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The Hidden Promise of Dolphin Delivery: *Shields, Swords and Horizontal Application of the* Canadian Charter of Rights and Freedoms

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I. Introduction

RWDSU v Dolphin Delivery ("*Dolphin Delivery*") is among the Supreme Court of Canada's least celebrated *Charter* decisions.[1] The Court proclaimed that, as a consequence of section 32, the *Charter* applies to state actors, but not to private actors nor courts deciding disputes between them.[2] Criticized as a retreat from robust rights protection, a return to the vapidity of the *Canadian Bill of Rights*, and an unthinking redux of classical liberal ideology, the case has been widely understood to betray the Court's promise to interpret the *Charter* broadly and generously.[3] In deciding that an injunction against a union's picketing was immune from *Charter* free speech protection, the Court channelled postures from earlier eras, relying on

* The authors disclose that they are co-counsel in one of the cases discussed below, *Cool World v Twitter*, and that one of them wrote and co-directed the documentary film at issue in that case.

1 *RWDSU v Dolphin Delivery Ltd*, 1986 CanLII 5 (SCC) [*Dolphin Delivery*].

2 A proposition reaffirmed by the Court in *McKinney v University of Guelph*, 1990 CanLII 60 (SCC) [*McKinney*], and *Stoffman v Vancouver General Hospital*, 1990 CanLII 62 (SCC). The exception is when non-state institutions are performing government functions as effective agents of government: *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC) [*Eldridge*].

3 An oft-repeated promise first made in *Hunter et al v Southam Inc*, 1984 CanLII 33 (SCC), and *R v Big M Drug Mart Ltd*, 1985 CanLII 69 (SCC). For criticism, see e.g. Brian Slattery, "The *Charter*'s Relevance to Private Litigation: Does *Dolphin* Deliver?" (1987) 32:4 McGill LJ 905; Richard Moon, "*Dolphin Delivery* and the Court's Loss of Confidence" (2019) 39:1 NJCL at 123; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) at 48–49.

narrow and technical reasoning to insist judges are mere "neutral arbiters," not state actors, when deciding private disputes. *Dolphin Delivery* remains the Court's seminal statement on *Charter* application,[4] and a key reason for the *Charter*'s marginal relevance in private domains.[5]

Ironically, *Dolphin Delivery* is also notable for providing a powerful avenue — albeit indirect, and so-far largely unpursued — for the *Charter* to have significant impact in private domains. Though the Court insisted the *Charter* does not apply to private actors, and nor to courts deciding private disputes, it held as well that the *Charter does* apply to private *law*. The latter holding was *obiter*, ambiguous, and in conflict with the rest of the decision, Peter Hogg observed at the time.[6] But nearly a decade later, in the case of *Hill v Church of Scientology of Toronto* ("*Hill*"), the Court relied upon *Dolphin Delivery* to hold that while the *Charter* does not bind private *actors*, it does apply to private *law*.[7] "Horizontality" — a concept used by jurists to describe application of constitutional rights and values to private law and relations — thereby exists, at least in some form, in Canada.[8]

Although *Hill* might have prompted a radical remake of the common law on the basis of a robust doctrine of horizontality drawing on the *Charter*, for the most part nothing much happened. The *Hill* approach was followed by courts sporadically and in narrow circumstances over the years, while its wider potential was left unrealized. Thirty years after the case was decided, it is fair to say that *Hill* was a missed opportunity.

This paper poses a series of questions arising from *Hill* regarding the horizontal application of the *Charter*. What could have happened differently with *Hill*? What should have happened? Why did it not happen? Could it happen now, and, if so, what would the actual impact be? We answer these questions by examining a nascent horizontality jurisprudence in Canada, rooted in *Hill* (which, in turn, was rooted in *Dolphin Delivery*), that infuses *Charter* values into private law. Drawing on three streams of jurisprudence, we reveal how horizontality enables private litigants to invoke *Charter* rights and freedoms: 1) as *shields* to develop defenses against actions brought against them by other private actors (Part II); 2) as *swords* to infuse content into *existing* common law causes of action available to them (Part III); and 3) as *swords* to craft *new* causes of action (Part IV).

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4 Even as the Court recognized exceptional circumstances where courts *do* act as state actors in private disputes — see *R v Salituro*, 1991 CanLII 17 (SCC); *Dagenais v Canadian Broadcasting Corp*, 1994 CanLII 39 (SCC); *BCGEU v British Columbia (Attorney General)*, 1988 CanLII 3 (SCC).

5 It was, for example, a key authority relied upon by the Court in *McKinney*, where the Court famously stated: "Only government requires to be constitutionally shackled to preserve the rights of the individual." *McKinney*, *supra* note 2 at 232.

6 See Peter Hogg, "The *Dolphin Delivery* Case: The Application of the *Charter* to Private Action" (1987) 51:2 Sask L Rev at 273.

7 *Hill v Church of Scientology of Toronto*, 1995 CanLII 59 (SCC) [*Hill*].

8 See e.g. Ernest Weinrib, *Reciprocal Freedom: Private Law and Public Right* (Oxford: Oxford University Press, 2022) at ch 6; Stephen Gardbaum, "The 'Horizontal Effect' of Constitutional Rights" (2003) 102:3 Mich L Rev 387 at 395; Justice Aharon Barak, "Constitutional Human Rights and Private Law" (1996) 3:2 Rev Const Stud 218; Claudia E Haupt, "The Horizontal Effect of Fundamental Rights" in Giovanni De Gregorio, Oreste Pollicino & Peggy Valcke, eds, *Oxford Handbook On Digital Constitutionalism* (forthcoming). See also Eleni Frantziou, "The Horizontal Effect of the *Charter*: Towards an Understanding of Horizontality as a Structural Constitutional Principle" (2020) 22 Cambridge YB Eur Leg Stud 208.

As we explain below, courts have treated the consideration of *Charter* values as *mandatory* — a result of section 52, and the Court's interpretation thereof in *Dolphin Delivery* and *Hill* — when considering those values as shields in private law cases. When considering *Charter* values as swords, however, they have treated them as an *optional* influence. We argue that this distinction is unfounded, and that *Hill* prescribes mandatory consideration of *Charter* values in private law cases regardless of whether those values are invoked defensively or offensively. To that end, we uncover the beginnings of a potentially robust horizontality jurisprudence in Canada. Whether that potential is realized, and whether significant real-world impacts would follow if it were, are questions we examine in the paper's conclusion (Part V).

II. The *Charter* as Shield: Defences in Private Law

In 1986, *Dolphin Delivery* held that, by virtue of section 32 of the *Charter*, private actors, along with courts deciding private law disputes between private actors, are exempt from *Charter* duties. Rather, it was held, the *Charter* only applies vertically to relationships between individuals and the state.[9] Less prominent in the Court's decision was the further ruling that, by virtue of the supremacy clause in section 52 of the *Constitution Act 1982*, the *Charter* applies to the common law. Justice McIntyre wrote in no uncertain terms:

> Does the *Charter* apply to the Common Law? In my view, there can be no doubt that it does apply … To adopt a construction of section 52(1) which would exclude from *Charter* application the whole body of the common law which in great part governs the rights and obligations of the individuals in society, would be wholly unrealistic and contrary to the clear language employed in section 52(1) of the Act.[10]

In a series of subsequent decisions, the Court fashioned a horizontality jurisprudence (though without calling it that) out of the intrinsic tension between *Dolphin Delivery*'s section 32 and section 52 holdings.[11] This line of cases originally focused on the role of the *Charter* in the law of torts. In the first decision, *Hill*, the Court held that courts can, and indeed must, *per* section 52, assess whether common law rules comply with the *Charter*. The Court began by quoting the above-noted passage from *Dolphin Delivery*, stating, in relation to it, that Justice McIntyre had reasoned "that, in light of section 52(1) of the *Constitution Act*, 1982, 'there can be no doubt' that the *Charter* applies to the common law."[12] Therefore, the Court continued in *Hill*, "[i]t is clear from *Dolphin Delivery*, *supra*, that the common law *must* be interpreted in a manner which is consistent with *Charter* principles,"[13] even while that obligation could also be understood as "a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values."[14] Notably, in support of the latter source of obligation, the Court relied on cases that, by its own account, involved "situations where government action was based upon a common law rule"[15]

9 *Dolphin Delivery*, *supra* note 1 at 593-599.
10 *Ibid* at 592–593.
11 *Hill*, *supra* note 7; *M (A) v Ryan*, 1997 CanLII 403 (SCC) [*Ryan*]; *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 [*Pepsi-Cola*]; *WIC Radio Ltd v Simpson*, 2008 SCC 40 [*Simpson*]; *Grant v Torstar Corp*, 2009 SCC 61 [*Torstar*].
12 *Hill*, *supra* note 7 at para 83.
13 *Ibid* at para 91 (emphasis added).
14 *Ibid*.
15 *Ibid* at para 84.

— in other words, where there was a clear section 32 route to *Charter* application. In private litigation governed by common law, no such route exists, which explains why Justice McIntyre found it necessary to invoke section 52(1) in *Dolphin Delivery*, and why *Hill*, in turn, relied upon that aspect of *Dolphin Delivery* to hold that the *Charter* applies to the common law.

Having said that, the *Charter* does not "apply" in a usual fashion to common law rules invoked in private litigation. *Hill* reasoned that because private parties do not have *Charter rights* — a result, *per* section 32, of opposing private parties not having *Charter* duties — *Charter values*, not rights, were the appropriate measure of assessment. As the Court explained:

> Private parties owe each other no constitutional duties and cannot found their cause of action upon a *Charter* right. The party challenging the common law cannot allege that the common law violates a *Charter* right because, quite simply, *Charter* rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by section 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny. Therefore, in the context of civil litigation involving only private parties, the *Charter* will "apply" to the common law only to the extent that the common law is found to be inconsistent with *Charter* values.[16]

Accordingly, the Court further held, in relevant private law cases, courts should "balance" competing values — specifically, *Charter* values and the values underlying the common law norm at issue.[17] Where the former outweigh the latter, courts should modify the common law so as to bring it into compliance with *Charter* values.

Applying this methodology, *Hill* held that common law rules of defamation did not require modification because the values underlying them — the protection of reputation and privacy (which themselves have footings in the *Charter*) — outweigh the relevant *Charter* value: freedom of expression.[18] In two subsequent defamation cases, however, the Court went the other way. The first, *WIC Radio Ltd v Simpson*, held that the "honest belief" test, part of the fair comment defense to libel, had to be broadened to give *Charter* free speech values sufficient effect.[19] The second case, *Grant v Torstar Corp*, then followed a year later, narrowing the scope of a defamation rule that imposed liability on media outlets, even when they had taken all reasonable steps to ascertain truth, and holding that, unmodified, the rule unduly encroached upon *Charter* free speech values.[20]

In *Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, the Court went beyond defamation to apply its *Hill*-inspired horizontality approach in the context of labour relations. The

16 *Ibid* at para 95.

17 *Ibid* at paras 97, 98, 100, 107, 121.

18 In *Hill* (and cases that have followed it), the Court insists *Charter*-driven modifications of the common law must abide by the principle of incrementalism that traditionally governs judicial development of the common law. As Justice Cory says (at para 92): "Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values." "The *Charter*," Justice Cory continues, "represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*." *Hill*, *supra* note 7.

19 *Simpson*, *supra* note 11 at paras 1, 2, 36, 79.

20 *Torstar*, *supra* note 11 at paras 66–87.

facts were similar to *Dolphin Delivery*. A court had issued an injunction against secondary picketing based on a common law rule banning such picketing. The union mounted a *Charter* free speech challenge in response. The difference this time was that the union, following *Hill*, challenged the common law *rule* rather than the judicially ordered injunction. On that basis, it won. Emphasizing the element of free speech inherent to picketing, the Court held that a total ban on secondary picketing unduly encroached upon free speech values, and that such picketing had to be permitted by applicable common law rules unless it involved tortious or criminal conduct.[21] The common law rule was thereby modified to be consistent with the *Charter* value of freedom of expression.

In *M (A) v Ryan*, the Court extended horizontality beyond both tort law and freedom of expression. A psychiatrist, defendant in a civil suit for sexual assault, moved for disclosure of notes and reports from another psychiatrist who had treated the plaintiff in the aftermath of the alleged assault. The latter psychiatrist claimed the notes were privileged. Relying on *Hill*, Chief Justice McLachlin, writing for the majority, held that, at least in relation to sexual assault, common law privilege rules had to be modified to accord with *Charter* values of privacy (section 8) and equality (section 15). "The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong," she reasoned.[22] A potential result was "that the victim of sexual assault does not obtain the equal benefit of the law to which s. 15 of the *Charter* entitles her."[23] Overall, according to the Chief Justice, privilege rules that fail to protect confidential doctor/patient communications offend *Charter* equality values because they "perpetuate … the disadvantage felt by victims of sexual assault, often women[,] … plac[ing them] in a disadvantaged position as compared with the victim of a different wrong."[24]

Two key factors unite *Hill* and the cases that follow it. First, consideration of whether common law rules are consistent with *Charter* values, and modification of those rules if they are not, is understood as *mandatory*, in the sense that section 52 *requires* courts to engage in this task. These mandatory duties differ, of course, from mandatory duties to apply the *Charter* directly to state actors and actions arising from section 32. Where a state actor is involved (as in vertical application cases), section 52 *combines* with section 32 to apply the *Charter* to that actor *and* its decisions, including legislation. Where there is no state actor (as in horizontal application cases), section 52 must do all the work on its own, since under section 32 the *Charter* does not apply to private actors. The result is a narrower but nonetheless *mandatory* duty, as articulated in *Hill*, to protect *Charter* values rather than rights.

Second, in these cases, *Charter* values are deployed as *shields* rather than *swords*, as defenses to actions based on common law rules, but not themselves as bases of causes of action. In the next section of the paper, we examine another line of horizontality cases in which, unlike in *Hill* and its progeny, *Charter* values are invoked offensively rather than defensively. As we explain — and critique — where the *Charter* is used as a sword, courts view *Charter* values as *optional* rather than mandatory considerations in assessing common law norms.

21 *Pepsi-Cola*, *supra* note 11 at paras 65–107.
22 *Ryan*, *supra* note 11 at para 30.
23 *Ibid.*
24 *Ibid.*

III. The *Charter* as Sword I: Content for Existing Causes of Action in Private Law

Public policy doctrines are "channel[s] through which constitutional values flow into private law," Aharon Barak observes in describing a prominent strain of horizontality jurisprudence worldwide.[25] Such doctrines, which operate as causes of action, thus provide vehicles for parties in private litigation to invoke constitutional values *offensively*.

In Canada, that approach appears in Justice Brown's concurring majority opinion in *Uber Technologies Inc v Heller*.[26] Mr. Heller, an Uber Eats driver, sued Uber for failing to comply with employment standards legislation. A clause in the standard form agreement between him and Uber required disputes to be heard and decided by an arbitrator in the Netherlands. The clause purported to oust the jurisdiction of the superior courts, and to thereby remove Mr. Heller's case from the Canadian legal system. Justice Brown held the clause was contrary to public policy because, among other things, it undermined the constitutional values of rule of law, and "access to justice [which] is constitutionally protected through s. 96 of the *Constitution Act*, *1867*."[27]

Courts have similarly relied upon constitutional values as sources of public policy in trust cases. In *Canada Trust Co v Ontario Human Rights Commission*, for example, the Court refused to enforce a blatantly racist trust on the ground it violated public policy. According to Justice Robins, writing for the majority, the principles of public policy could be found in "the democratic principles governing our pluralistic society in which equality rights are constitutionally guaranteed."[28] Justice Tarnopolsky stated in concurring reasons that the principles of public policy could be "gleaned from a variety of sources, including provincial and federal statutes, official declarations of government policy and the Constitution."[29] *Canada Trust* has been widely followed by courts across the country to support non-enforcement of discriminatory trust provisions and trustee decisions.[30]

Two features of *Uber* and *Canada Trust* distinguish them from the *Hill* line of cases. First, as already noted, constitutional values are, through the channel of public policy doctrines, relied upon by parties offensively — that is, as swords, not shields. Second, *Charter* values are treated as *optional* considerations rather than mandatory norms. The latter point is under-

25 Barak, *supra* note 8 at 237.

26 *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Uber*].

27 *Ibid* at para 120. The other majority judges reached the same result on the basis of the doctrine of unconscionability, *per* Justices Abella and Rowe. In *Pearce v 4 Pillars Consulting Group Inc*, 2021 BCCA 198 [*Pearce*], the Court followed Justice Brown's *Uber* opinion to hold that "a clause that effectively prohibits a party's ability to have recourse to a justice system to enforce their agreement undermines the administration of justice, the rule of law, democracy and commercial certainty" (at para 217) and is thereby contrary to public policy.

28 *Canada Trust Co v Ontario Human Rights Commission*, 1990 CanLII 6849 (ONCA) at 23[*Canada Trust*].

29 *Ibid* at 47.

30 See e.g. *Fox v Fox Estate*, 1996 CanLII 779 (ONCA); *Peach Estate (Re)*, 2009 NSSC 383; *McCorkill v Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased*, 2014 NBQB 148; *Grams v Babiarz*, 2015 SKQB 374 [*Grams*]; *Royal Trust Corporation of Canada v The University of Western Ontario et al*, 2016 ONSC 1143. For commentary, see Jane Thomson, "Discrimination and the Private Law in Canada: Reflections on *Spence v BMO Trust Co*" (2019) 36:2 Windsor YB Access Just 138.

lined by the notable absence in these cases of *any* reference to *Hill* and its section 52 analysis. Instead, courts canvas various sources of public policy, constitutional values (including those from the *Charter*) being among them, but seemingly holding no special, let alone mandatory, place.[31]

Grams v Babiarz is the one exception, which arguably proves the rule. A son of the deceased challenged the validity of his father's will on the ground it excluded him because of his sexual orientation and was thereby contrary to public policy. The Court followed the *Canada Trust* line of cases, but uniquely invoked *Hill* to emphasize that consideration of constitutional values is mandatory in sword as well as shield cases. "While not expressly considered in [the *Canada Trust*] line of cases," *Grams* holds, "it seems appropriate to … observe that the Supreme Court of Canada has directed [in *Hill*] that the values found in the *Canadian Charter of Rights and Freedoms must be considered* when analysing and considering common law principles."[32] *Grams* remains an outlier, however.

A further, and important, observation about *Uber* and the *Canada Trust* line of cases is that while, in these cases, public policy doctrines serve as channels through which constitutional values flow into private law, those doctrines are not the only possible channels. In theory, any private law doctrine might channel constitutional values. Other private law doctrines — such as the contract law doctrines of unconscionability and good faith — should, in principle, also serve as entry points for constitutional values into private law.[33] The overarching principle is not about public policy *per se* but rather the possibility of common law doctrines drawing upon constitutional values for content. Canadian courts can find guidance in comparative jurisprudence when engaging in this approach. Recently, for example, the South African Constitutional Court held that the abuse of process doctrine served as a channel for constitutional free speech values to flow into private law. According to that Court, strategic lawsuits against public participation (SLAPPs) offend common law abuse of process rules because "court process is not being used to resolve a genuine dispute, but rather is employed to achieve a result that undermines the [free speech] rights in the Constitution."[34]

Charter values have not yet flowed into the law of contract in Canada under the doctrine of public policy.[35] A case that could change that state of affairs, *Cool World v Twitter,* thereby warrants close consideration.[36] The facts are straightforward. Clause 4 of Twitter/X's Terms of Service ("Terms"), which is part of its User Agreement, grants the platform discretion to ban users, suspend Tweets, hide Tweets, and refuse to promote Tweets, "for any or no reason at our convenience."[37] Twitter exercised that discretion — an "absolute discretion," by its own

31 This aligns with what Weinrib describes as the "determinacy function" of horizontality, whereby "constitutional rights figure as sources of legal reasoning that, like other sources of legal reasoning, impart specificity to more abstractly formulated requirements for liability." Weinrib, *supra* note 8 at 132.

32 *Grams*, *supra* note 30 at para 23 (emphasis added).

33 As was recognized by the court in *Cool World Technologies Inc v Twitter Inc*, 2022 ONSC 7156 [*Cool World*].

34 *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others*, [2022] ZACC 37 at para 94 [*Mineral Sands*].

35 In Canada, the doctrine of public policy was articulated and developed by *Tercon Contractors Ltd v British Columbia (Transportation and Highways),* 2010 SCC 4 [*Tercon*]. Recall, *Uber* concerned constitutional values, but not from the *Charter*.

36 The authors are co-counsel to Cool World.

37 *Cool World*, *supra* note 33 at para 12.

account — to refuse to promote a Tweet publicizing the documentary film *The New Corporation*.[38] The Tweet's content was comprised of a link to the film's trailer. The latter includes commentary from Harvard politics professor Michael Sandel, Unilever Canada executive John Coyne, Grand Chief Stewart Phillip of the BC Union of Indian Chiefs, philanthropist Bill Gates, Economist Robert Reich, and US Congressional Representative Alexandria Ocasio-Cortez.[39]

Cool World challenged Twitter's rejection of the Tweet through the platform's internal complaints procedure. In response, it received an automated reply pointing to the platform's "sensitive targeting" ad policy.[40] When Cool World asked Twitter to advise what content in the trailer offended the policy, Twitter replied: "Our team reviewed your content and confirmed that it violates our Political Content policy." Cool World wrote back inquiring how exactly the trailer violated the latter policy, and Twitter replied: "Our team manually reviewed your content and confirmed that it violates our Inappropriate Content policy." Frustrated by the Kafkaesque exchange, likely with AI bots, Cool World asked to speak to someone at Twitter. It heard back from a Twitter employee, who wrote: "Taking another look, I am confirming that it seems that the tweets have been halted for violating our sensitive/inappropriate content as well as our political policy."

Cool World replied that *The New Corporation* had been recognized by numerous mainstream media outlets and the documentary film community as credible,[41] prompting the Twitter employee to respond:

> Twitter does not have the resources to deem all of the content on our platform as "credible" as many areas are quite nuanced and subjective. As mentioned on our policy page, Twitter *globally* prohibits the promotion of political content . … Looking at the trailer it does seem that there are some political undertones to the content.

Cool World sued Twitter for breach of contract. Twitter brought a motion to strike the application, which the Ontario Superior Court dismissed.

Horizontality lies at the core of Cool World's argument, which makes three main points. First, Twitter/X's absolute discretion under clause 4 of the Terms authorizes it to restrict any and all speech, including that which the Supreme Court of Canada has deemed "high-value

38 *The New Corporation: The Unfortunately Necessary Sequel* (Gant Street Productions, 2020) [*The New Corporation*] was written and co-directed by one of the authors of this paper: *Cool World*, *supra* note 33 at para 10.

39 For a transcript of the trailer see Cool World's "Fresh as Amended Notice of Application" [*Cool World NOA*] at 8–10.

40 The following facts appear in the *Cool World NOA* at 17–21.

41 *The New Corporation* film was commissioned by the Canadian broadcaster Crave (Bell Media), and funded by, among others, the Rogers Documentary Fund, Telefilm Canada, and the Canada Media Fund. It premiered at the Toronto International Film Festival in September 2020 and was released in Canada by Crave in February 2021. It has played at numerous international film festivals, received and been nominated for awards (including best documentary writing and directing at the Canadian Screen Awards), is streamed by major streamers (including Amazon Prime and Apple TV), and is lauded by critics, including in reviews appearing in (among many other outlets) the *Globe and Mail* ("searing, clever and essential … the film is right up to the minute, including COVID-19 and Black Lives Matter"); *Variety* ("It shakes up your perceptions. And it makes you suck in your breath"); and *Forbes Magazine* ("The must-see documentary of the year").

speech" — i.e. speech about social and political issues that is informative and ideas-driven and that causes no judicially recognized harm.[42] The trailer is emblematic of such speech, Cool World argued. Based upon *Charter* jurisprudence, a government or legislature would be barred from restricting it in the way Twitter did.

Second, Twitter/X's absolute power to restrict content operates in a *de facto* (albeit not *de jure*) public arena. The platform is routinely relied upon by politicians, officials, and public institutions to make important statements and announcements, to communicate with citizens and media, and to relay critical information, including on social, political, and public policy matters. And citizens and organizations widely use the platform to engage among themselves on social and political issues.

Third, and following from the first two points, Cool World argued — relying on the *Hill* line of cases, *Uber*, *Canada Trust*, *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, comparative horizontality jurisprudence, and scholarly commentary — that Twitter's absolute discretion to ban high-value speech in a *de facto* public arena substantially encroaches upon *Charter* free speech values, and therefore runs afoul of the contract law doctrine of public policy. That argument was accepted by Justice Myers as disclosing a sufficiently plausible cause of action to justify proceeding to a hearing of the case on its merits:

> In *Uber Technologies Inc. v Heller* … Brown J. premised his finding of invalidity of the arbitration clause on public policy. Moreover, he held that public policy in that private contract case was informed by constitutional norms related to access to justice … [The Applicants] referred to numerous cases in which the principles are said to have evolved so that the current mode of expression is that the common law is shaped by public policy as informed by *Charter* values. This effectively provides a defence to the enforcement of particular contract terms where the common law enforcement of freedom of contract is outweighed by applicable public policy informed by *Charter* values … Were I able to hold that on the facts as pleaded it is not possible for a court to ever hold that freedom of expression can inform a public policy that can outweigh Twitter's absolute discretion to refuse high value, non-harmful speech, I could strike [the] claim. But the applicants plead particulars to support their allegations that Twitter has attained a unique significance and that it acts discriminatorily and arbitrarily. I cannot say that it is not possible for a judge to find … that public policy at common law may evolve to deal with the new world of online mass communication and social media.[43]

If successful, *Cool World* will significantly expand Canada's horizontality jurisprudence. A victory would confirm that common law public policy doctrines are portals through which constitutional values radiate into the law of contract. More particularly, the case would provide a framework for judicial oversight of Twitter/X's (and perhaps other social media platforms') restrictions on high-value speech. It might even provide grounds for courts to require platforms to *not* permit certain kinds of speech — one can imagine, for example, a horizontality argument based upon equality values, with complainants alleging that a platform's inclusion of hate speech offends those values and that therefore, as a matter of public policy pertaining to enforcement of Twitter/X's User Agreement, a platform must prohibit such speech.

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42 *R v Keegstra*, 1990 CanLII 24 (SCC) at 762; *Harper v Canada (Attorney General)*, 2004 SCC 30 at para 1 (dissenting, but not on this point); *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 31 at para 75; *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para 7; *Irwin Toy Ltd v Quebec (Attorney General)*, 1989 CanLII 87 (SCC).

43 *Cool World*, *supra* note 33 at paras 15, 16, 18.

Nonetheless, it is important to recognize that *Cool World*'s approach to horizontality — based, as it is, on current case law, and the case's inherent logic — is limited by its dependence upon an *existing* cause of action (public policy) to channel *Charter* values into private law. Within its terms, *Charter* values cannot themselves generate causes of action, but can only provide content for causes of action that already exist. One case in Canada transcends that limitation, however: *Jones v Tsige*.[44]

IV. The *Charter* as Sword II: New Causes of Action

In *Jones*, one private actor sued another for a violation of privacy. The claim was allowed, despite there being no existing cause of action on which to base it. Invoking the *Hill* line of cases, Justice Sharpe, writing for a unanimous court, crafted a new cause of action — a tort of intrusion upon seclusion — based upon the *Charter* value of privacy. "While the *Charter* does not apply to common law disputes between private individuals," he wrote:

> … the Supreme Court has acted on several occasions to develop the common law in a manner consistent with *Charter* values [citing *Hill* and related cases] … The explicit recognition of a right to privacy as underlying specific *Charter* rights and freedoms, and the principle that the common law should be developed in a manner consistent with *Charter* values, supports the recognition of a civil action for damages for intrusion upon the plaintiff's seclusion.[45]

Jones is significant for reading the *Hill* line of cases as support for an *offensive* deployment of horizontality, and particularly for holding that constitutional values are capable of generating *new* causes of action, not only content for existing ones (as in the aforementioned "Sword I" cases).

To illustrate the potential synergy of *Jones* and *Hill*, let us consider how their combined effect might mobilize *Charter* equality values to require creation of a new common law tort of discrimination. In the pre-*Charter* era, the Supreme Court of Canada notoriously refused to create such a tort in *Christie v York*.[46] The facts bear repeating. On July 11, 1936, Fred Christie, a Black Montrealer, entered the York Tavern, an establishment attached to the Montreal Forum. He ordered three glasses of beer, one for himself, and one for each of two friends who

44 *Jones v Tsige*, 2012 ONCA 32 [*Jones*].

45 *Ibid* at paras 45–46.

46 *Christie v York*, 1939 CanLII 39 (SCC) at 142 [*Christie*]. *Christie* was followed by the majority in *Rogers v Clarence Hotel*, 1940 CanLII 247 (BCCA), a case with similar facts, on the ground that there was nothing particular to Quebec law about "freedom of commerce." That principle applied in common law jurisdictions as well. Justice O'Halloran dissented, claiming that, unlike Quebec law, the common law did not countenance refusal of a tavern owner to provide service as that was not a racially-based cause for refusal. In *Seneca College v Bhadauria*, 1981 CanLII 29 (SCC) [*Bhadauria*] (also a pre-*Charter* case), Chief Justice Laskin, writing for a unanimous Court, effectively confirmed *Christie*. Canvassing case law in the wake of *Christie*, he held that, to the extent some of these decisions, or dissenting opinions within them (including Justice O'Halloran's), showed an inclination towards a common law remedy for discrimination that was confined to situations (such as innkeepers' obligations, or the right to vote) to which public obligations attach. Cases outside those realms (including *Christie*), per Chief Justice Laskin, "exhibit a strict *laisser faire* policy, even where the business or service whose facilities were denied on the ground of colour or race or ancestry was under government licence." Accordingly, the Court held, the case law provides no support for a tort of discrimination, and jettisoned the possibility thereof by the fact that the area is covered by a comprehensive legislative code.

were with him, one Black, the other White. A long-time fan of the Montreal Canadians, and a season tickets holder, Mr. Christie regularly had drinks at the tavern and had always been served without incident. On this evening, however, the night of a boxing match, not a hockey game — and a match some worried could spark racial tensions in the city — he was refused service by a waiter who confessed the owner had told him not to serve Black customers.[47] Mr. Christie brought an action against the tavern claiming $200 in damages for humiliation. His claim was rejected by the lower court. The Supreme Court upheld that decision, invoking freedom of commerce as the reason. In the majority's words: "Any merchant is free to deal as he may choose with any individual member of the public."[48] Private law had no remedy for racism.

Does *Christie* remain good law in the post-*Charter* era, in light of *Hill*? *Vriend v Alberta* is interesting in this regard. Though the creation of a common law tort of discrimination was not expressly at issue before the Court, the case can be read as implicitly confirming *Christie*.[49] On January 28, 1991, Delwin Vriend, a laboratory coordinator at King's College in Edmonton, was fired because he was gay. An exemplary employee with positive evaluations, and to whom the College had granted salary increases and promotions over the years, Mr. Vriend appealed the decision and applied for reinstatement. The College refused his request. He lodged a complaint with the Alberta Human Rights Commission under the *Individual's Rights Protection Act* ("*IRPA*").[50] But the Commission dismissed his complaint, since sexual orientation was not a protected ground under the *Act*. Mr. Vriend ultimately prevailed, however, when the Supreme Court ruled in his favour. According to the Court, section 15(1) of the *Charter* required the *IRPA* to protect people from discrimination on the basis of sexual orientation, despite *IRPA*'s omission of that ground.

The implicit premise of *Vriend* was that there was no common law cause of action for discrimination on the basis of sexual orientation. Had Mr. Vriend been unable to find a legislative hook for his case, the Court appears to assume he would have suffered the same fate as Mr. Christie. This was indeed a possibility in light of then Alberta Premier Ralph Klein's threats, after the Court's decision, to invoke section 33 of the *Charter*, and to repeal the *IRPA* in its entirety. The Premier did neither, but had he done so, Mr. Vriend would have been denied a legislative remedy, and, as a consequence of *Christie* — and the *Vriend* Court's seeming acceptance of it — he would have had no remedy at common law.[51] It is, of course, impossible to know what the *Vriend* Court would have done if, hypothetically, Mr. Vriend had argued — in place of, or in addition to, his *Charter* challenge to the *IRPA* — that the College had committed a *Charter*-value-rooted tort by discriminating against him. Would the Court have followed

47 Maya Johnson & Selena Ross, "The story of Fred Christie, a Black Montrealer whose report of discrimination has long been forgotten", *CTV News* (2 February 2022), online: <montreal.ctvnews.ca> [perma.cc/YLH7-TV2B].

48 *Christie*, *supra* note 46 at 152.

49 *Vriend v Alberta*, 1998 CanLII 816 (SCC) [*Vriend*].

50 *Individual's Rights Protection Act*, RSA 1980, c I-2 [*IRPA*].

51 The Court was clear in *Vriend* that reading sexual orientation into the *IRPA* was an extension of the *IRPA* based on its under-inclusiveness. In the absence of the *IRPA* — i.e. if it were repealed — there would be no basis, at least on the Court's reasoning in the case, for requiring Alberta to protect against sexual orientation discrimination. It was the *IRPA* that caused the violation of section 15(1). See *Vriend*, *supra* note 49 at paras 65, 66, 86, 88.

Christie to rule out the possibility? Or would it have claimed (as discussed further below) that the *IRPA*, as a comprehensive legislative regime, overrode any possible tort? Or overturned *Christie* and provided Mr. Vriend a remedy? We cannot know.

What we do know, however, is that *Christie*, *Vriend*'s seeming complicity with *Christie*, and the absence of any apparent challenge to *Christie* in extant common law (other than, indirectly, in *Jones*) together yield three propositions: first, private law is largely impervious to human rights norms and values; second, legislation is thereby necessary to protect those norms and values; and third, such legislation can be found to breach the *Charter* for omissions as well as for direct restrictions. It follows that discriminators like the York Tavern and King's College — guilty of precisely the kind of blatant discrimination the *Charter* prohibits for state actors — are constrained neither by the Constitution (as private actors, they lie beyond the *Charter*'s reach) nor by the common law.

The limited scope of the *Charter*'s application, and private law's apparent immunity to *Charter* values in crafting new causes of action, belies a common intuition that *Christie* would be decided differently today because of the *Charter*.[52] As the Federal Court of Appeal observed in 1998 in *Still v MNR*, "even without human rights legislation, we know that the case [i.e. *Christie*] would not be decided the same way today."[53] It is not, however, clear on what basis *Still* made this observation, beyond hopeful conjecture. It did not cite *Hill*, despite the fact that *Hill* is a (and perhaps the only) plausible basis for deciding *Christie* differently. And *Jones* — which, as noted above, would be a strong basis for a new tort of discrimination — had not yet been decided.

Curiously, now a dozen years after having been decided, *Jones*' apparent potential to move Canadian jurisprudence towards a more robust horizontality is yet unrealized. Though occasionally cited since it was decided in 2012, no court has taken the case beyond the factual context of privacy in which it arose. And while the Supreme Court of Canada mentioned *Jones* on one occasion, in *Nevsun*, it merely noted the tort-*Charter* connection at the heart of *Jones*, without confirming, denying, or elaborating upon it.[54] Overall, evidence is scant that *Hill*, even

52 This intuition is typically based on a sense that it is arbitrary and wrong for constitutional values to be excluded from horizontal application in the private sphere and to be limited to vertical application between individuals and the state. The justification for such exclusion typically centres on the idea that liberty is enhanced by leaving individuals unencumbered by constitutional obligations (see e.g. *McKinney*, *supra* note 2 per LaForest at 262-263). Considering Mr. Christie's liberty to have a beer with his friends, however, quickly casts doubt on that rationale. As Stephen Gardbaum explains in Gardbaum, *supra* note 8 at 395: "The horizontal position expressly rejects a public-private division in constitutional law, and its justifications reflect a well-known critique of the 'liberal' vertical position. At least in the modern context, constitutional rights and values may be threatened by extremely powerful private actors and institutions as well as governmental ones, and the vertical position automatically privileges the autonomy and privacy of such citizen-threateners over that of their victims. Thus, the autonomy of racists, sexists, and harmful speakers is categorically preferred to that of those harmed or excluded by their actions, without any obvious justification in terms of an overall assessment of net gains and losses in autonomy. Moreover, since the vertical position does not prevent private actors from being regulated by statute or common law, it is unclear why autonomy is especially or distinctively threatened by constitutional regulation."

53 *Still v MNR*, 1997 CanLII 6379 (FCA) [*Still*].

54 According to Weinrib, *Jones*' approach to horizontality is ultimately a conservative one. *Charter* values are treated as just one among other bases of support for a new action (including legislation, international law norms, and scholarly opinion), only incremental change to common law rules is supported by the case, and

with the *Jones* gloss, has made the common law any more receptive to *Charter* equality rights-based (or indeed *any* rights-based) new causes of action than it was in Mr. Christie's time. One searches contemporary contract and tort law in vain for remedies helpful to a person in Mr. Christie's position. Legislative protection is, of course, abundant, and a person in his position today could rely upon it, including by bringing the *Charter* to bear upon underinclusive legislation, as Mr. Vriend did. Indeed, the truly significant change since *Christie* is that legislation has ousted the common law in relation to human rights. In the meantime, though, the common law has remained largely untouched by *Charter* values.

V. Conclusion

Robust horizontality is a theoretical possibility in Canada, though it remains elusive in practice. Jurisprudential support exists, in varying degrees, for *Charter* values to serve as: 1) shields to develop defences against claims based on common law rules that adversely impact those values; 2) swords that provide content for existing causes of action, typically (though not exclusively) based on public policy doctrines; and 3) swords that are sources of new causes of action. Whether these trends will coalesce into robust horizontality remains unclear.

To this point, *Jones* is the only non-Supreme Court decision that has relied upon horizontality as a sword to create a new cause of action. While *Halpern v Canada (Attorney General)* appears to be an example of robust horizontality — because the Court held that a common law rule excluding same-sex marriage breached section 15(1) of the *Charter*, and had to be reformulated in non-exclusory terms — the case, by the court's own description, involved a "government action or inaction," and therefore was not an example of the application of the *Charter* to private law governing private action.[55] In *McKitty v Hayani*, by contrast, both parties were private actors, and the question was whether *Charter* freedom of religion values required modification of the common law definition of death, although the Court refused to decide the issue due to a deficient record.[56] And while the *Cool World* case holds promise for expanding horizontality, as we have suggested above, it remains undecided on the merits.

Failure of judicial imagination and courage are likely in part responsible for the limited range of horizontality thus far. But there are two other factors as well. First, to the extent *Charter* values are understood as optional considerations when deployed as "swords," they can legitimately be ignored or given little weight by courts in such contexts. Horizontality would surely be more prominent and impactful in Canadian law if courts understood *Charter* values to be mandatory considerations in private law, whether raised offensively or defensively. This underlines why it is so important that courts understand there is no principled distinction between defensive and offensive roles of *Charter* values in private law, meaning there is no justification for eschewing a mandatory approach in the latter.

Charter values, on their own, are neither sufficient nor necessary to initiate such change (Weinrib, *supra* note 8 at 137-138). We argue, *contra*, for *Jones* having greater significance, especially in light of the Court's reliance on the *Hill* line of cases and its logic of mandatory consideration of *Charter* values rooted in section 52, as well as its support of a *Charter*-generated new cause of action.

55 *Halpern v Canada (Attorney General)*, 2003 CanLII 26403 (ONCA) at para 29 [*Halpern*].

56 *McKitty v Hayani*, 2019 ONCA 805.

That is especially so in light of the Court's decision in *Hill*, which gave effect to *Dolphin Delivery*'s hidden promise. In no uncertain terms, the Court held that section 52 *requires* courts to assess whether common law is consistent with *Charter* values, and to refashion whatever inconsistencies they find into consistencies. Nothing in *Hill* limits section 52's requirement to defenses to actions; and nothing in section 52 excludes inconsistencies arising out of causes of action being absent or incomplete. *Grams* and *Jones* each play out the logic of *Hill* and its mandatory application of section 52, relying respectively on the case as authority for considering *Charter* values in relation to creating new content for an existing cause of action (*Grams*), and creating a new cause of action (*Jones*). In short, by uniting offensive invocations of *Charter* values with the *Hill* line of cases, *Grams* and *Jones* support courts' mandatory obligations to consider the impact of *Charter* values on the common law, whether those *Charter* values are raised as shields or as swords.

Second, the limited range of horizontality thus far is a product of the paucity of areas where it has room to operate. Horizontality is only possible when two conditions are met: private law governs, and *Charter* values are relevant to private action. Where the latter condition holds — in areas like services, employment, housing, environmental protection, health care, and education — legislation tends to govern, meaning the former condition is not met. Today, for example, Mr. Christie would pursue a remedy under human rights legislation, as did Mr. Vriend. And he would be barred from relying on a horizontality-inspired tort of discrimination, even if one existed, because common law governance of human rights has been ousted by comprehensive legislative codes.[57] What is true of services and employment is true of most areas where *Charter* values might be vulnerable. Currently covered by comprehensive legislation, they have little room for common law rules, and therefore, horizontality.

It is possible, however, that jurisprudence is evolving towards more complementary operation of common law and legislative rules, at least where the former do not conflict with the latter, and where there is no clear legislative intent to override common law.[58] In *Hopkins v Kay*, for example, the Ontario Court of Appeal held that a claim concerning privacy in the health context based upon *Jones* could proceed despite existence of the *Personal Health Information Protection Act* ("*PHIPA*"). Allowing such an action would not "undermine the *PHIPA* scheme," the Court held, and nor would it be a case of a "common law action … 'circumventing' any substantive provision of *PHIPA*."[59] This is not the place to delve deeply into the jurisprudence on principles governing the interaction between legislation and common law,[60] but suffice it to say that the nature of that relationship in any given place or time will determine horizontality's actual scope and impact, whatever its theoretical possibilities. What can be said with confidence is that the most likely domains for horizontality's development are those where legislation is absent.[61]

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57 *Bhadauria, supra* note 46*; Honda Canada Inc v Keays*, 2008 SCC 39.

58 For comprehensive review of case law on legislation-common law interactions, see *Gauthier v Air Canada*, 2024 BCSC 231 at paras 151–163.

59 *Hopkins v Kay*, 2015 ONCA 112 at para 52.

60 See Andrew Burrows, "The Interaction between Common Law and Statute" in Andrew Burrows, ed, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge: Cambridge University Press, 2018) at 45-87.

61 Identifying areas of likely horizontality development is not the purpose of this paper, though it can be said here that reviewing horizontality cases from other jurisdictions can be helpful. *Cool World*, for example,

Having said that, it is important to note that the absence or presence of legislation in any given place or time is politically contingent and fungible. As such, legal openings for horizontality to take root are not set in stone. Imagine, for example, Mr. Vriend's fate had the Alberta government repealed the *IRPA* in its entirety to avoid the Supreme Court's ruling. Like Mr. Christie, he then would have had no legislative rights or remedies. But following *Hill* and *Jones*, as we suggest above, in the absence of an operative *IRPA* he might have argued that the horizontal application of *Charter* equality values yielded a tort of discrimination and sued on that basis.

Following that same logic, horizontality may have potential to protect *Charter* values in areas where protective legislation governing private relationships has been repealed or rolled back.[62] That could have significant implications for *Charter* protection in the future. With illiberal populism on the rise in Canada and in the world more generally, and neoliberal policies of deregulation and privatization in full swing, continued legislative protection of human rights in private realms cannot necessarily be taken for granted. It is conceivable that a future provincial or federal government would substantially diminish such protection. The same holds true of legislative protections in other areas of inequality and disempowerment among private actors — areas in which *Charter* values are therefore vulnerable — such as services, employment, housing, environmental protection, health care, and education. Diminishment and repeal of legislation in such areas would result, by default, in governance by common law rules and principles, which would thus create fertile ground for horizontality. Today, with illiberalism and neoliberalism synergistically combining to diminish the social state, and protective legislative regimes along with it, horizontality could thereby become an important protector of people's rights and freedoms.[63] And, ironically, we would have *Dolphin Delivery* to thank for that.

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draws on a pair of German decisions of the Federal Court of Justice that similarly apply constitutional free speech norms to social media platform user agreement restrictions: III ZR 179/20 and III ZR 192/20 (on July 29, 2021). The aforementioned South African case of *Mineral Sands* demonstrates a horizontality-inspired challenge to SLAPPS that could be deployed in Canada, at least in provinces lacking legislation (BC, Ontario, and Quebec are the only provinces with anti-SLAPP legislation). The point is that while legislation currently governs many areas where *Charter* values are at risk, it does not govern all, and comparative jurisprudence can be helpful in identifying fertile ground for horizontality.

62 We do not explore here whether the *Charter* requires enactment of legislation regulating private sector relationships. In *Ferrel v Ontario (Attorney General of)*, 1998 CanLII 6274 (ONCA), for example, the Ontario Court of Appeal left open whether section 15 required the enactment of legislation to prohibit employment discrimination. *Vriend* (*supra* note 49 at paras 63-64) and *Eldridge* (*supra* note 2 at para 73) left the same question open as well. This proposition has been considered in the context of section 2(d)'s guarantee of freedom of association, which the Court has interpreted to impose a positive obligation to protect certain labour rights for vulnerable workers. For a discussion of this jurisprudence, see Joel Bakan & Sujit Choudhry, "Constitutional Labour Rights in the Gig Economy: Digital Platform Workers and Section 2(d) of the *Charter*", McGill L J (forthcoming). See also cases involving section 7 and 15 *Charter* challenges to governments' climate change policies: *Mathur v Ontario*, 2024 ONCA 762 and *La Rose v Canada*, 2023 FCA 241.

63 Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, Massachusetts: Harvard University Press, 2018); Joel Bakan, *The New Corporation: How "Good" Corporations Are Bad for Democracy* (Toronto: Penguin, 2020).