fear that others will respond with hurtful and demeaning language, or attempt to manipulate and deceive them with misinformation. Moderation neither prevents self-fulfillment nor stands in the way of truth; it is a necessary precondition for the actualization of these ideals in digital spaces.[16]

23. The viewpoint-based moderation which is prohibited by the *DPSA* is a form of expressive conduct which falls squarely within the ambit of section 2(b) protection. Through moderation, ChitChat expresses its political values, its corporate identity, and promotes the search for truth in the marketplace of ideas that it fosters among its users. The first stage of the *Irwin Toy* test is accordingly satisfied.

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[14] *Irwin Toy*, *supra* note 3 at 970, Joint BOA, Tab 1; *Montreal (Ville) v 2952-1366 Québec Inc*, 2005 SCC 62 at 60 [*Montreal (Ville)*], Joint BOA, Tab 6.
[15] *Montreal (Ville)*, *supra* note 14 at 72, Joint BOA, Tab 6.
[16] *Montreal (Ville)*, *supra* note 14 at 72, Joint BOA, Tab 6.

(b) The purpose of the DPSA is to prohibit ChitChat's expression of its values through moderation

24. Section 3 of the *DPSA* directly prohibits the excercise of editorial discretion through moderation. The second stage of the *Irwin Toy* test is accordingly met, since both the purpose and effect of the *DPSA* is to restrict this form of conduct.[17] The *DPSA* was explicitly enacted to limit the power of social media companies to control the content hosted on their platforms.[18] Since the exercise of this discretion through moderation is protected expression, the *DPSA* is intended to limit expression.

25. The enormous scope of the *DPSA*'s prohibition is made clear from the exhaustive list of what can constitute "censorship" under the *DPSA*, listed in section 2. This list ranges from extreme measures (blocking or banning users, deleting content) to milder forms of moderation (restrictions of publication and visibility, including time-limited suspensions).[19] The comprehensiveness of this list clearly suggests that the purpose of the *DPSA* is precisely to prevent social media companies from engaging in any way with the content posted to their platforms. This prohibits the exercise of editorial discretion of any kind.

26. Where the purpose of legislation is to limit expression, the legislation is automatically in violation of section 2(b) of the *Charter*.[20] The *DPSA* does precisely this: it is intended to prevent companies like ChitChat from expressing their values and identity through moderation of user-generated content posted to their platforms. As such, the *DPSA* necessarily violates ChitChat's freedom of expression.

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[17] *Irwin Toy*, *supra* note 3 at 978–79, Joint BOA, Tab 1.
[18] Grand Moot Official Problem at 5.
[19] *DPSA*, s.2.
[20] *Irwin Toy*, *supra* note 3 at 972–73, Joint BOA, Tab 1.

(c) If the purpose of the DPSA is not to prohibit expression, that is nevertheless its effect

27. Even if the purpose of the *DPSA* was not to prohibit expression, that is its clear effect. Under section 3, the *DPSA* explicitly prohibits viewpoint-based moderation, which has the effect of restraining ChitChat's expression through those means.[21]

2) The *DPSA* compels speech by forcing ChitChat to host expression contrary to its values

28. The *DPSA* also infringes ChitChat's freedom of expression by forcing the platform to host content contrary to its values. Freedom of expression has long been understood to encompass both the right to speak, and the right not to speak.[22] As a consequence of its blanket prohibition on moderation, the *DPSA* compels ChitChat to host speech against its wishes. In *Lavigne v OPSEU*, Wilson J applied a modified version of the *Irwin Toy* test to establish if the impugned state conduct amounted to compelled speech contrary to section 2(b).[23] The first stage of this test is to establish whether the claimant is in fact being forced to engage in expression.[24] If so, the next stage asks whether the state conduct, in its purpose or effects, controls the conveyance of meaning. If it does, the state conduct is an automatic violation of section 2(b).[25] If not, the third stage of the test asks if the impugned conduct adversely effects expression, and in a way contrary to the underlying purposes of freedom of expression. If so, the impugned state conduct compels speech and violates section 2(b) of the *Charter*.[26]

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[21] *DPSA*, s. 3.
[22] *Slaight*, *supra* note 7 at 1080, Joint BOA, Tab 3.
[23] *Lavigne*, *supra* note 6 at 267, Joint BOA, Tab 2.
[24] *McAteer v Canada (Attorney General)*, 2014 ONCA 578 at paras 69–70 [*McAteer*], Joint BOA, Tab 7.
[25] *McAteer*, *supra* note 24, Joint BOA, Tab 7.
[26] *Ibid*, Joint BOA, Tab 7.

(a) The DPSA forces ChitChat to engage in expression by hosting content contrary to its values

29. The *DPSA* compels expression by forcing ChitChat to host content on its platform. The scope of what can constitute expressive conduct is very broad.[27] Hosting, publishing, or otherwise repeating the speech of others is itself a form of expression. Hosting user-generated content is a form of expression on the part of social media platforms, notwithstanding that the content hosted is also expression on the part of the users themselves. The same is true of articles and stories published in newspapers and journals; they are expression both on the part of their authors and on the part of the publication.[28]

30. In *Lavigne*, Wilson J asked two corollary questions which she held to be key factors in determining whether speech was compelled: first, whether the public would associate the claimant with the speech they are purportedly being compelled to share, and second, whether the claimant can disavow the content being shared in such a way as to negate any impact on their freedom of expression.[29]

31. Considering the two factors outlined in *Lavigne*, it is clear that the *DPSA* compels ChitChat's speech. The *DPSA* does provide a route for potential disavowal, outlined in section 4(2), which allows ChitChat and other social media companies to indicate that a user's post might violate their terms of service but that they are hosting it nevertheless pursuant to their obligations under the *DPSA*. However, this disavowal is not enough to fully disassociate the content of users' posts from the platform in the eyes of the public. If ChitChat becomes overrun with hateful, discriminatory content, it will inevitably become associated with that content in the public consciousness.

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[27] *Irwin Toy*, *supra* note 3 at 969–970, Joint BOA, Tab 7.
[28] *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835 at 880, Joint BOA, Tab 8.
[29] *Lavigne*, *supra* note 6 at 279–280, Joint BOA, Tab 2.

32. Association is different from attribution; even if the public understands that ChitChat itself is not promoting or endorsing the views it hosts on its platform, the corporation will inevitably become associated with its most vitriolic content. People tend to remember the places where they see and are exposed to disturbing, hateful, or traumatizing content. The mild disclaimer allowed by the *DPSA* will do nothing to prevent this association.

(b) The purpose of the DPSA is to control the conveyance of meaning

33. Having established that the *DPSA* forces ChitChat to engage in expression by hosting content contrary to its values, the next stage of the test articulated in *McAteer* is an inquiry into the purpose of the impugned state conduct.[30] If the purpose of the legislation is to control the conveyance of meaning, then there is an automatic violation of the section 2(b) freedom of expression.[31]

34. The *DPSA* is intended to control the conveyance of meaning. The purpose of the legislation is to prohibit viewpoint-based moderation of content posted to social media platforms. The state is interfering directly with the way meaning is conveyed online, and attempting to control what can and cannot be said on social media platforms. The *DPSA* was enacted in part to address concerns among Flavellians that social media companies were misusing their moderation powers. The legislation's purpose is to impose state control over the moderation of privately owned platforms for public conversation. This is a clear and automatic violation of the section 2(b) rights of ChitChat and other social media corporations.

35. This case can be distinguished easily from cases like *Lavigne*, in which the impugned state conduct had objectives which had very little to do with controlling expression. In *Lavigne*, the purpose of the conduct at issue was to "promote industrial peace through the encouragement of

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[30] *McAteer*, *supra* note 24 at 69–70, Joint BOA, Tab 7.
[31] *Ibid*, Joint BOA, Tab 7.

collective bargaining."[32] There is a clear difference between legislation aimed at promoting collective bargaining which incidentally affects free expression, and legislation enacted for the explicit purpose of regulating and controlling public expression through the restriction of the moderation powers of private companies.[33]

36. It is immaterial to ChitChat's section 2(b) claim that the *DPSA* was enacted with the purported intention of facilitating free expression. The section 2(b) analysis focuses only on the effect of the legislation on the claimant's freedoms; any corresponding benefit to the freedoms of ChitChat's user base should only be considered under section 1.

(c) The DPSA has an adverse effect on expression

37. The *DPSA* has an adverse effect on expression that will corrode the values and ideals which underpin freedom of expression. Because the purpose of the *DPSA* is to control the conveyance of meaning, it is not necessary to consider the third and final stage of the *Lavigne* test. However, even if it were, this stage of the test also weighs in favour of the Appellant. At this stage, the question is whether, notwithstanding the purpose of the impugned state conduct, it nevertheless has an adverse effect on expression in a way that is contrary to the underlying purpose of freedom of expression.[34]

38. Unmoderated and unregulated speech is not the same as open, equal speech. In a liberal democratic society like ours, the rule of law exists to insure against the domination of the weak by the strong. Freedom of expression is a core ideal of liberal democracy. Like all *Charter* rights, it must be considered within its broader social, philosophical, and historical context.[35] To ensure

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[32] *Lavigne*, *supra* note 6 at 271, Joint BOA, Tab 2.
[33] *Ibid* at 267, Joint BOA, Tab 2.
[34] *Ibid* at 267, Joint BOA, Tab 2.
[35] *Reference re Secession of Québec*, [1998] 2 SCR 217 at 240, Joint BOA, Tab 9.

truly equal and free speech for all Flavellians, there must be safeguards in place to prevent some speech from drowning out the rest.[36]

39. Words and images can have powerful, destructive impacts, particularly on members of historically oppressed and marginalized groups, for whom slurs, epithets, and other forms of discriminatory speech can be deeply damaging.[37] When such language is permitted to form part of the discourse, it creates unequal conditions for public engagement. Members of minority groups can avoid such language only by not engaging in the so-called "public square." The effect is to force those citizens to choose between exercising their free speech and avoiding harmful and potentially traumatizing content. When such conditions are allowed to propagate, truly open and equal speech is not possible. The privileged few who can engage without fear of discrimination have greater access to public platforms than others. When only a few can speak without fear, the marketplace of ideas is corrupted and the search for truth is frustrated.

40. Corrective measures are necessary to protect against inequality in freedom of speech. The moderation done by ChitChat and other social media corporations is necessary to provide safe and equal spaces for free and open discourse. The *DPSA* takes a sledgehammer to the complexities of internet moderation; it violates the section 2(b) freedoms of social media companies and corrodes the very foundations of free speech in Flavelle.

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[36] The importance of equality of opportunity when it comes to expression has long been recognized in the s. 2(b) context as it relates to elections (see *Working Families Ontario v Ontario*, 2021 ONSC 4076 at para 27, Joint BOA, Tab 10; *Harper v Canada (Attorney General)* 2004 SCC 33 at para 24, Joint BOA, Tab 11). The same is true of expression generally.

[37] Grand Moot Official Problem at 8.

B. THE *DPSA* INFRINGES SECTION 15 OF THE *CHARTER*

41. The DPSA creates a discriminatory distinction along the lines of race, religion, sexual orientation, and gender identity by perpetuating discriminatory speech targeting members of those groups.

42. In order to make out a section 15 violation, the claimant must first demonstrate that the law creates a distinction, directly or indirectly, based on a protected ground.[38] A law creates an indirect distinction when it has a disproportionate and adverse impact on a protected group.[39] This form of discrimination, known as "adverse effects discrimination," recognizes that facially neutral treatment may "frequently produce serious inequality."[40] Second, the claimant must establish that the distinction is discriminatory in that it "imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[41]

1) The DPSA draws a distinction along the lines of race, religion, sexual orientation, and gender identity

43. The harmful effects of the DPSA are borne disproportionately by members of minority racial and religious groups and members of the LGBTQ+ community. The DPSA operates to preserve content that would otherwise be removed pursuant to ChitChat's "harmful and abusive" community guideline. Prior to the DPSA, ChitChat removed approximately 110 000 posts per day, much of which consisted of "slurs describing members of minority groups and…prejudicial stereotypes."[42] Dr. Mullins' research suggests that roughly 70% of offensive posts were likely

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[38] *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27 [*Fraser*], Joint BOA, Tab 12.
[39] *Withler v Canada (Attorney General)*, 2011 SCC 12, at para 64, Joint BOA, Tab 13.
[40] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1 at 164 [*Andrews*], Joint BOA, Tab 14.
[41] *Fraser*, *supra* note 38 at para 27, Joint BOA, Tab 12.
[42] Grand Moot Official Problem at 8.

targeted at members of minority groups.[43] It follows that millions more discriminatory posts and counting have been circulating online since the enactment of the DPSA.

44. Although the record contains no specific facts regarding the reach of discriminatory posts, it is virtually inevitable that members of minority groups will face greater exposure to discriminatory content as a result of the DPSA. Given that the average person spends 2 hours and 29 minutes on social media per day, increased exposure is the only reasonable inference to be drawn.[44] The alternative suggestion, that marginalized individuals successfully evade the dramatic influx of discrimination each day, is simply untenable.

45. The fact that the DPSA may also impose more general harm—for instance, by increasing the prevalence of disinformation or generally mean-spirited content—is irrelevant. The determinative question is whether members of minority groups are disproportionately, not exclusively, impacted by the law. On top of experiencing the same global harm as everyone else, members of minority racial, religious, sexual orientation, and gender identity groups endure the additional harms associated with increased discriminatory content. As such, the law has a disproportionately negative impact on these groups.

2) <u>The DPSA perpetuates disadvantages faced by these groups</u>

46. As the Supreme Court recognized in *R v Keegstra*, there are two types of injury caused by discriminatory speech: (1) the social and psychological harm to the targeted groups and (2) the prejudicial influence on society at large. The DPSA inflicts both types of injury.

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[43] *Ibid*.
[44] Global Web Index, "Flagship Report on the Latest Trends in Social Media," (2022).

(a) Harm to the targeted groups

47. Exposure to content that belittles, mocks, or disparages a person on the basis of their minority status is directly harmful to their wellbeing. Dr. Mullins' research shows that members of minority groups who are exposed to discriminatory content may experience "heightened stress, anxiety, depression, increased drug and alcohol use, lower self-esteem, and other psychological symptoms such as pain, fear, and intrusive thoughts of intimidation and denigration."[45]

48. The demeaning and dehumanizing effects of discriminatory speech are a matter of consensus in psychological and legal scholarship[46] as well as Supreme Court jurisprudence. As Chief Justice Dickson (as he then was) stated in *Keegstra*, "[i]t is indisputable that the emotional damage caused by words may be of grave psychological and social consequence."[47]

49. Targeted discrimination also interferes with the ability of minority groups to participate in social, political, and cultural conversations. In that sense, studies indicate that the DPSA's discriminatory impact is likely to breed further discrimination by reducing the voice of minority groups in the political process. This too has been recognized by the Supreme Court.[48]

50. The ability of social media users to log off or delete their accounts does not mitigate the law's discriminatory effect. That members of minority groups may feel compelled to log off in order to feel safe is itself a discriminatory effect of the *DPSA*, not a redeeming one. The ability to block users similarly provides no relief, because it requires the targeted individual to first encounter the hateful speech, and it places an increased burden of vigilance on those individuals.

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[45] Grand Moot Official Problem at 8.
[46] R Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" (1982) 17 Har CR-CLL Rev 133 at pp 135-136, 143; A Fish, "Hate Promotion and Freedom of Expression: Truth and Consequences" (1989) 2 Can J L & Jurisprudence 111 at p 122; Kretzmer, "Freedom of Speech and Racism" (1987) 8 Cardozo L Rev 445 at p 477; Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story (1989) 87 Mich L Rev 2320 at pp 2336-2337.
[47] *Keegstra*, *supra* note 12 at 746, Joint BOA, Tab 4.
[48] *Keegstra*, *supra* note 12 at 763, Joint BOA, Tab 4; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 75 [*Whatcott*], Joint BOA, Tab 15.

51. Moreover, in many cases, individuals do not have a meaningful ability to log off social media, even if they wanted to. Social media often serves a vital role, not only for a person's social life, but also for their employment or education. The effect of the *DPSA* is to expose these individuals to slurs and invective just so that they can fulfill their day-to-day obligations.

(b) Prejudicial influence on society

52. By shielding offensive content from moderation, the *DPSA* gives exposure and lends credence to discriminatory ideas. Discriminatory ideas, in turn, impact societal attitudes and actions. One U.S. study demonstrates that the prevalence of race, ethnicity, and national origin-based discrimination on social media directly correlates with higher incidence of hate crimes on a city-by-city basis.[49]

53. The Supreme Court has recognized the societal impact of discriminatory speech as well. In *Keegstra*, Chief Justice Dickson acknowledged that the protection of hateful speech brings with it "the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society."[50] While *Keegstra* was decided over 30 years ago, the advent of social media has only magnified the social and political impacts of discriminatory speech.[51]

3) <u>The appellant is not requesting positive protections</u>

54. The appellant is not arguing that the government is under a positive obligation to combat discriminatory speech online, but simply that that it cannot prevent others from attempting to do so. When the government sets out to remedy a social problem, it must do so in a *Charter*-compliant manner. In *Centrale des syndicats du Québec v Quebec (Attorney General)*, the Supreme Court

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[49] Kunal Relia, Zhengyi Li, Stephanie H. Cook, Rumi Chunara, "Race, ethnicity, and national origin-based discrimination on social media and hate crimes across 100 US Cities," (2019) 13th International Conference on Web and Social Media.
[50] *Keegstra*, *supra* note 12 at 748, Joint BOA, Tab 4.
[51] *Whatcott*, *supra* note 48 at para 72, Joint BOA, Tab 15.

held that a law which was intended to cure pay inequities violated section 15 because it delayed remediation for women in female-dominated workplaces.[52] Even though the government was under no positive obligation to fix pay inequities created by private employers, once it undertook to do so, it was obligated to proceed constitutionally.[53]

55. This case is easier: unlike the law in *CSQ*, the *DPSA* does not simply fail to remedy discrimination properly; it proactively *bans* efforts to remedy discrimination altogether. In asking this court to strike down that law, the appellant is merely asking for the freedom to implement protective measures itself. There is no sense in which the appellant's application to strike down this law is a request for positive protections.

C. NEITHER VIOLATION CAN BE JUSTIFIED UNDER SECTION 1 OF THE *CHARTER*

1) Substantial deference is not owed to Parliament

56. Because the *DPSA* infringes on the rights of Flavelle's most vulnerable populations, the government is not entitled to a high level of deference. A commitment to social justice and equality is essential to a free and democratic society.[54] Courts have therefore taken a more deferential approach with respect to legislation that seeks to protect disadvantaged groups.[55] By contrast, more stringent justification is required to uphold a law that defeats measures designed to protect disadvantaged groups.[56]

57. With respect to laws the restrict speech specifically, more deference is owed when the law targets speech that "systematically and consistently undermine[s] the position of some

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[52] *Centrale des syndicats du Quebec v Quebec (Attorney General)*, 2018 SCC 18 at para 18 [*CSQ*], Joint BOA, Tab 16.
[53] *CSQ*, *supra* note 52 at para 33, Joint BOA, Tab 16.
[54] *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 at 136, Joint BOA, Tab 17.
[55] *RJR-MacDonald Inc v Canada,* [1995] 3 SCR 199 at 335, 127 DLR (4th) 1at para 68 [*RJR-MacDonald*], Joint BOA, Tab 18; *Irwin Toy* at 993–94, Joint BOA, Tab 1.
[56] *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 at 779, Joint BOA, Tab 19.

members of society."[57] It follows that a less deferential approach is warranted when the government creates a law that *protects* speech of that nature.

58. Additionally, the *DPSA*'s form—an absolute prohibition on content moderation—diminishes the degree of deference owed to Parliament. Although Parliament is generally owed deference when addressing nuanced social issues, that deference is reduced when it fails to respond with correspondingly nuanced legislation. In *Carter v Canada (Attorney General)*, the Supreme Court took a less deferential approach because Parliament's blanket ban on physician assisted dying was an insufficiently complex response to a complex problem.[58] The same is true of the Flavellian government's blanket ban on viewpoint-based content moderation.

2) <u>The *DPSA* has a pressing and substantial objective, and its means are rationally connected</u>

59. The purposes of the *DPSA* are pressing and substantial. They are to:

> (a) affirm that free and open public discourse is critical to the functioning of a free and democratic society;
> (b) recognize that social media platforms play an increasingly central role in facilitating and hosting public discourse on matters of social and political importance; and
> (c) promote the marketplace of ideas, thereby facilitating the pursuit of truth, individual self-fulfillment, and democratic participation[59]

60. The means chosen to pursue those objectives, banning all forms of moderation, are rationally connected. Although a blanket ban on moderation has significant counterproductive effects, the test for rational connection is "not particularly onerous."[60] The government need only "show that it is reasonable to suppose that the limit may further the goal, not that it will do so."[61] The appellant agrees that the *DPSA*'s means meet the low bar for rational connection. The *DPSA*'s

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[57] *Thomson Newspapers Co. v. Canada (Attorney General),* [1998] 1 S.C.R. 877 at para 92, Joint BOA, Tab 20.
[58] *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 98 [*Carter*], Joint BOA, Tab 21.
[59] Grand Moot Official Problem at 13.
[60] *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para 228, Joint BOA, Tab 22.
[61] *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37 at para 44 [*Hutterian*], Joint BOA, Tab 23.

counterproductive effects, insofar as they stem from its overbroad elements, will instead affect the minimal impairment analysis.

3) The *DPSA* is not minimally impairing

61. The government has provided no evidence that it considered and rejected less-impairing alternatives to the DPSA. At this stage, the respondent bears the onus of demonstrating the unavailability of less drastic means of achieving its objective.[62] Less impairing alternatives need not satisfy the governments objective "to *exactly* the same extent," only to a "real and substantial degree."[63] Absolute prohibitions frequently fail the minimal impairment test:[64] such blunt legislation is rarely necessary and suggests an inadequate attempt on the part of the drafters to account for individual rights.

62. The *DPSA* imposes an absolute prohibition on viewpoint-based content moderation, with exceptions aimed solely at bringing the Act in compliance with existing law. In other words, the *DPSA* is drafted as broadly as possible without compelling social media companies to aid criminal speech. The breadth of the Act is neither necessary nor productive for achieving its objectives.

63. Specifically, the *DPSA* is overbroad in two ways: (1) it protects low-value speech that stifles rather than contributes to the marketplace of ideas, and (2) it constrains social media platforms that were never intended, and are not needed, to serve as a forum for free expression. As a result of its overbreadth, the *DPSA* is more impairing of both section 2(b) and section 15 rights than necessary to achieve its objective.

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[62] *Hutterian, supra* note 61 at para 55, Joint BOA, Tab 23.
[63] *Ibid*, Joint BOA, Tab 23.
[64] See e.g. *Carter*, *supra* note 58, Joint BOA, Tab 21; *Multani c. Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6 at para 77, Joint BOA, Tab 24; *RJR-MacDonald*, *supra* note 55, Joint BOA, Tab 18.

(a) The DPSA applies to an unnecessarily broad range of content

(i) The DPSA protects discriminatory invective

64. The *DPSA* prohibits the moderation of all speech aside from threats, sexual exploitation or abuse, and otherwise unlawful content. It therefore operates on the theory that all lawful speech contributes to the "pursuit of truth, individual self-fulfillment, and democratic participation."[65] This premise is incorrect.

65. There is a high bar to find speech unlawful under s. 319(1) or (2), the hate propaganda provisions of the *Criminal Code*. First, the speech must incite or promote "hatred," which is defined as "unusually strong and deep-felt emotions of detestation, calumny and vilification."[66] Additionally, the comment must be "likely to lead to a breach of peace" under subsection (1), or the author must have incited hatred "wilfully" under subsection (2). Neither requirement is easy to establish.[67]

66. Because of this high bar, expression may frequently be appalling but nonetheless lawful. For instance, in *R v Ahenakew*, the accused stated, among other things, that when the Nazis murdered 6 million Jews in the Holocaust, they were just getting rid of a disease.[68] In *R v (B)A,* the accused wrote "Fuk n****", "fuck n****", "Fuck the Pigs" and drew swastikas and a handgun with the word "bang" on a wall.[69] Despite being "shocking, brutal, and hurtful,"[70] neither of these messages were unlawful because neither accused had the requisite intent to incite hatred. Speech of this nature, though entirely lawful, contributes nothing to the quest for truth and thwarts the participation of members of minority groups, just as hate propaganda does.

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[65] Grand Moot Official Problem at 13.
[66] *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at para 121 [*Taylor*], Joint BOA, Tab 25.
[67] *Criminal Code*, RSC 1986 c C-46, s 319(1) and (2).
[68] *R v Ahenakew*, 2008 SKCA 4 at para 8 [*Ahenakew*], Joint BOA, Tab 26.
[69] *R v B(A)*, 2012 NSPC 31 at para 6, Joint BOA, Tab 27.
[70] *Ahenakew*, *supra* note 68 at para 52, Joint BOA, Tab 26.

(ii) The DPSA, in practice, protects unlawful hate speech

67. Even if it were true that only unlawful speech is antithetical to the objectives of the *DPSA*, in practice, the exception for unlawful content fails to permit the moderation of hate propaganda itself. Because the *DPSA* imposes fines for removing lawful content but not for preserving unlawful content, platforms are incentivized to preserve speech unless they are certain that it is unlawful.

68. The nature of s. 319 is such that platforms will never be certain that content amounts to hate propaganda. First, the *mens rea* element of the offense—recklessness under subsection (1) or intent under subsection (2)—is virtually impossible to investigate. Second, the definition of "hatred" for the purposes of the offence is highly vague and ever-changing.

69. It is completely unrealistic to expect lay social media moderators to conduct a complex legal analysis, one that has perplexed legal thinkers for decades, on a day-to-day basis with respect to hundreds of thousands of posts. In the face of this uncertainty, it is inevitable that unlawful hate propaganda will be preserved.

(iii) Both lawful and unlawful hate speech frustrate the DPSA's objectives

70. The purposes of the *DPSA* are not served by protecting racist, sexist, antisemitic, Islamophobic, homophobic, and transphobic invective. This form of low value speech pollutes rather than promotes the quest for truth. As the Supreme Court stated in *Keegstra*, "[t]here is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world."[71] In concrete terms, none of the *DPSA*'s three objectives are undermined by permitting ChitChat to remove "[p]osts disparaging members of minority groups on the basis of their race, religion, sexual orientation, and gender identity."[72]

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[71] *Keegstra*, *supra* note 12 at para 92, Joint BOA, Tab 4.
[72] Grand Moot Official Problem at 6.

71. Discriminatory speech is not only unproductive itself, but its prevalence also thwarts productive discussion. Hateful content intimidates and silences those who are being targeted. The Supreme Court recognized this effect in *Whatcott*, observing that "[w]hile hate speech may achieve the self-fulfillment of the publisher, it does so by reducing the participation and self-fulfillment of individuals within the vulnerable group."[73] The *DPSA*'s protection of discriminatory speech at the expense of contributions from members of minority groups is entirely out of line with its objectives.

72. Many courts have already found that discriminatory speech fails to advance the values underpinning the *DPSA*'s purpose. Prohibitions on discriminatory speech, found in both the *Criminal Code* and various provincial human rights codes, have consistently been upheld as justifiable incursions on section 2(b) rights.[74] The purposes of section 2(b)—to facilitate the quest for truth, participation in social and political decision-making, and the pursuit of self-actualization and human flourishing[75]—are substantively identical to the purposes of the *DPSA*. The fact that limits on discriminatory speech have repeatedly been saved by section 1 on the basis that such speech frustrates the purposes of section 2(b) is a strong indicator that the *DPSA* has frustrated its own purpose by protecting that very same type of speech.

73. A properly tailored law would not protect speech that mocks, derides, belittles, disparages, or maligns members of protected groups on the basis of their protected status. This carve out would be easier to administer than the carve-out for hate speech: it dispenses with the impossible *mens rea* investigation and the finicky distinctions of degree rather than kind. Importantly, providing

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[73] *Whatcott*, *supra* note 48 at para 104, Joint BOA, Tab 15.
[74] *Keegstra*, *supra* note 12, Joint BOA, Tab 4; Whatcott, *supra* note 48, Joint BOA, Tab 15; *R v Topham*, 2017 BCSC 259, Joint BOA, Tab 28; *Taylor*, *supra* note 68, Tab 25.
[75] *Irwin Toy*, *supra* note 3, Joint BOA, Tab 1.

this carve out would not *require* social media companies to remove content that disparages others on the basis of protected status; it would simply permit them to do so.

74. A carve out of this nature would not give leeway to platforms to remove purely political content criticizing the government, the Supreme Court, large corporations, or ChitChat itself. By design, it would protect the least powerful in society, not the most.

(b) The DPSA applies to an unnecessarily broad range of platforms

75. There is no rationale for imposing the *DPSA*'s uncompromising scheme upon social media platforms that were never intended to provide a forum for free expression in the first place. The *DPSA* applies to all "social media platforms," defined in the Act as:

> [A]n Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images.[76]

The breadth of this definition means that platforms that were designed to serve niche purposes which require vigilant moderation will be forced to relinquish their chosen business model and become a haven for any and all speech.

76. For instance, a social media platform that is advertised as a space to connect on the basis of viewpoint will no longer be able to remove content that is disparaging of its entire user base. A platform intended for children will only be permitted to host pro-diversity content if it also hosts racist, homophobic, transphobic, and otherwise discriminatory content. A platform designed to facilitate connections amongst members of a particular religious group will be forced to host content that mocks and insults the very group to which it caters. None of these spaces are intended to contribute, let alone integral, to a free marketplace of ideas; yet, the *DPSA* forces them to host speech at the expense of the purposes they were built to serve.

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[76] *DPSA*, s 2.

77. A properly tailored law would apply only to social media companies that effectively operate as a "public square." These are platforms that do not embrace specialized objectives which require moderation—namely, those that cater to special interest groups, protected groups, or children. Without exempting these platforms, the *DPSA* drastically overreaches in its transformation of online spaces, making it impossible to foster important types of online environments.

4) <u>The DPSA's deleterious effects outweigh its salutary effects</u>

78. At the final proportionality stage, the Court must weigh the impact of the law on protected rights against the law's beneficial impact on the public good. The salutary effects of the *DPSA* are speculative and underwhelming, while its deleterious effects are concrete and substantial.

(a) The DPSA's salutary effects are marginal

79. The government suggests that the effect of the *DPSA* is to foster a freer marketplace of ideas on social media platforms. In reality, the ban on content moderation results in an unwelcome compromise: the *DPSA* unquestionably precipitates a greater volume of content, but it simultaneously stifles the participation of members of minority groups. On balance, the *DPSA*'s salutary impact on the marketplace of ideas is slight or outright nullified.

80. Moreover, whatever salutary effects the *DPSA* does have are entirely unproven. At this stage, the legal burden rests on the government. In *Alliance*, the Supreme Court held that the salutary effects of the legislation were "indiscernible and speculative given the absence of evidence" proffered by the government.[77] The same is true of the purported benefits of the *DPSA*.

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[77] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para 53, Joint BOA, Tab 29.

(b) The DPSA's deleterious effects are overwhelming

(i) The DPSA mangles the marketplace of online spaces

81. The DPSA's astonishing overreach drastically transforms the online world: it prevents any social media platforms from devising effective and profitable moderation policies and leaves no space for those who wish to engage with others without a looming threat of hate speech.

82. Prior to the *DPSA*, companies like ChitChat employed thoughtful moderation schemes built to attract the broadest possible userbase without sacrificing the welfare of its most vulnerable users. Other social media companies embraced different degrees of moderation. Users who were uncomfortable with ChitChat's policies could turn to Gab, Parler, Truth Social, Telegraph, 8kun, or any number of low-moderation social media platforms. Still other platforms advertised narrower purposes which required more specialized forms of moderation.

83. The *DPSA* obliterates variety between social media platforms, setting in place a new one-size-fits-all policy: no viewpoint-based moderation. By government fiat, Flavelle's most popular social media platforms are forced to adopt the business model of their least formidable competitors. Specialized social media companies that depend on stringent moderation must now surrender to bullies who will eagerly torment and shame their target userbase.

(ii) The DPSA runs roughshod over the rights of social media companies and users

84. Given the importance of content moderation, the impact of the *DPSA* on ChitChat's section 2(b) rights is profound. It is prohibited from expressing its values through moderation policies, and it is compelled to display highly offensive discriminatory content. In effect, the *DPSA* is doubly coercive of ChitChat's expression.

85. Similarly, the *DPSA*'s effect on users' section 15 rights is substantial. In 2022, the online world is where people go to congregate, meet friends, engage politically, conduct work, express

culture, and find entertainment. As a result of the *DPSA*, that online world has become far more hostile to members of minority groups.

5) <u>The DPSA is not justified in a free and democratic society</u>

86. The government has failed to demonstrate the *DPSA* is properly tailored to its objective and that less impairing means would not similarly fulfill that objective. Moreover, the deleterious effects of the Act far outweigh its speculative, marginal salutary effects. On the whole, the DPSA's blanket ban on viewpoint-based content moderation cannot be justified in a free and democratic society.

PART IV – ORDER SOUGHT

87. We respectfully request that the appeal be allowed, the *DPSA* struck down, and ChitChat's convictions quashed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of August, 2022.

Benjamin MacLean-Max and Laura Goldfarb
Counsel for the Appellant

PART V – TABLE OF AUTHORITIES

JURISPRUDENCE

	Case Authority	Paragraph
1	*Irwin Toy Ltd v Quebec*, [1989] 1 SCR 927	13, 17, 18, 21, 23, 24, 26, 29, 56, 72
2	*Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211	13, 28, 30, 31, 35, 37,
3	*Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038	15, 28
4	*R v Keegstra*, [1990] 3 SCR 697	19, 48, 49, 53, 70, 72
5	*R v National Post*, 2010 SCC 16	20
6	*Montreal (Ville) v 2952-1366 Québec Inc*, 2005 SCC 62	21, 22
7	*McAteer v Canada (Attorney General)*, 2014 ONCA 578	28
8	*Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835	29
9	*Reference re Secession of Québec*, [1998] 2 SCR 217	38
10	*Working Families Ontario v Ontario*, 2021 ONSC 4076	38
11	*Harper v Canada (Attorney General),* 2004 SCC 33	38
12	*Fraser v Canada (Attorney General)*, 2020 SCC 28	42
13	*Withler v Canada (Attorney General)*, 2011 SCC 12	42
14	*Andrews v Law Society of British Columbia*, [1989] 1 SCR 143	42
15	*Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11	49, 53, 71, 72
16	*Centrale des syndicats du Quebec v Quebec (Attorney General)*, 2018 SCC 18	54
17	*R v Oakes*, [1986] 1 SCR 103	56
18	*RJR-MacDonald Inc v Canada,* [1995] 3 SCR 199	56, 61
19	*R v Edwards Books and Art Ltd*, [1986] 2 SCR 713	56
20	*Thomson Newspapers Co v Canada (Attorney General),* [1998] 1 SCR 877	57
21	*Carter v Canada (Attorney General)*, 2015 SCC 5	58, 61
22	*Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69	60
23	*Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37	60, 61
24	*Multani c. Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6	61

25	*Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892	65, 72
26	*R v Ahenakew*, 2008 SKCA 4	66
27	*R v B(A)*, 2012 NSPC 31	66
28	*R v Topham*, 2017 BCSC 259	72
29	*Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17	80

LEGISLATION

Flavellian *Charter of Rights and Freedoms*

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

2 Everyone has the following fundamental freedoms:
…
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
…

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The *Digital Public Squares Act*

Purpose of this Act
1(1) The purpose of this Act is to:
(a) affirm that free and open public discourse is critical to the functioning of a free and democratic society;
(b) recognize that social media platforms play an increasingly central role in facilitating and hosting public discourse on matters of social and political importance; and
(c) promote the marketplace of ideas, thereby facilitating the pursuit of truth, individual self- fulfillment, and democratic participation.

(2) In furtherance of that purpose, this Act creates measures intended to reduce or eliminate discrimination on the basis of viewpoint on social media platforms.

Interpretation
2 In this Act,

social media platform means an Internet website or application that is open to the public, allows a user to create an account, and enables users to communicate with other users for the primary purpose of posting information, comments, messages, or images. The term does not include:

(a) an Internet service provider;

(b) electronic mail; or

(c) an online service, application, or website:

(i) that consists primarily of news, sports, entertainment, or other information or content that is not user-generated but is preselected by the provider; and

(ii) for which any chat, comments, or interactive functionality is incidental to, directly related to, or dependent on the provision of the content described in subparagraph (i);

censor means any action taken to edit, alter, block, ban, delete, deplatform, demonetize, regulate, remove, restrict, inhibit the publication or reproduction of, deny equal access or visibility to, or suspend a right to post.

receive, with respect to an expression, means to read, hear, look at, access, or gain access to the expression;

user means a person who posts, uploads, transmits, shares, or otherwise publishes or receives expression, through a social media platform. The term includes a person who has a social media platform account that the social media platform has disabled or locked.

Prohibition on Censorship
3 A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on:

(a) the viewpoint of the user or another person; or

(b) the viewpoint represented in the user's expression.

Exceptions
4(1) This Act does not prohibit a social media platform from censoring expression that:

(a) directly incites criminal activity or consists of specific threats of violence targeted against a person or group;

(b) depicts sexual exploitation or physical or sexual abuse; or (c) is otherwise unlawful.

(2) A notice stating that a user's expression might have been censored but for the provisions of this Act does not itself constitute censorship.

Waiver
5 A waiver or purported waiver of the protections provided by this Act is void as unlawful and against public policy, and a court or arbitrator may not enforce or give effect to the waiver, notwithstanding any contractual choice-of-law provisions.

Sanction

6 Every one who fails to comply with section 3 of this Act is guilty of an offence and on conviction is liable for a fine of $500.00 for each violation.

The *Criminal Code*

Public incitement of hatred

319 (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

Wilful promotion of hatred

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.