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 RESPONDENT

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. Open, uncensored debate breathes life into a democracy. With the rise of social media as avenue for public debate, corporate censorship endangers democratic discourse. ChitChat, one of the nation's largest social media platforms, has censored public policy debates, grassroot activism, and critiques of its own CEO. The *Charter* does not protect conduct so destructive of democracy.

2. Subjecting public discourse to the whims of corporations would shatter the delicate balance that Parliament and Flavellian courts have struck between free speech, fringe movements, and vulnerable groups. In an age of political polarization, mainstream platforms may maximize profit by censoring unpopular speech, while conspiracy-minded ones may censor science. No platform, regardless of its political leaning, can be tasked with balancing competing social interests.

3. Even good-faith content moderation by social media corporations misses the mark. After years of experimentation and heavy investment, ChitChat's scheme still arbitrarily censors innocuous posts while preserving harmful content on the platform.

4. The *Digital Public Squares Act* (the "*DPSA*") does not infringe ChitChat's s. 2(b) rights. The *DPSA* aligns corporate censorship with lawful speech, a standard calibrated through decades of *Charter* jurisprudence and evolving legislation.

5. The *DPSA* does not infringe s. 15(1): a finding of discrimination on a *de minimis* causation standard and with such a tenuous evidentiary record would trivialize the equality guarantee.

6. Only a broad prohibition of censorship ensures both that Flavellians are free to engage in public debate and that those with the most concerning views will not cultivate them without outside input. Any exception more generous than the ones currently contained in the *DPSA* would continue to allow corporations to encroach on public discourse.

B. FACTUAL BACKGROUND

1) Social Media Corporations Control Essential Forums for Public Discourse

7. Flavellians rely on social media platforms to voice their opinions. ChitChat, for example, boasts 9.5 million monthly active users among a national population of 38 million: a quarter of its population. Flavellians collectively create 7,000 posts per minute, and more than 10 million a day.

8. The censorship policy ChitChat had in place prior to the enactment of the *DPSA* was broad, and its application was not consistent. ChitChat users were required to agree to the platform's Terms of Service which stated that the platform reserved the right to take various enforcement actions if the user's content is "harmful or abusive."[1] There was no further description as to what constituted harmful or abusive speech.

9. In addition to the breadth of the censorship policy, it also functioned imperfectly. Innocuous posts were deleted, and harmful ones would sometimes remain. Decisions of the censorship regime could only be challenged internally and reviewed at the sole discretion of ChitChat's compliance staff, and there was no further appeals process. Thus, transparency in the censorship process was lacking, and users were subjected to the uncertainty of when their speech would be repressed.

2) ChitChat's Censorship Has Not Fostered Civil Discourse as Intended

10. The *DPSA* was enacted in response to public complaints about corporate control of social media discourse. Many voters in Flavelle have expressed concerns that they were having their posts deleted, being suspended from platforms, or being banned based on their expressed political

[1] 2022 Grand Moot Problem, at para 10.

opinions. Prior to the enactment of the *DPSA*, at least half of Flavellians believed that social media hurt, rather than promoted, open debate.

11. ChitChat and other social media platforms are first and foremost corporations. Their corporate interests disincentivize fair regulation of public discourse. The platform remains free for users and as such, ChitChat does not generate revenue directly from users. Rather, ChitChat earns money from advertisements placed across the platform, paid for by corporations or individuals. Yet, advertiser demand will depend on the popularity of the platform, and further, on the popularity of particular pages. Thus, ChitChat's revenue nevertheless ties directly to its users.

12. The conflicting interests of the platform are revealed in its application of censorship in the first day after the enactment of the *DPSA*. One post deleted by ChitChat criticized Big Tech CEOs. It is not clear how the substance of this post violated ChitChat's Terms of Service other than the fact that it invoked anti-corporate sentiment. ChitChat also deleted political speech, including posts about a recent Supreme Court of Flavelle ruling, posts criticizing the current government and its polices, as well as a post by animal rights activists.

13. Yet, ChitChat operated restrained censorship in this time frame, deleting only 1,432 posts. ChitChat normally censors 110,000 posts a day—75 times more than they did the day after the *DPSA* was enacted. The fact that the deleted political posts were determined to be "particularly egregious" by the compliance team suggests that ChitChat's regular censorship would capture a significant deal more.[2]

3) Flavelle Enacted the *DPSA* to Protect Public Discourse From Censorship

14. The *DPSA* was enacted to ensure that Flavellians have equal opportunity to participate in social media discourse regardless of political view, and to encourage public debate.

[2] *Ibid* at para 18.

15. The *DPSA* prohibits viewpoint censorship on public social media platforms. It does not apply to private platforms or other internet websites. The *Act* balances the need to protect vulnerable populations and does not prohibit censorship of violent speech or speech which is otherwise unlawful. It allows for the platform to attach a notice to a post, informing public readership that it does not necessarily endorse the content contained therein.

16. Mr. Charles Mackenzie, the founder of ChitChat, did not comply with the *DPSA*'s regulations, and ChitChat has been charged with 1,109 violations of the *DPSA* as a result.

C. PROCEDURAL HISTORY

17. The Respondent accepts the Appellant's procedural history as substantially correct.

PART II – QUESTIONS IN ISSUE

18. The Government answers the three issues on this appeal as follows:

A. Does the *DPSA* infringe s. 2(b) of the *Charter*? The answer is no. Section 2(b) does not protect censorship on social media, which is antithetical to the section's values and purposes. Even if it does, neither the purpose nor the effect of the *DPSA* is to restrict ChitChat's freedom of expression.

B. Does the *DPSA* infringe s. 15(1) of the *Charter*? The answer is no. The global impact of the *DPSA* on minority groups is severely limited given that censorship practices have been uneven among platforms before the enactment of the *DPSA*. The increase in offensive content does not necessarily reach users from minority groups.

C. If the *DPSA* infringes either s. 2(b) or s. 15, is/are the infringement(s) justified under s. 1 of the *Charter*? The answer is yes. The *DPSA* is minimally impairing because the broad prohibition is necessary to achieve the purpose of protecting public discourse. The *DPSA*'s substantial salutary effects outweigh any deleterious effect.

PART III – ARGUMENT

A. THE DPSA DOES NOT INFRINGE SECTION 2(B) OF THE CHARTER

19. The *DPSA* does not infringe ChitChat's right to freedom of expression under s. 2(b) of the *Charter*.[3] Under the two step-analysis from *Irwin Toy Ltd v Quebec (Attorney General)*,[4] this Court must first determine whether the claimant's activity falls within the sphere of conduct protected by s. 2(b), and then whether the impugned government action restricts freedom of expression, either in purpose or in effect. ChitChat's argument fails at both steps of the *Irwin Toy* test: censorship on social media does not fall within the sphere of conduct protected by s. 2(b). Even if it did, the *DPSA* does not restrict ChitChat's expression in either purpose or effect.

1) Censorship on Social Media Is Excluded from the Protective Scope of s. 2(b)

20. ChitChat's s. 2(b) claim fails because s. 2(b) does not protect censorship on social media. In *Montréal (Ville) v 2952-1366 Québec Inc*, the Supreme Court of Canada held that expressive activity falls outside the scope of s. 2(b) if its method or location of expression conflicts with the purposes that the section is intended to serve, namely (1) democratic discourse, (2) truth finding, and (3) self-fulfillment or human flourishing.[5] A factor that assists in this analysis is the activity's compatibility with the historical or actual function of the location of expression.[6] While much of the case law on this factor centres around physical spaces, the *Montréal* test is meant to be flexible and adaptable to technological developments like the rise of social media platforms.[7]

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[3] *Flavellian Charter of Rights and Freedoms*, s. 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Flavelle Act 1982* (UK), 1982, c 11 [*Charter*].
[4] [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy*], Joint BOA, Tab 1.
[5] 2005 SCC 62 at paras 72–74 [*Montréal*], Joint BOA, Tab 6; *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31 at para 39 [*Greater Vancouver*], Joint BOA, Tab 30; *Société Radio-Canada c Québec (Procureur Général)*, 2011 SCC 2 at para 37 [*CBC*], Joint BOA, Tab 31.
[6] *Montréal*, *supra* note 5 at para 74, Joint BOA, Tab 6; *Greater Vancouver*, *supra* note 5 at para 39, Joint BOA, Tab 30; *CBC*, *supra* note 5 at para 37, Joint BOA, Tab 31.
[7] *Montréal*, *supra* note 5 at paras 77, 80, Joint BOA, Tab 6; *Greater Vancouver*, *supra* note 5 at para 44, Joint BOA, Tab 30.

21. The Government of Flavelle concedes that acts of censorship, as defined in the *DPSA*, convey expressive *content*, since the *Irwin Toy* framework recognizes that most human activities have expressive elements.[8] However, the *method* of ChitChat's expression—through the censorship of others' expressions on a public forum—disqualifies it from *Charter* protection. First, it conflicts with all three purposes of s. 2(b). Second, social media sites' very function is to host content created by the public. Censorship is incompatible with this function.

(a) Censorship on Social Media Conflicts with the Purposes of s. 2(b)

22. Censorship on social media conflicts with all three purposes of s. 2(b): (1) democratic discourse, (2) truth finding, and (3) human flourishing.

23. Censorship on social media is antithetical to democratic discourse and the finding of truth. As Justice Rand of the Falconer Court of Appeal stated, "Social media platforms now act as essential forums for debate and discourse on all matters of social and political importance."[9] Censorship removes from these forums expressions that could spur further debate and information-sharing. It distorts public discourse by silencing views that the censor personally finds objectionable. For example, ChitChat has removed passionate political commentary, posts about controversial court rulings, allegations of corruption, scepticism about public health policies, and critiques of Big Tech CEOs.[10] The exclusion of these posts from any further discussion and inquiry contravenes the very purposes for which free expression is protected.

24. Censorship on social media hinders human flourishing by suppressing Flavellians' self-expression. As early as 2002, the Supreme Court of Canada has observed that the internet is one of the "optimum means of communication" for regular consumers because traditional media are

[8] *Irwin Toy*, *supra* note 4 at 969, Joint BOA, Tab 1.
[9] 2022 Grand Moot Problem, at para 35.
[10] *Ibid* at para 19.

often beyond reach due to high costs.[11] In particular, censorship hurts the self-fulfillment of grassroot activists and artists whose main platform of expression is social media. For example, ChitChat has censored posts containing graphic images of animal suffering,[12] while studies have shown this to be an indispensable form of advocacy for animal rights activists.[13]

25. An analogy to violent expressions confirms the unsuitability of censorship being protected by the *Charter*. In *Montréal*, the Supreme Court developed the test for whether to exclude a method or location of expression partly by analogy to the categorical exclusion of violent expressions from the protective sphere of s. 2(b). The Court observed that violence "prevents dialogue rather than fostering it," "prevents the self-fulfilment of the victim rather than enhancing it," and "stands in the way of finding the truth rather than furthering it."[14] Likewise, censorship on social media, as the antithesis to all three core values underlying the s. 2(b) guarantee, calls for a categorical exclusion from *Charter* protection.

26. Censorship conflicts with the pursuit of truth even if carried out with the intention of preventing the spread of misinformation. The Supreme Court of Canada has held that even "undoubtedly 'false'" statements can "[represent] a valuable contribution to political debate."[15] Moreover, a democracy leaves the judgment of truth and falsity to its citizens. After all, "a statement that is true on one level for one person may be false on another level for a different person."[16] Censorship takes away Flavellians' ability to access information and draw their own conclusions; it imposes what the censor personally believes to be the truth.

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[11] *Guignard c St-Hyacinthe (Ville)*, 2002 SCC 14 at para 25, Joint BOA, Tab 32.
[12] 2022 Grand Moot Problem, at para 19.
[13] See e.g. Laura Fernández, "Images That Liberate: Moral Shock and Strategic Visual Communication in Animal Liberation Activism" (2020) 45:2 Journal of Communications Inquiry 138; Carol Bishop Mills & Joseph Scudder, "The Credibility of Shock Advocacy: Animal Rights Attack Messages" (2009) 35 Public Relations Review 162.
[14] *Montréal*, *supra* note 5 at para 72, Joint BOA, Tab 6.
[15] [1992] 2 SCR 731 at 754–55, 95 DLR (4th) 202 [*Zundel*], Joint BOA, Tab 33.
[16] *Ibid* at 756, Joint BOA, Tab 33.

27. Permitting censorship based on fear of offensive language or misinformation departs from the principle that s. 2(b)'s scope must be determined without reference to the content of expression.[17] This appeal mirrors the structure of analysis common to the Supreme Court's past jurisprudence on speech regulations: restrictions on speech that is distasteful due to its content will always pass the s. 2(b) infringement test and be subjected to a s. 1 analysis. Corporate censorship, however, outright suppresses speech due precisely to its content, without any justification or balancing. A coherent application of the *Charter* cannot tolerate this *method* of expression, regardless of what content it conveys or how noble the censor's objectives are.

(b) Censorship Undermines the Function of Social Media as Space for Expressions

28. Censorship on social media is incompatible with the functioning of the space in which it occurs—namely, public forums that are dedicated to open debate and the free flow of information.

29. Section 2(b) does not protect expressive conduct on a venue if it intrudes on a specific public function to which the venue is dedicated. In *R v Breeden*, the British Columbia Court of Appeal found a fire station, a courthouse, and a municipal hall to be improper places for erecting protest signs.[18] These are "confined and special purpose venues" where "a public function or mandate, or constitutional function, [is] being performed."[19] In contrast, expressive activities are more likely compatible with venues that have not been dedicated to any particular purpose: courts have permitted into the ambit of s. 2(b) activities such as pamphleteering in airports' open areas,[20] loud music on public streets,[21] and protests on a plaza inside a park.[22] Expressive activities are also

[17] *Ibid* at 754; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123 at 1181, [1990] 4 WWR 481, Lamer J, Joint BOA, Tab 34; *R v Keegstra*, [1990] 3 SCR 697 at 729, [1990] SCJ No 131 [*Keegstra*], Joint BOA, Tab 4.
[18] 2009 BCCA 463 at paras 20–24, Joint BOA, Tab 35.
[19] *Ibid* at para 23, Joint BOA, Tab 35.
[20] *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at 158–59, 77 DLR (4th) 385, Joint BOA, Tab 36.
[21] *Montréal*, *supra* note 5 at para 71, Joint BOA, Tab 6.
[22] *Bracken v Niagara Parks Police*, 2018 ONCA 261 at para 49 [*Bracken*], Joint BOA, Tab 37.

compatible with the venue if they facilitate its dedicated function: journalistic activities in courthouses are protected by s. 2(b) because they advance the open court principle.[23]

30. Like the venues in *Breeden*, social media sites have a dedicated public and constitutional function, which is to facilitate open debate and the free exchange of information. The very reason why someone visits a social media site is to express their views and engage with others.[24] As Justice Karakatsanis stated, social media platforms "have become increasingly important for the exercise of free speech, freedom of association and for full participation in democracy."[25]

31. Censorship on social media, unlike journalistic activities in courthouses, undermines the public and constitutional function of the space. As the Court of Appeal for Ontario once observed in *Bracken*, the ongoing patterns of how a space is used are indicators of "informal social conventions," which provide "a ready guide to what is likely reasonable in a free and democratic society."[26] Here, an overwhelming number of Flavellians complained about censorship on social media before the enactment of the *DPSA*.[27] This suggests that censorship, by social convention, is not a reasonable use of social media sites and should not be protected by s. 2(b).

32. Social media sites are not analytically distinct from the locations in existing jurisprudence, despite private ownership. The *Montréal* test focuses not on the ownership, but on the *function* of the space in question.[28] The Supreme Court indeed contemplated that "the increasing privatization of government space will shift the debate [about the venues in which s. 2(b) applies] to the private sector."[29] The locations in existing jurisprudence, such as airports or fire stations, may well be operated by private entities who are contracted to perform a public function. A flexible and

[23] *CBC*, *supra* note 5 at paras 45, 52–53, Joint BOA, Tab 31.
[24] 2022 Grand Moot Problem, at para 9.
[25] *Douez v Facebook*, 2017 SCC 33 at para 56, Joint BOA, Tab 38.
[26] *Bracken*, *supra* note 22 at para 43, Joint BOA, Tab 37.
[27] 2022 Grand Moot Problem, at para 15.
[28] *Montréal*, *supra* note 5 at para 71, Joint BOA, Tab 6.
[29] *Ibid* at para 80, Joint BOA, Tab 6.

principled application of the *Montréal* test would treat social media platforms as key infrastructure in a modern democracy despite private ownership.

33. ChitChat cannot, by virtue of private ownership, escape the public and constitutional implications of its chosen business model. The common law and various statutes have long required certain categories of private businesses, such as innkeepers and common carriers, to treat all customers equally without regard to their identity or views.[30]

34. Social media corporations, like innkeepers and common carriers, have chosen a business model that profits from the public and essential nature of their platform. Social media corporations do not curate content for a paying audience like traditional news outlets who enjoy editorial discretion. Rather, they rely on the sheer volume and diversity of user-generated content and engagement to attract advertising revenue. When a politician makes official announcements on social media,[31] the platform reaps benefits from the public reactions and debate that occur as a result. It cannot simultaneously claim to operate as private space so as to exclude certain members of the public, or as a newspaper column that curates content for its chosen group of audience.

2) The *DPSA* Does Not Restrict Protected Expression in Its Purpose

35. ChitChat has not established that the purpose of the *DPSA* is to restrict freedom of expression. In *Irwin Toy*, the Supreme Court of Canada outlined three types of purposes that legislation affecting expression may have: (1) to restrict content by singling out particular meanings; (2) to restrict a form of expression in order to control access to its meaning or to control

[30] See e.g. *R v Kantorovich*, 1985 CarswellMan 512 at para 11, 15 WCB 77 (MBCA), Joint BOA, Tab 39; *Graham & Strang v Dominion Express Co*, 1920 CarswellOnt 56 at paras 37–38, 48 OLR 83 (Ont HCJ), Joint BOA, Tab 40; *Telecommunications Act*, SC 1993, c 38, s 27(2) ("No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person…").

[31] 2022 Grand Moot Problem, at para 35 (Justice Rand of the Falconer Court of Appeal observing that "Today's politicians even use social media to make official announcements.").

one's ability to convey such meaning; and (3) to restrict the physical consequences of certain human activity, regardless of the meaning being conveyed.[32] Although the *Irwin Toy* test was developed in the context of physical spaces, the distinction between restricting expression due to its meaning and doing so due to its consequence applies equally to the digital space.

36. Only the first two types of legislation outlined in *Irwin Toy* limit the guarantee of free expression in their purpose.[33] The *DPSA* falls under the third type.

37. First, the *DPSA* does not restrict content by singling out any particular meaning. Acts of censorship simply convey disapproval of whatever message that the censored posts happen to contain. Even if all acts of censorship convey the corporate value of the platform conducting censorship, the *DPSA* applies to all platforms and may capture entirely opposite values.

38. Second, the *DPSA* does not seek to restrict users' access to any particular meaning or ChitChat's ability to convey such meaning. There is no single meaning that the *DPSA* targets. In fact, the *DPSA* does the opposite of restricting access to ChitChat's corporate value or its ability to convey its value: the *DPSA* explicitly allows a platform to display a textbox under any potentially objectionable post, where it could refer to its corporate value and explain its objection however it chooses.[34]

39. The *DPSA*'s purpose is to control the consequences of a form of expression. As the *DPSA*'s preamble suggests, Parliament was concerned with the impact of censorship on "free and open public discourse" and "the marketplace of ideas."[35] It enacted the *DPSA* as a response to Flavellian voters who complained about the deletion of their posts and the suspension of their memberships.[36]

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[32] *Irwin Toy*, supra note 4 at 974, Joint BOA, Tab 1.
[33] *Ibid* at 976, Joint BOA, Tab 1.
[34] *Digital Public Squares Act*, s. 4(2) [*DPSA*].
[35] *Ibid*, s. 1(1).
[36] 2022 Grand Moot Problem, at para 15.

The "mischief" that the *DPSA* targets therefore consists in these consequences of censorship, not any meaning that acts of censorship convey.[37]

40. The Appellant's approach to the purpose branch of the *Irwin Toy* test is flawed. The fact that the prohibited conduct has been found to be expressive does not mean the law's purpose is to prohibit expression. Otherwise, the purpose branch would be rendered meaningless after the first step of the test, which already asks whether the conduct conveys or attempts to convey meaning.

3) The *DPSA* Does Not Restrict Protected Expression in Its Effect

41. ChitChat has not established that the *DPSA* restricts its freedom of expression in its effects.

42. To prove that the effects of legislation restrict freedom of expression under the *Irwin Toy* test, ChitChat must "demonstrate that such [an] effect occurred," and that the expressive activity "promotes at least one of [the] principles" underlying the protection of free expression.[38]

43. Given that ChitChat alleges that it has been compelled to associate with messages that it finds objectionable, two factors are particularly relevant: "public identification" of the messages with the claimant, and the claimant's "opportunity to disavow" these messages.[39] As Justice Wilson held in *Lavigne v OPSEU*, "if a law does not really deprive one of the ability to speak one's mind or does not effectively associate one with a message with which one disagrees, it is difficult to see how one's right to pursue truth, participate in the community, or fulfil oneself is denied."[40]

44. ChitChat failed to establish that the *DPSA* has a restrictive effect on its expressive freedom. First, the *DPSA* does not identify ChitChat with the posts created by its users. Second, the *DPSA*'s permission for social media platforms to publicly disavow their association with whatever content

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[37] *Irwin Toy*, *supra* note 4 at 976, Joint BOA, Tab 1.
[38] *Ibid*, Joint BOA, Tab 1.
[39] *Lavigne v OPSEU*, [1991] 2 SCR 211 at 278–79, 81 DLR (4th) 545, Wilson J, concurring [*Lavigne*], Joint BOA, Tab 2; see also *McAteer v Canada (Attorney General)*, 2014 ONCA 578 at paras 76–77 [*McAteer*], Joint BOA, Tab 7.
[40] *Lavigne*, *supra* note 39 at 278–79, Joint BOA, Tab 2.

it chooses mitigates any effect on ChitChat's freedom of expression. Finally, ChitChat has failed to show that its censorship of user content promotes any of the core principles underlying s. 2(b).

(a) The* DPSA *Does Not Publicly Identify ChitChat with User-Generated Content

45. ChitChat hosts content in a way that clearly indicates authorship. It is difficult to mistake a user's post as ChitChat's given the prominent display of the user's profile and name on it.

46. The ubiquity of social media membership and frequency of posting makes it impossible to attribute any particular user's message to the corporation operating the platform. One in four Flavellians is active on ChitChat, and over ten million posts are created each day.[41] ChitChat automatically hosts these posts. As Justice Wilson observed in *Lavigne*, the ubiquity of taxation and union dues means that it is "axiomatic" that making these payments does not indicate support of the activities they are used to finance.[42] The fact that ChitChat by default hosts all posts makes it unlikely that the platform is seen as endorsing any single one of them.

47. Further, opposing views often exist in the same discussion thread on social media, and readers would not reasonably think that the platform holds both views at the same time.

48. The Appellant's argument on this *Lavigne* factor rests on the fear that the public may think of ChitChat as a platform containing problematic content;[43] in effect, ChitChat seeks protection for its brand image, which stretches s. 2(b) beyond its limits. This *Lavigne* factor requires public *attribution* of a message to the claimant, not mere public *perception* that the claimant frequently displays the message. Any law that compels speech will create such *perception* by virtue of the claimant complying with the law, rendering this factor pointless. Moreover, if this factor required *perception* and not *attribution*, the inquiry in *Lavigne* would have been whether the public know

[41] 2022 Grand Moot Problem, at para 6.
[42] *Lavigne*, *supra* note 39 at 280, Joint BOA, Tab 2.
[43] Appellant Factum, at para 32.

that union dues are frequently used to fund certain activities, instead of whether paying union dues indicates support for the activities. This deviates from how Justice Wilson discussed this factor.

(b) The DPSA *Does Not Deprive ChitChat of the Opportunity to Disavow Any Identification with User-Generated Content*

49. ChitChat has ample opportunity to disavow any identification with posts that it dislikes.

50. In cases where compelled speech was held to limit s. 2(b), the impugned state action also prevented the claimant from expressing contrary views. On this basis, Justice Wilson distinguished *Lavigne* from the Supreme Court's earlier decisions in *National Bank of Canada v RCIU* and *Slaight Communications v Davidson*. In *National Bank* and *Slaight*, the claimants were not only required to express views they disagreed with, but were also explicitly prohibited from saying anything else.[44] In *Lavigne*, however, the obligation to pay union dues under the Rand formula did not prevent the claimant from expressing contrary views, and hence the s. 2(b) claim failed.[45]

51. ChitChat, like Mr. Lavigne, is free to express contrary views: it can show a disclaimer under any post, stating that it would have been removed but for the requirement of the *DPSA*.

52. In fact, s. 4(2) of the *DPSA* explicitly permits social media platforms to use such disclaimers,[46] which further ameliorates any effect of compelled hosting on the ChitChat' s. 2(b) right. In *Lavigne*, the Rand formula specifically provided for dissent by permitting members of a bargaining unit to not join the union. Justice Wilson held that this "built-in feature" enhances free expression.[47] Section 4(2) of the *DPSA* achieves the same effect.

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[44] *Lavigne*, *supra* note 39 at 278–79, citing *National Bank of Canada v RCIU*, [1984] 1 SCR 269, 9 DLR (4th) 10, Joint BOA, Tab 2 and *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416, Joint BOA, Tab 3.
[45] *Lavigne*, *supra* note 39 at 280–81, Joint BOA, Tab 2.
[46] *DPSA*, *supra* note 34 at s. 4(2).
[47] *Lavigne*, *supra* note 39 at 272 and 281, Joint BOA, Tab 2.

53. ChitChat's opportunity to disavow is "meaningful", as required in *Lavigne*,[48] for three reasons. First, many other social media corporations have already been making use of the disclaimer permitted by s. 4(2) of the *DPSA*.[49] Second, ChitChat has unlimited space on its website for disclaimers, which incur little cost. Third, there are no negative consequence for social media platforms who use the s. 4(2) disclaimer. In *McAteer v Canada (Attorney General)*, the Ontario Court of Appeal held that the oath to the Queen in citizenship ceremonies does not infringe s. 2(b). An important factor supporting this holding was that a subsequent recantation of the oath has no effect on one's citizenship status.[50] Similarly, ChitChat faces no repercussion from the government or anyone else. Its refusal to use the s. 4(2) disclaimer is merely a "subjective" preference that "cannot be used to trump the objective fact that [it is] entirely free to express [its] opinions."[51]

54. Finally, even if ChitChat considers outright censorship to be the optimal way to express its corporate values, the *Charter* does not protect against regulatory impediments that make one's expressions less effective. As Justice Wilson held in *Lavigne*, although mandatory taxes may reduce the "vigor with which a citizen can give partisan support to a political belief," the "vigor" in expression is out of the scope of s. 2(b).[52] Likewise, the *Charter* does not entitle ChitChat to express its views in a way that most effectively maintains its corporate brand.

(c) ChitChat Failed to Establish that Its Censorship Promotes the Values of s. 2(b)

55. Even if the *DPSA* has an effect on ChitChat's freedom of expression, its expression through censorship does not promote the core values of s. 2(b) such that it warrants protection.

56. To promote the core values of s. 2(b), the restricted form of expression often needs to

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[48] *Ibid* at 279, Joint BOA, Tab 2.
[49] 2022 Grand Moot Problem, at para 17.
[50] *McAteer*, *supra* note 39 at para 79, Joint BOA, Tab 7.
[51] *Ibid* at para 80, Joint BOA, Tab 7.
[52] *Lavigne*, *supra* note 39 at 273, citing *International Association of Machinists v Street*, 367 US 740 at 806 (1961), Joint BOA, Tab 2.

facilitate communication to the public or encourage public participation in activities connected to s. 2(b) values. Courts have found infringement where the impugned state action restricted pamphleteering in airports,[53] postering on public property,[54] political advertising on the side of buses,[55] and news coverage of courtrooms.[56] These forms of expressions could communicate clear messages or detailed information to a large segment of the public. In addition, s. 2(b) may also be infringed where the restricted expression encourages public participation in lawful leisure activities, which enhance human flourishing.[57]

57. ChitChat has not established that its acts of censorship facilitate communication to the public or encourage public participation in activities valuable to s. 2(b).

58. First, censorship does the opposite of facilitating users' communication to the public.

59. Second, censorship fails to clearly communicate ChitChat's own objection to the public, because most other users would not even see the censored post or know that ChitChat removed it.

60. Finally, ChitChat's hope to facilitate public participation in open debate through censorship has not materialized, for two reasons. One is that the connection between censorship and online participation is dubious: the removal of objectionable views also removes the opportunity for them to be questioned and debated. Although minority groups who are targeted by offensive *speech* in general may experience psychological stress, their actual exposure to offensive *posts* is speculative at best.[58] The second reason lies in the difficulty in moderation. While ChitChat is a successful platform with sophisticated content moderation practices, its moderation remains ineffective, removing innocuous posts while leaving harmful ones intact.[59] Despite its commitment to

[53] *Committee of the Commonwealth*, *supra* note 20 at 158–59, Joint BOA, Tab 36.
[54] *Ramsden v Peterborough (City)*, [1993] 2 SCR 1084 at 1104–05, 106 DLR (4th) 233, Joint BOA, Tab 41.
[55] *Greater Vancouver*, *supra* note 5 at para 46, Joint BOA, Tab 30.
[56] *CBC*, *supra* note 5 at paras 46, 54, Joint BOA, Tab 31.
[57] *Montréal*, *supra* note 5 at para 84, Joint BOA, Tab 6.
[58] See paras 65–69, *below*.
[59] 2022 Grand Moot Problem, at para 14.

promoting civil discourse, at least half of Flavellians felt that social media hurt open debate.[60]

61. By putting an end to corporate censorship on social media, *DPSA* promotes the values underlying s. 2(b).[61] The Government should not be required to justify this under s. 1.

B. THE *DPSA* DOES NOT INFRINGE THE APPELLANTS' SECTION 15 RIGHTS

62. The Appellant has failed to establish that the *DPSA* infringes s. 15 of the *Charter* because the harm alleged is distanced from the *DPSA* in three ways.[62] First, the *DPSA* is a step removed from the increase in offensive speech that results from its enactment, or the distinction it creates, because this causation hinges on the assumption that censorship policies across different platforms actually protect members of minority groups. Second, the Appellant has not demonstrated that the posts that would otherwise be censored have reached members of minority groups and, if so, to what extent. Third, there is no evidence of the harm resulting from outreach. The cumulative effect of establishing a s. 15 breach on such a tenuous basis would be to lower the threshold required for a finding of discrimination such that it would no longer be meaningful.

63. The Appellant's evidentiary record does not prove that the legislation, which is facially neutral, "produce[s] serious inequality."[63] The Respondent acknowledges the gravity of offensive speech generally and the disproportionate impact it has on minority groups. However, the Appellant's claim of discrimination under the second step of the test for adverse discrimination per *R v Fraser* is unsubstantiated.[64]

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[60] *Ibid* at para 15.
[61] See paras 22–27, *above*.
[62] *Charter*, *supra* note 3, s. 15(1).
[63] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 171, Joint BOA, Tab 14.
[64] *Fraser v Canada*, 2020 SCC 28 at para 27 [*Fraser*], Joint BOA, Tab 12.

1) The DPSA Creates a Distinction on a De Minimis Causation Standard

64. The Respondent concedes that the *DPSA* creates a distinction because a law which prohibits censorship will result in more speech, including offensive speech. However, in contrast to existing jurisprudence on s. 15 claims, the distinction that flows from the *DPSA* is a step removed from the law. If not for the *DPSA*, then corporate censorship policies may still change at whim, subjecting social media users to any range of offensive speech. Indeed, the Appellant affirms that a range of moderation already exists.[65] The *de minimis* causation standard may not prevent a distinction finding, but it does suggest a requirement for a strong evidentiary record.

2) The DPSA Is Not Discriminatory

65. The Appellant's evidentiary record fails to demonstrate both that minority groups are exposed to more offensive speech and that they suffer increased harm. Thus, the distinction does not have the effect of "reinforcing, perpetuating, or exacerbating disadvantage."[66] The Ontario Superior Court of Justice recently held in *Affleck v Ontario* that "when an applicant seeks to have a law of general application struck down as unconstitutional, some degree of detail and thoroughness is required."[67] Likewise, in *Fraser*, Justice Abella emphasized that the pertinent question on this point asks what the law's effects are "in practice."[68] The Appellant has presented no evidence of the law's effects in practice.

66. The evidence of Dr. Mullins is useful insofar as it explains that minority groups are more susceptible to offensive speech, and in delineating the harm that can arise from such speech.

[65] Appellant Factum, at para 82.
[66] *Fraser*, *supra* note 64 at para 48, Joint BOA, Tab 12.
[67] *Affleck v The Attorney General of Ontario*, 2021 ONSC 1108 at para 70, Joint BOA, Tab 42.
[68] *Fraser*, *supra* note 64 at para 53, Joint BOA, Tab 12.

However, Dr. Mullins is unable to demonstrate whether members of minority groups have been subjected to an increase in such speech since the enactment of the *DPSA*.

67. The Appellant argues that because the *DPSA* prevents it from deleting posts, some of which includes offensive speech directed at minority groups, members of minority groups are necessarily subjected to more offensive posts. However, the base number of posts containing offensive speech is not equivalent to outreach. A single post may have greater viewership than several (or even several thousand) others. The outreach of a particular post depends on how popular the creator of the post is, measured by the number of their followers. It also depends on how often a post is transmitted, shared, or repeated, and the popularity of those users who share said post.[69]

68. Registered users of ChitChat also have the choice as to which users to "follow," and therefore can filter which posts they see. While users may see posts from individuals they do not follow, they may also "block" users if they find that a user's posts are offensive. Thus, users' feeds are dictated by who they choose to follow and not merely a survey of all posts. ChitChat alleges that the increase in offensive posts would be, at most, 1% of the total posts on the platform. It has not been established that this increase would in fact result in an effectual increase in either exposure or harm for an individual user.

69. Dr. Mullins' research focuses on expression broadly. It has inadequately considered the possibility of differences relating to language on social media. Speech on social media may not result in the same harm as that offline. The Superior Court recently pointed out that this era of media communication has led to an increase in hyperbolic language. Thus, while no one "would relish being insulted … the use of outrageous language has lost its intimidating nuance in the

[69] 2022 Grand Moot Problem, at para 9.

'crude mirror of our culture' that is the contemporary media environment."[70] The ubiquity of offensive speech on social media platforms may well dilute the harm of each individual post.

70. In sum, ChitChat is drawing two inferences that are not available on the record. As the Court stated in *Kahkewistahaw First Nation v Taypotat,* notwithstanding that "intuition may well lead us to the conclusion that the provision has some disparate impact," this is insufficient to show a *prima facie* breach of s. 15.[71] Without demonstrating the *DPSA*'s effect on outreach and consequential harm, the Appellant's evidentiary basis for discrimination remains merely "a web of instinct."[72]

71. As the Supreme Court of Canada held in *Ernst v Alberta Energy Regulatory,* "the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position." [73] If a factual basis for the harm alleged in this case is not required, then the *Fraser* test, already flexible, is rendered superfluous.

C. IF THERE IS AN INFRINGEMENT, IT IS JUSTIFIED UNDER SECTION 1

72. Should this Court find that the *DPSA* infringes ss. 2(b) or 15, the limitation is demonstrably justified under s. 1 of the *Charter*.[74] The Appellant has conceded that the *DPSA* has a pressing and substantial objective and that it is rationally connected to its objective. The *DPSA* is minimally impairing because only a broad prohibition of social media censorship will properly maintain open public discourse. The deleterious effects of the *DPSA* are outweighed by the salutary effects of the law, the latter of which are fundamental to the proper functioning of democracy.[75]

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[70] *College of Physicians and Surgeons v O'Connor*, 2022 ONSC 195 at para 71, Joint BOA, Tab 43.
[71] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 34 [*Taypotat*], Joint BOA, Tab 44.
[72] *Ibid* at para 34, Joint BOA, Tab 44.
[73] *Ernst v Alberta Energy Regulator*, 2017 SCC 1 at para 22, Joint BOA, Tab 45.
[74] *Charter*, *supra* note 3, s. 1.
[75] *R v Oakes,* [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*], Joint BOA, Tab 17.

1) The *DPSA* Has a Pressing and Substantial Objective

73. The Appellant has outlined the *DPSA*'s objectives and conceded that they are pressing and substantial. The legislation's objectives are not "trivial," but rather are "of sufficient importance to warrant overriding a constitutionally protected right or freedom."[76] The goals of the *DPSA* 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.[77] Thus, the purposes of the *DPSA* are "directed to the realization of collective goals of fundamental importance."[78]

2) The DPSA Is Proportionate

(a) The DPSA *Is Rationally Connected to Its Objective*

74. The *DPSA* prohibits the censorship of speech on social media on the basis of viewpoint, thereby ensuring that all viewpoints are incorporated in public discourse. The requirement at this stage is to determine whether it is "reasonable to suppose that the limit may further the goal," not whether "it will do so."[79] This test is "not particularly onerous."[80] A prohibition on viewpoint discrimination is rationally connected to the statutory objective of including all voices in public discourse. As the Appellant has conceded, this stage of the analysis is met.

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[76] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 352, Joint BOA, Tab 46; *Oakes*, *supra* note 75 at 136, Joint BOA, Tab 17.
[77] *DPSA*, *supra* note 34, s. 1(1)(a), (b), (c).
[78] *Sauve v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 137, Joint BOA, Tab 47.
[79] *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37 at para 49 [*Hutterian Brethren*], Joint BOA, Tab 23.
[80] *Little Sisters Book and Art Emporium*, 2000 SCC 69 at para 228 [*Little Sisters*], Joint BOA, Tab 22.

(b) The DPSA *Is Minimally Impairing because It Must be Broad to Achieve its Purpose*

(i) The Standard of Review Is Deferential

75. The limit imposed by the *DPSA* impairs the rights of the Appellant as little as reasonably possible to achieve its legislative goals.[81] Only a broad prohibition of censorship will ensure that regulation of speech remains the task of Parliament and not of corporations. Corporations like ChitChat are unaccountable to the public, they are compromised by profit motivation, and their censorship policies are opaque.

76. The *DPSA* addresses a complex social problem that requires careful balancing of competing interests. This Court should defer to Parliament's judgement. This case can also be distinguished from cases in which the breadth of the legislation diminishes deference. In cases with a s. 15(1) infringement, the concern with breadth is often that it results in the wholesale exclusion of groups or individuals.[82] Yet, the *DPSA* was enacted for the purpose of including individuals in public discourse.[83] In cases where a s. 2(b) infringement has been found, a frequent argument against overbroad legislation is that it may entail undue intrusion into free expression.[84] This, too, does not apply because the purpose of the law is to prevent intrusion by corporations.

77. The Appellant has also failed to establish a "clearly superior" alternative that would override this deference.[85] The alternatives of tailoring the *DPSA* to include exceptions for offensive speech, misinformation, or type of forum, would not satisfy the government's objective to a "real and substantial degree."[86] In fact, they would undermine its very purpose. An exception for offensive speech would effectually revert back to the corporate censorship policies that existed

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[81] *Ibid* at para 160, Joint BOA, Tab 22.
[82] See *M v H,* [1999] 2 SCR 3 at 6, Joint BOA, Tab 48. *Quebec (Attorney General) v A*, 2013 SCC 5 at para 361, Joint BOA, Tab 49.
[83] *DPSA*, *supra* note 34, s. 1(1)(c).
[84] *Keegstra*, *supra* note 17 at 783, Joint BOA, Tab 4.
[85] *Lavigne*, *supra* note 39 at 295—96, Joint BOA, Tab 2.
[86] *Hutterian Brethren*, *supra* note 79 at para 55, Joint BOA, Tab 23.

prior to the *DPSA*. An exception for misinformation could not feasibly be implemented. A carve-out based on type of forum would encourage the isolation of views including dangerous rhetoric. The *DPSA* was enacted for the precise purpose of rectifying siloed discourse.

(ii) Creating an Exception for Offensive Speech Is Untenable

78. An additional exception for "offensive speech" in the *DPSA* would facilitate discretionary errors on the part of social media platforms, and ultimately undermine the purpose of the *DPSA*. The Appellant contends that the DPSA is overly broad in regard to the content that it restricts, as it allows for the proliferation of posts which contain offensive speech.

79. Any general exception for offensive speech would in effect revert control to ChitChat's censorship policy prior to the enactment of the *DPSA*. ChitChat's previous Terms of Service allowed it to censor any posts that were "harmful and abusive."[87] While this policy may have restricted posts containing offensive content, it comes at a great cost to the freedom of expression. Despite operating under a highly restrained version of its policy, ChitChat still deemed the following to be offensive: posts about a controversial Supreme Court of Flavelle ruling, posts criticizing the current Premier of Falconer, a post from animal rights advocates, a post criticizing those who did not vote for the government, and a post containing anti-corporate speech.[88]

80. In part, the difficulty in streamlining censorship such that it captures only offensive speech arises from the nexus between extreme language and political expression. This connection was recognized by the Supreme Court of Canada in *Keegstra*, which acknowledged that "the use of strong language in political and social debate … is an unavoidable part of the democratic process."[89] The Court in *Saskatchewan (Human Rights Commission) v Whatcott* also cautioned

[87] 2022 Grand Moot Problem, at para 10.
[88] *Ibid* at para 19.
[89] *Keegstra*, supra note 17 at 764, Joint BOA, Tab 4.

against censorship of speech on the broad basis that it "ridicules, belittles or affronts the dignity of protected groups."[90] It held that "restricting expression because it may offend or hurt feelings does not give sufficient weight to the role expression plays in individual self-fulfillment, the search for truth, and unfettered political discourse.[91] In both cases, the Court canvassed the difficulty of balancing of individual freedom of expression and harm caused to members of minority groups. The Court drew the line at hate speech, not offensive speech.

81. A further issue with a carve-out for offensive speech is that there is a lack of means to review censorship. The Court in *R v Keegstra* was alive to the possibility that the trier of fact in criminal trials may "improperly infer hatred from statements that they personally find offensive," but upheld criminal prohibitions on hate speech in part because of the ability for judges to instruct the trier of fact on the definition of hate speech.[92]

82. If the *DPSA* also provided a carve-out exception for offensive speech, there would be no such protections to ensure that corporations exercised censorship in a proper manner. There is no bulwark such as the criminal justice system to determine whether such speech really is offensive prior to the platform's exercise of censorship.

83. The Appellant contends that the uncertainty in distinguishing between hate speech and offensive speech may lead to platforms to err on the side of not censoring hate speech. The Respondent raises three objections to this point. First, the reason for including the exception in the *DPSA* to allow the removal of unlawful speech is clear. As the Appellant notes, the *DPSA* does not "compe[l] social media companies to aid criminal speech."[93] Second, social media platforms do not need to be "certain that content amounts to hate propaganda," and they merely must act in

[90] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 109 [*Whatcott*], Joint BOA, Tab 15.
[91] *Ibid*, Joint BOA, Tab 15.
[92] *Keegstra*, *supra* note 17 at 778, Joint BOA, Tab 4.
[93] Appellant Factum, at para 62.

good faith. The defence of due diligence is available for all regulatory offences.[94] Third, the alternative, creating an exception for offensive speech, is untenable. ChitChat conducts censorship through two imperfect means: a proprietary technology which censors content containing certain words and phrases and allowing individuals on the compliance team to respond to reports. However, the evidentiary record shows that harmful posts are sometimes left uncensored and innocuous posts are sometimes removed.[95] A platform like ChitChat hosts "hundreds of thousands of posts" a day, making it difficult to review all posts properly.[96]

84. Indeed, if the Appellant foresees the exception for hate speech being difficult to apply, it is unclear how the platform could apply any other exception adequately, particularly one so ambiguous as an exception for offensive speech. Though the distinction between hate speech and offensive speech may not be a "bright line," ChitChat's prior censorship policy demonstrates that the distinction between offensive speech and merely unpopular speech had no line at all.

85. Other social media platforms may have an even higher error margin than ChitChat, and any error in censoring odious views risks suppression of political expression—the "linchpin of the s. 2(b) guarantee."[97] Thus, an exception for offensive speech would remove protection against platforms that choose to exercise discretion inconsistently, arbitrarily, or maliciously.

(iii) Creating an Exception for Misinformation Is Untenable

86. Creating an exception in *DPSA* for "misinformation" would be difficult to apply in practice. It also runs counter to the truth-seeking function underlying the freedom of expression. Though the Appellant has not suggested an alternative with a carve-out for misinformation, ChitChat has faced charges for censoring posts containing COVID-19 misinformation since the

[94] *R v Sault Ste Marie (City),* [1978] 2 SCR 1299 at 1311–12, 1320–21 Joint BOA, Tab 50.
[95] 2022 Grand Moot Problem, at para 14.
[96] Appellant Factum, at para 69.
[97] *Keegstra*, *supra* note 17 at 763, Joint BOA, Tab 4.

enactment of the *DPSA*. This requires a response. As with a carve-out for offensive speech, identifying misinformation requires social media platforms to discern falsehood from truth. This raises concerns about the legitimacy of allowing corporations to determine what is true and the practical issue of how any such determination could be made.

87. Although some statements may be accepted broadly by scientists and other experts as false, societal understanding of truth is not static. As the Supreme Court in *R v Zundel* cautioned, courts must be mindful "both of the evolving concept of history and of its manipulation in the past to promote and perpetuate certain messages."[98] One pertinent example of the evolving nature of truth is the changing medical measures in the COVID-19 pandemic.

88. Second, the line between truth and falsehood is difficult to draw, and there are policy concerns with suppressing speech even when it is known to be true. On this point, the Court in *Zundel* provided a few examples: a concerned citizen who states that a nuclear power plant in her neighbourhood "is destroying the health of the children nearby" when the injury is in fact minimal or a medical professional who describes an outbreak of meningitis as an epidemic.[99] Even assuming good faith on the part of social media platforms, there is no bright line between mere hyperbole and deliberate and dangerous misinformation.

89. Third, any broad prohibition against false statements or misinformation is discordant with the truth-seeking function underlying freedom of expression.[100] While posts such as those asserting COVID-19 vaccines are unsafe or ineffective may seem far removed from the truth-seeking function on its face, a law which requires a determination of truth prior to the communication of

[98] *Zundel*, *supra* note 15 at 772, Joint BOA, Tab 33.
[99] *Ibid* at 772, Joint BOA, Tab 33.
[100] *Keegstra*, *supra* note 17 at 728, Joint BOA, Tab 4.

expression cannot rationally be connected to a search for truth. There may not always be a reliable, independent means to discern falsehood from the truth to begin with.

(iv) Creating an Exception for Specific Forums is Untenable

90. A forum-based exception is not a reasonable alternative to the *DPSA*'s broad definition of "social media platform." A forum-based exception may be broadly written for groups with "specialized objectives," or it may specify particular groups that are allowed to censor. Both would eschew the purposes of the *DPSA* entirely and would necessarily exacerbate political polarization.

91. The DPSA must capture a broad range of forums to create dialogue because the diverging practices of moderation among forums lead to disengagement between different viewpoints. The Appellant correctly points out that individuals dissatisfied with the heavy moderation on a mainstream platform often turn to a low-moderation fringe alternative.[101] This is precisely what the *DPSA* militates against. The *DPSA* cannot permit some forums to be exempted from its single standard of moderation, the effectiveness of which derives from universal application.

92. A forum-based exception would allow for manipulation that circumvents obligations under the *DPSA*. A social media platform could recharacterize itself as one that is aimed toward specific objectives or catered to a particular group of people to avoid the effects of the *DPSA*. For example, to take advantage of the exception, a platform dedicated to QAnon, "a conspiracy theory that alleges a group of pedophiles is running a global child sex-trafficking ring,"[102] could confine its objective to furthering the theory itself. A platform controlled by anti-vaxxers could define itself as a safe space for naturalists and thus prohibit a user from posting about medical science or even

[101] Appellant Factum, at para 82.
[102] *GC, Re*, 2020 CarswellOnt 19417 at para 37 (Ontario Consent and Capacity Board), Joint BOA, Tab 51. This case is used for its definition of the group only.

the devastating impact of the COVID-19 pandemic. These maneuvers result in the opposite of promoting open debate and truth-seeking.

93. A forum-based exception allows fringe groups to promulgate their views to curious members of the public without challenge, giving rise to radicalization and violence. For example, the "incel" or "involuntary celibate culture" movement has grown through the online connections between ideologues who share misogynistic views. Teenagers and socially isolated individuals can be susceptible to the influence of incel ideology.[103] A law permitting censorship on incel forums removes an avenue for directly challenging these views before they escalate into violence.

94. Creating a list of exceptions such as platforms for children or minority groups, would not be feasible because the list could never be exhaustive. What qualifies as a minority group is not fixed. This would require Parliament to make judgements about what forums are acceptable and unacceptable.[104] For example, the existence of a forum for the purposes of connecting those of a particular religious group encounters the difficulty of defining religion. Flavellian jurisprudence has defined religion expansively, and as the Supreme Court noted in *Syndicat Northcrest v Amselem*, "it is perhaps not possible to define religion precisely."[105] The inclusion of "cults" in the list of exceptions would entail similar dangers as that for a general exception on the basis of forum.

95. In sum, if there were a forum-based exception, individuals with extreme views may connect and censor any dissenting counterviews. Preventing this possibility is a fundamental for both truth-seeking, and as safeguard against the improper influence of young children on social media.

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[103] *R v OS*, 2022 ONSC 4217 at paras 8–10, Joint BOA, Tab 52; *R v Minassian*, 2021 ONSC 1258 at para 176, Joint BOA, Tab 53; *Bungie Inc v TextNow Inc*, 2022 ONSC 4181 at paras 15–16, Joint BOA, Tab 54.
[104] See e.g. *Little Sisters*, *supra* note 80, Joint BOA, Tab 22.
[105] *Syndicat Northcrest v Amselem*, 2004 SCC 47 at paras 39–40, Joint BOA, Tab 55.

(c) The DPSA*'s Salutary Effects Outweigh Its Deleterious Effects*

96. At the final proportionality stage, the Court must weigh the deleterious against the salutary effects of the impugned provision, typically with reference to the anticipated attainment of the asserted legislative objective.[106]

97. The Respondent acknowledges that the deleterious effects of the *DPSA* include impingement on social media platforms' censorship decisions. However, social media platforms may include a notice stating that they might have censored a user's expression if permitted. The restriction on censorship may also lead to the proliferation of more posts with offensive content. As Park JA of the Falconer Court of Appeal recognized, "a law which facilitates more expression will invariably also facilitate some harmful expression."[107] Yet, Flavellian society has always balanced the need to protect vulnerable populations from harmful speech and commitment to freedom of expression. Indeed, the fact that there are further exceptions to criminalizing hate speech suggests that our society has in fact a high tolerance for unpopular or even disparaging speech.[108]

98. On the other hand, the beneficial effects of the *DPSA* are directly related to its pressing and substantial purpose. First, the legislation prevents social media platforms from censoring posts on an improper basis. Social media platforms are corporations motivated by economic profit. Any censorship policy will necessarily be subordinated to profit margins because a non-profitable platform will not continue to function. In fact, ChitChat has recently experimented with outsourcing its discretionary censorship to external corporate partners, who may have their own rationales for censorship.[109] ChitChat has in fact recently attempted to censor a post containing

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[106] *Hutterian Brethren*, *supra* 79 note at paras 75–76, Joint BOA, Tab 23.
[107] 2022 Grand Moot Problem, at para 34.
[108] *Criminal Code*, RSC 1986 c C-46, s. 319(2)(a)–(b).
[109] 2022 Grand Moot Problem, at para 11.

anti-corporate speech.[110] It is also unclear how many other anti-corporate posts have been censored prior to the *DPSA's* enactment, particularly since ChitChat employed a restrained censorship practice after the *DPSA* was passed.[111]

99. The purpose of ensuring that all individuals have equal opportunity to engage in public conversation is imperative to the proper functioning of democracy. In the span of one day since the enactment of the *DPSA*, ChitChat has already censored multiple political posts. This is indicative of how essential the *DPSA* is to the "maintenance of a free and democratic society."[112]

100. Finally, the *DPSA* provides guidance for both platforms and users.[113] The exceptions to censorship are clear to social media platforms, who may also attach a disclaimer to any objectionable post. As a result of the *DPSA*, social media users will also not be subject to the uncertainty of platforms' censorship rules. Thus, the *DPSA* is proportionate.

PART IV – ORDER SOUGHT

101. The Government of Flavelle respectfully requests that this Court dismiss the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of August, 2022.

Ivy Xu and Adrianna Mills
Counsel for the Respondent

[110] *Ibid* at para 19.
[111] *Ibid* at para 18.
[112] *Zundel*, *supra* note 15 at 766, Joint BOA, Tab 33.
[113] *Whatcott*, *supra* note 90 at para 148, Joint BOA, Tab 15.

PART V – TABLE OF AUTHORITIES

JURISPRUDENCE

Case Authority	Paragraphs
Affleck v The Attorney General of Ontario, 2021 ONSC 1108	65
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37	74, 77, 96
Andrews v Law Society of British Columbia, [1989] 1 SCR 143, 56 DLR (4th) 1	63
Bracken v Niagara Parks Police, 2018 ONCA 261	29, 31
Bungie Inc v TextNow Inc, 2022 ONSC 4181	93
Canadian Federation of Students v Greater Vancouver Transportation Authority, 2009 SCC 31	20, 29, 56
College of Physicians and Surgeons, 2022 ONSC 195	69
Committee for the Commonwealth of Canada v Canada, [1991] 1 SCR 139, 77 DLR (4th) 385	29, 56
Douez v Facebook, 2017 SCC 33	30
Ernst v Alberta Energy Regulator, 2017 SCC 1	71
Fraser v Canada, 2020 SCC 28	63, 65, 71
GC,Re, 2020 CarswellOnt 19417 (Ontario Consent and Capacity Board)	92
Graham & Strang v Dominion Express Co, 1920 CarswellOnt 56, 48 OLR 83 (Ont HCJ)	33
Guignard c St-Hyacinthe (Ville), 2002 SCC 14	24
Irwin Toy v Quebec, [1989] 1 SCR 927, 58 DLR (4th) 577	19, 35, 36, 39, 40, 42
Kahkewistahaw First Nation v Taypotat, 2015 SCC 30	70
Lavigne v OPSEU, [1991] 2 SCR 211, 81 DLR (4th) 545	43, 46–54, 77
Little Sisters Book and Art Emporium v. Canada (Minister of Justice), 2000 SCC 69	74, 75, 94

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.