Form 10
[Rule 3.25]

COURT FILE NUMBER	
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF(S)	ALBERTA ENTERPRISE GROUP AND INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION
DEFENDANT(S)	CANADA (ATTORNEY GENERAL)
DOCUMENT	**STATEMENT OF CLAIM**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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NOTICE TO DEFENDANT(S)

You are being sued. You are a defendant.

Go to the end of this document to see what you can do and when you must do it.

Basis for this claim:

I. OVERVIEW

1. The question of how to balance economic and resource development with sound environmental stewardship is a defining public policy issue of our times, upon which there is a wide range of views.

2. There is no single orthodoxy or 'right answer' to the enormously complex public policy questions that arise in this context.

3. That is why the public must be entitled to the broadest possible exchange of information, views, and opinions on these issues, from a diverse range of

perspectives, in order to inform their economic, personal, and democratic choices.

4. In a free and democratic society, it is not legally open to a government to control or manipulate this public discourse, by erecting obstacles that prevent certain participants in this public policy debate from providing valuable information and unique opinions and viewpoints for the public to consider.

5. However, that is precisely what the federal government has done in enacting sections 236 and 254 of the *Fall Economic Statement Implementation Act, 2023*, amending the deceptive marketing practices provisions of the *Competition Act* ("**Impugned Provisions**").

6. The Impugned Provisions prohibit persons from making representations, for the purpose of directly or indirectly promoting any business interest, about the environmental benefits of products, businesses, or activities unless those representations can be proven, to the satisfaction of a government tribunal, to have been based on adequate and proper 'tests' or 'methodologies'.

7. Even if the representation in question is true, reasonable, or defensible in light of the known evidence – and therefore important information for the public to consider – it is still prohibited by the Impugned Provisions if it was not based, at the time it was made, on a process of verification that the government deems sufficient.

8. Therefore, the direct legal result of the Impugned Provisions is to prohibit a range of expression in relation to the environmental impacts of businesses or their activities, including expression that is true, reasonable, or defensible in light of the known evidence.

9. In addition to the expression that is directly prohibited, the Impugned Provisions also create an additional "chilling effect", by deterring the expression of information or viewpoints about the environment that may be perfectly lawful under the Impugned Provisions.

10. Former Chief Justice McLachlin explained the "chilling effect" as follows:

> A second characteristic peculiar to freedom of expression is that limitations on expression tend to have an effect on expression other than that which is their target. In the United States this is referred to as the chilling effect. Unless the limitation is drafted with great precision, there will always be doubt about whether a particular form of expression offends the prohibition. There will always be limitations inherent in the use of language, but that must not discourage the pursuit of the greatest drafting precision possible. The result of a failure to do so may be to deter not only the expression which the prohibition was aimed at, but legitimate

> expression. The law-abiding citizen who does not wish to run afoul of the law will decide not to take the chance in a doubtful case. Creativity and the beneficial exchange of ideas will be adversely affected.
>
> *R. v. Keegstra*, [1990] 3 SCR 697, at 850, per McLachlin J.

11. That is precisely what will occur – and indeed already has occurred – as a result of the Impugned Provisions.

12. That is, many businesses and industry associations will refrain making statements about the environmental impacts of businesses or industries at all, even statements that may turn out to have been based on standards of verification deemed acceptable by the government, as a result of the vague and unclear nature of the applicable standards, the uncertainty as to the outcome of any tribunal process, and the risk of significant penalties if the tribunal believes the verification process undertaken was not sufficient.

13. Others will refrain from lawful expression in order to avoid the significant financial and reputational harm they may face as a result of being dragged through a costly and public tribunal proceeding, even if they believe that they would be ultimately successful before the tribunal.

14. The profound "chilling effect" these new provisions will have on free expression in this context is confirmed by the fact that large segments of the business and resource development community have already withdrawn a range of public statements regarding the environmental impacts of their products or activities, and have since refrained from making other statements on those topics, in direct response to the Impugned Provisions.

15. The Impugned Provisions therefore prohibit or deter a wide range of valuable expression on a matter of pressing public importance – the environmental impact of businesses and industries – including expression that may be true, reasonable, defensible, or verifiable.

16. This significant breach of freedom of expression – including the public's right to hear, consider, and assess the expression in question – cannot be justified on the basis of an alleged need to shield the public from false or misleading statements.

17. Prior to the Impugned Provisions, representatives of businesses and industries were *already* prohibited from making statements that could be proven to be false or misleading, including with respect to the environmental benefits and impacts of their products, businesses, and activities.

18. The Impugned Provisions go much further, because they do not require challengers to have any basis to believe, much less an ability to prove, that the representations are in any way false or misleading.

19. Rather, these new measures pre-emptively prohibit any representations that cannot be proven by the speaker to have been, at the time they were made, based on the required vague and uncertain standards of verification, even if the statements may be true, reasonable, defensible, or otherwise verifiable.

20. This creates an unreasonably wide and impractical net, sweeping up a significant amount of valuable expression that the Canadian public is entitled to hear in making their personal, economic, and democratic decisions about a very important public policy matter.

21. And, as just noted, many others will be deterred from engaging in expression that may turn out to be perfectly lawful under the Impugned Provisions, due to the uncertain nature of the standards of verification and the significant reputational and financial costs associated with a government tribunal process.

22. There is and can be no formal list of adequate 'tests' or 'methodologies' in relation to the environmental impacts of various products, businesses, and activities, much less the benefits that can be said to flow from them.

23. As such, a speaker will never know in advance whether they will face significant liability for a statement that they, reasonably and in good faith, believe to be true and defensible, which both creates a significant risk of liability and exacerbates the extreme "chilling effect" of these provisions.

24. In addition, projections about future impacts or intentions, by their very nature, cannot be definitively proven or substantiated in advance. They will frequently involve both known and unknown risks regarding the future, or the expected pace of technological development or scientific progress, which can rarely be anticipated with certainty.

25. Businesses may set ambitious environmental goals, in good faith, and with viable plans to achieve them. However, this will always be done in the knowledge that there are risks and uncertainty involved, and the actual results may be better or worse than anticipated.

26. Prohibiting businesses from making public statements about their environmental goals, plans, or ambitions will deprive the public of important information they require in order to assess the impact of those businesses, and to inform their economic and democratic choices.

27. That is why it is so important that the public dissemination of such information is not pre-emptively prohibited by the government.

28. In short, the Impugned Provisions go well beyond what is necessary to address false and misleading commercial statements about the environment, and instead prohibit or deter the expression of a wide range of valuable information and viewpoints to which the Canadian public is entitled to hear and consider.

29. The Impugned Provisions are also unconstitutional for another reason – they not only unduly limit valuable expression, but they do so *unequally*, in a manner that is certain to manipulate or distort the public discourse regarding the proper balance between economic and environmental objectives.

30. That is because the Impugned Provisions are "one-sided" in their impact – they only apply to business and industry representatives who seek to provide information and viewpoints in favour of their businesses and industries, or in support of economic or resource development.

31. These provisions do not apply to the *critics* or *opponents* of resource development and other industrial activity, whether they are environmental groups seeking to encourage donations or to influence public policy, or politicians seeking to procure votes and political support.

32. These environmental groups and political actors remain free to make negative or critical representations about products, businesses, and business activities – even claims they know to be incomplete, misleading, or unverified – without any statutory penalties or tribunal process requiring them to substantiate their claims.

33. Indeed, governments and their representatives can make whatever statements they want in an attempt to garner public support, regardless of whether they have any good faith intention to proceed with their announced policies, or a good faith belief in the accuracy of the alleged benefits of those policies.

34. This is permitted because of the importance of free and unobstructed debate on such matters, and because the public can be trusted to sort out fact from fiction through the operation of the "marketplace of ideas"; that is, through the free and unobstructed exchange of ideas and information, and open debate about the accuracy, reasonableness, and value of representations or statements.

35. That is how a free and open society is intended to operate, particularly as it relates to areas upon which there is considerable controversy and debate, such as how to balance economic and resource development with environmental protection.

36. However, as a result of the Impugned Provisions, one essential participant in this important public policy debate – the business community – is under what is effectively a one-sided legislative "gag order", that requires it to justify its statements and opinions before a government-created tribunal, or else risk significant, and sometimes ruinous, financial penalties.

37. In this way, the Impugned Provisions will not only impact the expression rights of both speakers and listeners in this important public policy area – they will also distort or manipulate the very marketplace of ideas upon which the freedom of expression guarantee depends, by effectively creating a lop-sided public discourse.

38. And it sets a very dangerous precedent that would equally allow a different government to place restrictions on politically controversial statements deemed contrary to that government's preferred viewpoints or agenda, unless the speaker can pre-emptively establish the validity of such criticisms to the satisfaction of a government tribunal.

39. Obviously, it is not legally open to the state to prevent the public from hearing information and viewpoints that are contrary to the government's preferred policy outcomes or agenda, or to what it believes to be the prevailing orthodoxy – but that is exactly what the federal government has done here.

40. Taken together, the Impugned Provisions, in both purpose and effect, represent a profound restriction both on the freedom of speakers to express and disseminate information and viewpoints on a matter of pressing public importance, as well as the right of listeners to hear, assess, and consider that information and viewpoints, as part of the broader "marketplace of ideas".

41. There is no overriding societal interest in this situation that could justify these harsh restrictions on free speech under the *Charter of Rights and Freedoms*.

42. This is not a fair competition issue, where the public needs to be protected from false and misleading claims about a business and its activities to ensure a level competitive playing field, or unverified statements about the performance of a particular product.

43. That is because the *Competition Act* already prohibits members of the business community from making false and misleading claims about their products and business activities, and unverified claims about the performance of a product, including the environmental impact of those products and activities.

44. The Impugned Provisions go much further than is necessary to achieve this objective, and represent an extraordinary intrusion upon expression that is essential to an informed and balanced public discourse on important public policy issues.

45. As a result, the ultimate effect of these measures is simply to control and manipulate public opinion of how best to protect the welfare of the present and future generations in the face of the environmental challenges confronting the world today, by depriving the public of essential information and opinions offered by those on all sides of the issue.

46. For these reasons and the reasons set out below, the Impugned Provisions violate section 2(b) of the *Canadian Charter of Rights and Freedoms*, are not demonstrably justified under section 1, and should be declared of no force and effect.

II. FACTUAL BASIS

A. Parties

47. The Plaintiff Alberta Enterprise Group ("**AEG**") is a member-based, non-profit, and non-partisan organization composed of business leaders across Alberta that represent companies of all sizes across all major industries. AEG members collectively employ over 100,000 people and generate several billion dollars in economic activity each year.

48. Many of AEG's members are involved in large-scale construction, transportation, resource development, and infrastructure projects that are routinely subjected to environmental assessments and considerable public scrutiny regarding their environmental impacts.

49. AEG's mandate is to make Alberta a better place to live and do business, thereby creating long-term prosperity for every Albertan. It seeks to advance those objectives by providing advice to governments, creating forums for the exchange of ideas and best practices, and informing the public and policy makers on complex and challenging issues facing the province and the country.

50. AEG believes that economic development brings a range of advantages to Alberta and Canada generally, including economic prosperity, greater tax revenues to pay for public services, a higher standard of living, and greater employment and investment opportunities for members of the community.

51. At the same time, AEG recognizes that Canada and the world face pressing environmental challenges, and that economic and resource development must take place in a manner that is environmentally sustainable.

52. From AEG's perspective, it is important for democratic governments to reach a balance between these objectives, in a manner that is accountable to the public.

53. That in turn requires the broadest possible exchange of information, viewpoints, and ideas in relation to how to promote the prosperity that is essential to the creation of jobs, economic opportunities, and public services Albertans depend on, while also meeting modern environmental challenges.

54. The Plaintiff Independent Contractors and Businesses Association ("**ICBA**") is a voluntary association whose members are comprised of large, medium, and

small businesses located primarily in British Columbia and Alberta. ICBA's 4,500 members and clients make it the largest construction association in Canada.

55. ICBA advocates on behalf of free enterprise, investment, job creation, and economic development generally, including the principle of open and fair bidding for projects.

56. ICBA also engages in public advocacy on issues that impact its members, including labour and employment policies, fair tendering of government infrastructure projects, workers compensation policies, regulation and taxation, responsible resource development, along with other issues that impact the investment climate and economic development more generally.

57. Many of ICBA's members are involved in the construction and maintenance of large-scale resource and infrastructure projects, including oil and liquid natural gas ("**LNG**") pipelines, hydro-electric dams, bridges, highways, mass transit subway lines, marine terminals and airports.

58. These large-scale projects are typically subject to a broad range of environmental laws, regulations, and approval processes, as well as contentious political and public policy debates regarding their environmental impacts, and how best to balance those impacts with the economic benefits to the population.

59. Like AEG, ICBA and its members recognize that it is essential for the well-being of our communities that economic and resource development be undertaken in a manner that is environmentally sustainable, while at the same time generating the economic opportunities upon which Canadians depend for jobs, investments, and public services.

60. The Defendant Attorney General of Canada (the "**Defendant**") is the chief law officer of the Crown of Canada, and represents the Government of Canada in defence of the Impugned Provisions of the *Competition Act*, RSC 1985, c C-34 ("***Competition Act***").

61. The Competition Bureau of Canada (the "**Bureau**") is an independent law enforcement agency that is responsible for the administration and enforcement of the *Competition Act*. The Bureau is headed by the Commissioner of Competition (the "**Commissioner**").

62. The Competition Tribunal (the "**Tribunal**") is an adjudicative body established by the *Competition Act*, with the jurisdiction to hear and dispose of certain applications made under the *Competition Ac*t and related matters.

B. Summary of Key Facts

63. The fundamental purpose of the *Competition Act* is to ensure and maintain a competitive, efficient, and healthy marketplace.

64. Consistent with this purpose, the *Competition Act* has always prohibited businesses from making false and misleading representations about their products, businesses, and activities.

65. These prohibitions are intended to safeguard a fair and efficient marketplace, by preventing companies from obtaining an undue competitive advantage by misleading consumers about their products or businesses.

66. Prior to the Impugned Provisions, there were already three different mechanisms in the *Competition Act* that were available to address false and misleading statements:

    a. Criminal prohibitions, which prohibit a person from "knowingly or recklessly" making false or misleading representations about products, businesses, or activities, and subject them to criminal sanctions;

    b. Civil damages, which allow anyone who has been harmed by such false or misleading representations to sue and recover damages from the party making the representations; and

    c. Civil penalties, which prohibit persons from making false or misleading representations, even if they were not made knowingly or recklessly, and subject them to fines and other remedial orders.

67. Consistent with the long-standing legal principle that "one who alleges must prove", each of these regimes place the burden on the party alleging that the representations were false or misleading to establish that claim before a court or the Tribunal.

68. This ensures the free flow of expression, viewpoints, and information to the public, while safeguarding the purposes of the *Competition Act* by prohibiting commercial statements that can be proven to be false or misleading.

69. In addition to these prohibitions on false and misleading representations, the *Competition Act* also prohibits the making of claims about the performance, efficacy, or length of life of products that were not based on an "adequate and proper test".

70. This is referred to as a "reverse onus" provision, because it requires the party making certain representations about their products to establish that the representation was made based on a proper test of those claims, rather than requiring the party challenging the accuracy of the statement to prove that the claim was false or misleading.

71. However, with the exception of this narrow and specific category of product claims, no other type of claim or representation, such as about a business or its

activities, was subjected to this reverse onus provision, prior to the enactment of the Impugned Provisions.

72. In support of these regimes, the Commissioner has extensive investigative and enforcement powers, and members of the public have a right to initiate an inquiry by the Commissioner – which ensures that any representations that may be false or misleading can be fully investigated and appropriate measures taken.

73. All of these powers can be, and in the past have been, used to punish and deter false and misleading claims, including about the environmental benefits of products or businesses.

74. And, in addition to the *Competition Act*, there are numerous other legal regimes – such as provincial consumer protection legislation – which also prohibit or deter the making of false and misleading representations about products, businesses, or their activities, and subject them to a range of serious legal sanctions.

75. Put simply, prior to the Impugned Provisions, there was already a robust body of legal restrictions in place, both within and outside of the *Competition Act*, that prohibited the making of false or misleading representations, including about the environmental benefits of a product, business, or its activities.

76. There is no reason to believe that these legal measures were insufficient or incapable of properly addressing a business or industry representative from making false or misleading claims about the environmental impacts of products, businesses, or activities.

77. The Impugned Provisions, however, go much further than these pre-existing prohibitions, and much further than is necessary to protect the public against false and misleading environmental claims.

78. The Impugned Provisions significantly broaden both the scope and effect of the pre-existing provisions in a number of ways, including by subjecting all claims about the environmental benefits of a product, a business, or business activity, to a reverse onus requirement.

79. This means that, unlike non-performance based claims relating to products, and unlike any other claims regarding a business or its activities, *environmental* claims are uniquely and comprehensively subject to the extraordinary reverse onus provision.

80. As a result, rather than requiring proof that such claims are false or misleading, the Impugned Provisions impose an obligation on the party making the representation to meet undefined, vague standards of verification, for which the truth of the representation is not a defence.

81. In particular, any environmental claims about a *product* must now be based on an "adequate or proper" test, while any environmental claims about a *business or its activities* must be based on "adequate and proper substantiation in accordance with internationally recognized methodology".

82. What this means is that even if a claim is true, reasonable, or defensible in light of the known evidence, or made in good faith, it may still result in liability if it was not based, at the time it was made, on a process of verification that a government tribunal subsequently deems acceptable or appropriate.

83. Further, the Impugned Provisions in question provide no allowance or exemption for statements of the speakers' views or opinions, which almost by definition cannot be proven by an "adequate and proper test", much less substantiation by "internationally recognized methodologies".

84. Finally, the Impugned Provisions permit private parties (e.g. opponents of businesses or industries) to directly bring a challenge to any representations, without needing to establish proof that the statement is false or materially misleading, or that they were in any way harmed by the statement.

85. This in turn increases the likelihood that such claims will be brought for political or ulterior purposes by opponents of businesses or industries, rather than based on any genuine concern (or any basis for a concern) over the accuracy or defensibility of the statements in issue.

86. The effect of the Impugned Provisions is to significantly limit expression in relation to the environmental impacts of businesses and industries, and will deprive the public of a range of valuable expression in this context that is necessary to make fully informed personal, economic, and democratic decisions.

87. In particular, the direct impact of the Impugned Provisions is to render unlawful a wide range of statements or representations that are either not amenable to the process of verification contemplated by the Impugned Provisions, or that are true, reasonable, or defensible on the available evidence, despite not being based upon a process of verification subsequently deemed adequate by the government.

88. In addition to the expression that is directly prohibited by the Impugned Provisions, the Impugned Provisions also create a significant, and additional, "chilling effect", which involves the deterrence of expression that would have turned out to be lawful under the Impugned Provisions.

89. This may occur for a range of reasons, driven by the inherent vagueness and uncertainty of the applicable standards, the dynamic nature of the relevant evidence or representations themselves, as well as rational decisions about the risk created by the Impugned Provisions.

90. Put simply, many businesses or industry representatives will refrain from making true, reasonable, or defensible statements about their products, businesses and activities, including those that would ultimately be found to meet the government's standards of verification, because of the uncertainty and risk involved.

91. The enactment of the Impugned Provisions has already caused businesses and industry representatives to remove material and information pertaining to the environment from their websites, social media accounts, and other platforms, and to refrain from engaging in further expression on the topic, depriving the public of access to essential information and viewpoints.

92. In summary, taken together, the Impugned Provisions:

    a. significantly expand the risk of liability for making statements in relation to the environmental benefits of a product, activity, or business, extending them beyond any other types of claims made for the purposes of advancing a business interest;

    b. create a significant risk of being subjected to a government tribunal process, even in the absence of any basis to disbelieve or doubt the accuracy statements in question;

    c. can result in liability for statements that are true, reasonable, defensible, verifiable, or that are true or made honestly, in good faith, and with a reasonable factual basis; and

    d. will deter the making of statements in this context that would be found to meet the government's standards of verification, due to the uncertainty of these standards and the significant reputational and financial costs associated with defending the statements in question.

93. There is no evidence that these measures are necessary to prevent the making of false and misleading statements in relation to the environmental benefits of products, businesses or business activities, any more than they are necessary in relation to any other type of claim that may be made about a product, business or its activities.

94. The result of the Impugned Provisions is to prohibit or deter a significant range of valuable expression regarding the environmental benefits of businesses or industries, which the public requires in order to make informed choices, while placing no similar restrictions on representations by opponents of businesses or industries.

95. These facts are reasserted, elaborated upon, and supplemented in the remaining sections of the Factual Basis, set out below.

C. The *Competition Act* – False and Misleading Advertising Provisions

i. The Purpose of False and Misleading Representation Provisions

96. The general purpose of the *Competition Act* is "to eliminate activities that reduce competition in the marketplace"; "to preserv[e] competitive conditions which are crucial to the operation of a free market economy"; and "to maintain and encourage competition in Canada in order to 'provide consumers with competitive prices and product choices'".

> See *R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154, para 138, 139; *Canada (Competition Bureau) v. Chatr Wireless Inc.*, 2013 ONSC 5315, para 126.

97. For many years, going back to its predecessor legislation – the *Combines Investigation Act* – the *Competition Act* has included a range of measures designed to address "deceptive marketing practices".

98. This was based on the premise that deceptive marketing practices, such as the making of false or misleading claims about a product, a business, or a business's activities, can interfere with the proper operation of a competitive market by giving companies who make false and misleading claims an undue competitive advantage.

99. In this way, the *Competition Act*, including the deceptive marketing provisions, have a different purpose than provincial consumer protection legislation, as explained in *Chatr Wireless*:

> [126] There is a difference between the purpose of Québec's *Consumer Protection Act* and the purpose of the *Competition Act*. The Québec legislation is intended to protect vulnerable persons from the dangers of certain advertising techniques: see *Richard v. Time Inc.*, at para. 72. The *Competition Act* is intended to maintain and encourage competition in Canada in order to "provide consumers with competitive prices and product choices": see s. 1.1 of the *Competition Act*.
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> *Canada (Competition Bureau) v. Chatr Wireless Inc.*, 2013 ONSC 5315, para 126.

100. That is, while the focus on deceptive marketing practices takes into account the perceptions, interests, and actions of the consumer, this is being done to promote the broader objectives of the *Competition Act*, being to safeguard the integrity and proper operation of a competitive marketplace.

101. As explained by the Federal Court of Appeal:

> [61] […] Importantly, the deceptive marketing provisions—unlike many other provisions of the Act—do not list actual harm to competition as an element of the offence. Since harm to competition is not listed as an element of the offence in this case, but it is a truism that the Act always seeks to prevent harm to competition, it is presumed that whenever the elements of paragraph 74.01(1)(a) are made out, there is per se harm to competition.
>
> [62] When a firm is permitted to make misleading representations to the public, putative consumers may be more likely to choose the inferior products of that firm over the superior products of an honest firm. When consumer information is distorted in this manner, firms are encouraged to be deceitful about their goods or services, rather than to produce or provide higher quality goods or services, at a lower price. Therefore, as the appellant contends, when a firm feeds misinformation to potential consumers, the proper functioning of the market is necessarily harmed, and the Act is rightly engaged, given its stated goals.
>
> [63] As the appellant submits, the proper focus of analysis in deceptive marketing cases is the consumer. While the respondents correctly state that the Act is not a consumer protection statute, they are wrong to suggest that this interpretation of the deceptive marketing provisions is tantamount to interpreting the Act as a consumer protection statute. On the contrary, as the foregoing analysis indicates, a focus on the consumer is not indicative of the objective of the scheme, but is a consideration antecedent to the ultimate objective: maintaining the proper functioning of the market in order to preserve product choice and quality.

Canada (Commissioner of Competition) v. Premier Career Management Group Corp., 2009 FCA 295, paras 61-63.

102. As such, the purpose of the false and misleading advertising provisions in the *Competition Act* is to ensure and safeguard a competitive marketplace, and in particular, to prohibit market participants from obtaining an undue competitive advantage through the making of false and misleading claims about business or products.

103. Prior to the Impugned Provisions, the *Competition Act* contained three separate mechanisms designed to achieve these purposes through the prohibition of “false or misleading” statements or representations to the public: criminal penalties, civil damages, and civil or administrative penalties.

ii. Criminal Prohibition Regime

104. First, section 52(1) of the *Competition Act* makes it a criminal offence to "knowingly or recklessly" make representations that are false or misleading in a material respect:

> **False or misleading representations**
>
> 52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

105. Where a person is found on indictment to have committed an offence under section 52(1) of the Act, they are liable for a fine (at the discretion of the court), imprisonment not to exceed fourteen years, or both (section 52(5)(a)).

106. On a summary conviction under section 52(1) of the Act, a person is liable for a fine not to exceed $200,000, imprisonment not to exceed one year, or both (section 52(5)(b)).

iii. Civil Damages Regime

107. Second, under section 36(1)(a), conduct in breach of any provision of Part VI of the *Competition Act,* which includes section 52(1), can also lead to damages in civil proceedings, which can be sought by anyone "who has suffered loss or damage as a result" of conduct in breach of the criminal prohibition on false and misleading advertising:

> **Recovery of damages**
>
> 36 (1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

108. Such private actions can proceed individually, or by way of class action, the latter being a common form of private competition proceeding in Canada.

iv. Civil Penalties Regime

109. Third, in addition to the criminal prohibition and civil damages regimes, false and misleading statements can also amount to "reviewable conduct" that can be subject to a range of civil or administrative penalties under section 74.01(1)(a).

110. Prior to the Impugned Provisions, representations that amounted to "reviewable conduct" were limited to those set out in the former section 74.01(1), as follows:

> 74.01(1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
>
> (a) makes a representation to the public that is false or misleading in a material respect;
>
> (b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or
>
> (c) makes a representation to the public in a form that purports to be
>
> (i) a warranty or guarantee of a product, or
>
> (ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,
>
> if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out. [emphasis added]

111. Unlike with respect to the criminal prohibition, it is not necessary to demonstrate that the false or misleading statement was made "knowingly or recklessly" in order to establish liability as "reviewable conduct": section 74.01(1)(a) ("**Subsection A**").

112. In addition to Subsection A, statements about "the performance, efficacy or length of life of a product" constitute "reviewable conduct" insofar as the party making the representation is not able to establish, at the time the representation

is made, that it was based on an "adequate and proper test": section 74.01(b) ("**Subsection B**").

113. Under section 74.1(1) of the *Competition Act*, both before and after the Impugned Provisions, the Commissioner can apply to the Competition Tribunal or a court for remedies under the civil liability provisions.

114. Prior to the Impugned Provisions, there was no mechanism for private parties to directly seek to enforce the civil liability provisions of the *Competition Act*.

115. Rather, individuals or competitors could raise such matters with the Commissioner, either through the Bureau's complaint process or through the statutory inquiry process in section 9 of the *Competition Act*, the latter of which allows any six persons to require the Commissioner to initiate an inquiry into a breach of either the criminal prohibitions or the civil penalty provisions.

116. The Commissioner was then empowered to apply under section 74.1 for orders under the civil penalty provisions, or to seek criminal charges, depending on the deemed merits of the complaint.

117. Any party found to have engaged in "reviewable conduct" can be subject to a range of civil penalties, including significant fines, injunctions, and orders to provide notice of the deceptive representation, amongst others (section 74.1(1)(a-d)).

118. The total fines under the civil liability provisions for a corporation were recently increased to the higher of:

    (i) $10 million (or $15 million for subsequent orders) or

    (ii) three times the value of the benefit derived from the conduct at issue, or if that amount cannot be calculated, three percent of annual worldwide gross revenues.

v. <u>Commissioner's Investigatory Powers</u>

119. In seeking to enforce either the criminal prohibitions or the civil liability provisions, whether following an inquiry initiated under section 9, a complaint, or on its own motion, the Commissioner has extensive investigatory powers through the inquiry provisions of the *Competition Act*, which permit the Commissioner to, *inter alia*:

    a. Seek and obtain orders for oral examination, production, or written returns (sections 11(1), 11(2));

    b. Compel witnesses to testify and give evidence under oath (sections 11(1)(a), 12(1));

c. Seek and obtain orders for preservation or production of data (section 14.1);

d. Seek and obtain warrants to search premises and electronic devices, and to seize records or things in that context (sections 15, 16).

120. Therefore, both prior to and following the enactment of the Impugned Provisions, any concerns in relation to the veracity of claims being made by businesses or their representatives can be thoroughly investigated by the Commissioner to determine whether it can be proven that they are false or misleading in a material respect.

vi. Summary of Prohibitions on False and Misleading Advertising

121. In summary, prior to the enactment of the Impugned Provisions, the *Competition Act* already prohibited the making of representations that are "false or misleading" in a material respect, making them subject to three different regimes:

a. criminal sanctions, where the making of the false or misleading claims was made "knowingly or recklessly" ("**Criminal Offence Regime**");

b. civil damages, where the representatives are in violation of section 52 and can be shown to have caused loss or damage ("**Civil Damages Regime**");

c. civil penalties, where the representation was false or misleading, regardless of knowledge or intent ("**Civil Penalties Regime**").

122. All three of these mechanisms for investigating and prosecuting false and misleading representations remain in the *Competition Act* following the addition of the Impugned Provisions.

123. And any such representations may be investigated by the Commissioner through the statutory inquiry process, whether at the Commissioner's own motion or following a request for an inquiry under section 9 of the *Competition Act*.

vii. Pre-Existing Prohibitions on False and Misleading Representations Applied to Environmental Claims

124. Statements pertaining to the environmental impacts or benefits of a product, business, or its activities, like other claims made for the purpose of promoting a business or product, were and remain subject to each of the three regimes that existed in the *Competition Act* prior to the Impugned Provisions.

125. Numerous claims relating to false or misleading advertising in relation to environmental claims were brought under these pre-existing prohibitions in the

Competition Act, or have been subject to investigations under the *Competition Act.*

126. The applicability of these provisions to false and misleading environmental statements was confirmed by the Bureau and Commissioner in 2021, when the Bureau provided guidance in relation to so-called "greenwashing".

127. In that guidance, the Bureau confirmed that false, misleading, or insufficiently supported claims about the environmental benefits of products or businesses are subject to the *Competition Act* prohibitions:

> To attract environmentally-conscious consumers, you may want to feature ads, slogans, logos and packaging highlighting environmental attributes or benefits of your product or service. However, if you portray your products and services as having more environmental benefits than they truly have, you may be greenwashing, which could be illegal. Businesses should avoid vague claims such as "eco-friendly" or "safe for the environment", which can lead to multiple interpretations, misunderstanding and deception.
>
> <u>If your business makes an environmental claim about a product or service, remember that the laws enforced by the Bureau directly apply to environmental claims that are false, misleading or not based on adequate and proper testing</u>. [emphasis added]

128. As such, prior to the enactment of the Impugned Provisions, the *Competition Act* already prohibited the making of false and misleading representations, including representations about the environmental benefits of a business, product or service, as well as insufficiently supported claims about the environmental benefits of a product, and provided a range of mechanisms for the investigation and prosecution of such conduct.

viii. <u>Additional Legal Restrictions on False and Misleading Representations</u>

129. In addition to the regimes under the *Competition Act*, false and misleading environmental representations are also prohibited by provincial consumer production legislation, and misrepresentations made by public companies, including misrepresentations with respect to the environmental benefits of products, may create liability for a company under securities laws.

130. There are also a range of other less formal regimes in place that police or provide best practice guidance in relation to environmental claims and advertising, including the Canadian Standards Association and AdStandards, the latter of which has an adjudicative body to which complaints can be made regarding misleading environmental advertising.

ix. The Impugned Provisions

131. Bill C-59, which included the Impugned Provisions, was tabled in the House of Commons for first reading on November 30, 2023. It received royal assent on June 20, 2024, becoming the *Fall Economic Statement Implementation Act, 2023* (the "***Implementation Act***").

132. The *Implementation Act* is a sweeping piece of omnibus legislation, which contains legislative measures addressing a range of disparate and unrelated matters.

133. It includes the enactment of or amendments to over 30 statutes, such as the *Income Tax Act*, the *Excise Tax Act*, the *Digital Services Tax Act, the Bank Act,* the *Canada Labour Code,* the *Canada Water Act*, the *Tobacco and Vaping Products Act,* and the *Bankruptcy and Insolvency Act*.

134. Amongst these amendments and enactments were changes to the *Competition Act*, set out in Division 6 of Part 5 of the *Implementation Act*, the preamble in relation to which states:

> Division 6 of Part 5 amends the *Competition Act* to, among other things,
>
> > (a) modernize the merger review regime, including by modifying certain notification rules, clarifying that Act's application to labour markets, allowing the Competition Tribunal to consider the effect of changes in market share and the likelihood of coordination between competitors following a merger, extending the limitation period for mergers that were not the subject of a notification to the Commissioner of Competition and placing a temporary restraint on the completion of certain mergers until the Tribunal has disposed of any application for an interim order;
> >
> > (b) improve the effectiveness of the provisions that address anti-competitive conduct, including by allowing the Commissioner to review the effects of past agreements and arrangements, ensuring that an order related to a refusal to deal may address a refusal to supply a means of diagnosis or repair and ensuring that representations of a product's benefits for protecting or restoring the environment must be supported by adequate and proper tests and that representations of a business or business activity for protecting or restoring the environment must be supported by adequate and proper substantiation;
> >
> > (c) strengthen the enforcement framework, including by creating new remedial orders, such as administrative monetary penalties, with respect to those collaborations that harm competition, by

creating a civilly enforceable procedure to address non-compliance with certain provisions of that Act and by broadening the classes of persons who may bring private cases before the Tribunal and providing for the availability of monetary payments as a remedy in those cases; and

(d) provide for new procedures, such as the certification of agreements or arrangements related to protecting the environment and a remedial process for reprisal actions.

The Division also amends the *Competition Tribunal Act* to prevent the Competition Tribunal from awarding costs against His Majesty in right of Canada, except in specified circumstances.

135. Prior to the enactment of the *Implementation* Act, there was very little scrutiny or debate in Parliament regarding the purpose, intended effect, or wisdom of the Impugned Provisions, as a result of the fact that it was included in sweeping omnibus legislation.

136. There is no basis to support the claim that the existing prohibitions on false and misleading advertising, or the existing enforcement mechanisms, were inadequate or incapable of adequately addressing any competitive impacts in relation to representations regarding the environment, in the same way they are considered adequate and capable of dealing with all other categories of representations.

137. While the *Implementation Act* makes numerous amendments to the *Competition Act*, the only provisions challenged in this proceeding are set out in sections 236(1) and 254, which in turn amend sections 74.01 and 103 of the *Competition Act* (i.e the Impugned Provisions).

Section 236 – Amending Section 74.01 of the Competition Act

138. Section 236(1) of the *Implementation Act* amends the list of "reviewable conduct" under section 74.01(1) of the *Competition Act*, by adding two additional instances of "reviewable conduct" in addition to the existing categories, as follows:

236(1) Subsection 74.01(1) of the Act is amended by striking out "or" at the end of paragraph (b) and by adding the following after that paragraph:

(b.1) makes a representation to the public in the form of a statement, warranty or guarantee of a product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change that is not based on an adequate and proper test, the proof

> of which lies on the person making the representation ("**Subsection B.1**");
>
> (b.2) makes a representation to the public with respect to the benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change that is not based on adequate and proper substantiation in accordance with internationally recognized methodology, the proof of which lies on the person making the representation ("**Subsection B.2**"); or

139. Subsection B.1 uses language similar to the pre-existing Subsection B, in that it deals only with representations about "*products*", but specifically captures representations about "a product's benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change".

140. This broadens the scope of the provision to reach beyond performance-based statements (i.e. representations about a product's "performance, efficacy, or length of life"), as was captured by Subsection B, to now also include *any* statements about a product's benefit to the environment.

141. In both cases, a person may be liable for representations made about a product that cannot be proven, to the satisfaction of the Tribunal, to be "based on an adequate and proper test" at the time it was made. That is so even if, upon such testing, the statement turns out to be objectively true, reasonable, defensible, or even verifiable based on "an adequate and proper test".

142. The addition of Subsection B.2 goes much further than either Subsection B or Subsection B.1, by expanding the reverse onus provisions to capture any representation "with respect to the benefits <u>of a business or business activity</u> for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change".

143. This expands the existing provisions in two significant ways.

144. First, Subsection B.2 expands the reverse onus provisions, for the first time, beyond specific claims about the performance of *products* – which can often be more easily verified by testing – to now also include any environmental claims about a business or business activities. This is a much broader category that will capture nearly every statement made by a business or industry representative pertaining to the environment impacts or benefits of those businesses or their activities.

145. Second, Subsection B.2 requires the party making the statement to be able to establish that such representation is based on "an adequate and proper

substantiation *in accordance with internationally recognized methodology*", which is a vague and uncertain standard that is undefined in the amended *Competition Act*.

146. Importantly, as with Subsections B and B.1, it is not a defence that the environmental representation captured by Subsection B.2 is objectively true, reasonable, defensible on the available evidence, or that it was made honestly and in good faith.

147. Nor is it a defence that the statement was made based on adequate and proper substantiation in accordance with a methodology that is recognized and accepted *nationally* or *regionally*, or that the claim can later be shown to be true, reasonable, or defensible based on "internationally recognized methodology".

148. It is sufficient to incur liability if the statement cannot be proven to have been based, at the time it was made, on "an adequate and proper substantiation in accordance with internationally recognized methodology", based on whatever methodology the Tribunal subsequently deems to be "adequate", "proper", and sufficiently "recognized" internationally.

149. At first reading in Parliament, the initial draft of Bill C-59 contained what was to become Subsection B.1, pertaining to the need for environmental claims relating to "products" to be "based on an adequate and proper test".

150. However, that initial draft did not contain what was to become Subsection B.2, requiring all environmental claims relating to a business or its activities to be made "based on adequate and proper substantiation in accordance with internationally recognized methodology".

151. During the committee stage, the Commissioner sent a letter to the Standing Committee on Finance, urging it to make amendments to the draft bill, including the inclusion of a measure like Subsection B.2, as follows:

> When companies make environmental claims to promote a product or business interest, they should be able to back them up. Bogus claims are false or misleading and undermine competition on the merits.
>
> Clause 236(1) adds a new provision to the deceptive marketing provisions of the Act to help address certain types of false or misleading environmental claims. It specifies that claims about a "product's benefits for protecting the environment or mitigating the environmental and ecological effects of climate change" must be "based on an adequate and proper test". Importantly, the burden of proof would fall on the person making the representation, making it a type of 'reverse onus' provision.

> While we welcome this new tool to address certain forms of "greenwashing", in our view, it may prove to be a limited change that is more in the vein of clarifying the law than expanding it. This is consistent with the views expressed by various commentators, including environmental advocacy groups (see below). Notably, there is already a similar reverse onus provision of the Act dealing with product performance claims (para 74.01(1)(b)). That provision prohibits making a claim about "the performance, efficacy or length of life of a product that is not based on an adequate and proper test" and would likely capture some of the same claims captured under this new provision.
>
> The reality is that a significant portion of the greenwashing complaints the Bureau receives do not involve claims about products, but rather more general or forward-looking environmental claims about a business or brand as a whole (e.g. claims about being "net zero" or "carbon neutral by 2030"). <u>These more general claims to promote a business interest can also be false or misleading, and may be captured by our general deceptive market provisions. However, these claims are not reverse onus, and it can be challenging for the Bureau to prove that they are false or misleading in a material respect.</u> While these more general claims may not be amenable to 'testing' like product performance claims, business should at least be able to substantiate them if challenged. [emphasis added]

152. As the Commissioner acknowledged, such statements, if proven to be false or misleading in a material respect, were already prohibited by the *Competition Act*, prior to the Impugned Provisions.

153. However, the Commissioner believed that, because it may be difficult to prove that they are false or misleading, despite the expansive investigatory powers of the Commissioner, those statements should be presumptively prohibited unless they can be proven, at the time the statements were made, to have met vague and uncertain standards of substantiation.

Section 254 – Amending Section 103 of the Competition Act

154. Section 254 of the *Implementation Act* amends section 103 of the *Competition Act* to provide that private parties can now bring claims under section 74.1, pertaining to "reviewable conduct", directly to the Competition Tribunal, if granted leave to do so in the public interest:

> 254(1) Subsections 103.1(1) and (2) of the Act are replaced by the following:
>
> **Leave to make application under section 74.1, 75, 76, 77, 79 or 90.1**

> 103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 74.1, 75, 76, 77, 79 or 90.1. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under that section.
>
> (…)
>
> (4) Subsection 103.1(7) of the Act is replaced by the following:
>
> **Granting leave — section 74.1**
>
> (6.1) The Tribunal may grant leave to make an application under section 74.1 if it is satisfied that it is in the public interest to do so.

155. As noted above, prior to the Impugned Provisions, allegations of deceptive practices under the Civil Penalties Regime could only be brought directly by the Commissioner. However, private parties could either make complaints to the Commissioner, identifying any representations believed to constitute "reviewable conduct", or could formally initiate an inquiry under section 9 of the *Competition Act*.

156. This ensured that private parties had effective means of raising such matters before the Commissioner, while also ensuring that the Commissioner was satisfied that there was a sound legal basis for the proceeding before one was initiated.

157. Section 254 of the *Implementation Act*, amending section 103.1 of the *Competition Act,* has opened up the right to directly initiate a tribunal proceeding to private parties, such that environmental advocacy groups, competitors, and other third parties can effectively stand in for the Commissioner and prosecute such claims directly before the Tribunal.

158. Such proceedings may be brought for purely political or commercial purposes, without any evidence that the representations at issue are false or misleading in any respect, and will allow such private parties to impose considerable financial and reputational costs on respondents regardless of whether the representations are ultimately found to be lawful.

x. Summary of the Legal Impact of the Impugned Provisions

159. In summary, prior to the *Implementation Act*, the *Competition Act* already contained three mechanisms that prohibited businesses from making false or misleading representation in the course of promoting their business interests, including representations relating to their environmental performance:

i. The Criminal Regime that prohibits knowingly or recklessly making a materially false or misleading representation to the public (section 52(1)), with the onus on the prosecuting authority to establish this allegation beyond a reasonable doubt;

ii. A Civil Damages Regime that allows parties who had been harmed or suffered a loss from conduct in breach of section 52 to obtain compensation for such losses in court, including through class action proceedings (section 36);

iii. A Civil Penalties Regime that prohibits "reviewable conduct", which includes making materially false and misleading representations (section 74.01(a)), and that had to be established before a court or tribunal on a balance of probabilities.

160. As is ordinarily the case, each of these regimes placed the burden on the party alleging that the representations were false or misleading to establish that claim before the appropriate adjudicator, whether a court or the Tribunal. This is consistent with the well-established legal principle that "one who alleges must prove".

161. In addition to these measures, another civil or administrative provision, section 74.01(b) (i.e. Subsection B), imposed a reverse onus in relation to one specific type of representation, by prohibiting the making of representations about "the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof", with the burden of proof to establish this standard falling on the party making the representation.

162. While this provision reversed the burden of proof by requiring the party making the representation to establish that it was based on an adequate and proper test, it was limited to a narrow category of representations – namely, representations about the performance of a product – and therefore would not extend to other representations about a product, or any representations about a business, an industry, or business activities more broadly.

163. These pre-existing criminal and civil measures under the *Competition Act*, in addition to other federal regulations and provincial consumer protection statutes, prohibited businesses from making materially false or misleading representations about their businesses, including their past or anticipated environmental performance, or the environmental benefits of their products or businesses.

164. The additions made through the Impugned Provisions significantly broaden both the scope and effect of these provisions in a number of ways, including by:

i. Broadening the reverse onus provisions to include all claims relating to the environmental benefits of a product, as well as any claims about the environmental benefits of a "business or business activity";

ii. No longer requiring a party alleging that a representation in relation to the environmental benefits of a product, business or business activity to establish, or even have a reasonable basis to believe, that the representation is "false or misleading in a material respect";

iii. Rather than requiring proof that such claims are false or misleading, instead imposing an obligation on the person making the representation to establish that it was based on undefined, vague standards of verification – that the representation was made in accordance with "adequate or proper" tests or "adequate and proper substantiation in accordance with internationally recognized methodology", depending on the nature of the claim; and

iv. Expanding the enforcement of this provision by private parties (e.g. opponents of businesses or industries), who no longer need to establish proof that the statement is materially misleading or false, or that they were harmed by the representation, which in turn increases the likelihood that such claims will be brought for political or ulterior purposes.

165. In addition, the Impugned Provisions provide no allowance or exemption for statements of the speakers' views or opinions.

166. If a statement about a business's or industry's benefits for the environment is in the nature of an opinion, it is, almost by definition, prohibited by the reverse onus provisions, as an opinion is not typically something that can be proven by an "adequate and proper test", much less substantiation by "internationally recognized methodology".

167. Taken together, the Impugned Provisions significantly expand the risk of liability for making statements in relation to the environmental benefits of a product, activity, or business; create a significant risk of being subjected to a government tribunal process, even in the absence of any basis to disbelieve or doubt the statements in question; and can result in liability for statements that are true, reasonable, defensible, verifiable, or that are true or made honestly, in good faith, and with a reasonable factual basis.

D. The Expression Directly and Indirectly Prohibited by the Impugned Amendments

168. The scope of the Impugned Provisions, and the expression that is directly prohibited or indirectly deterred or by the Impugned Provisions, is broad, and includes a wide range of truthful, accurate, reasonable, defensible, or good faith

statements of information, data, views, or opinions relating to environmental impacts or benefits, past, present and future.

i. The "Direct Effect" – Expression Directly Prohibited by the Impugned Provisions

169. Beginning with the language of the *Competition Act*, there are few internal limitations on what types of "representations" are subject to the Impugned Provisions.

170. The term "representation" is an inherently broad term that encompasses virtually any form of communication, including everything from oral statements in private meetings to formal statements in corporate annual reports, and everything in between.

171. As such, virtually any representation, including to a small contingent of the public, may be subject to challenge as "reviewable conduct", including under the Impugned Provisions.

172. Similarly, the purpose requirement – i.e. that a representation subject to either the criminal or civil liability regimes must be made "for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest" – is also very broad, capturing nearly any statement that might directly or indirectly advance a business interest.

173. Thus, the range of representations that may be subject to the Impugned Provisions is expansive and includes any representations pertaining to the environmental impacts of a business or businesses made by any person who may be considered to be promoting a business interest, directly or indirectly, in nearly any context.

174. Such representations may include simple and innocuous statements on advertisements claiming or implying that a company is "green friendly", to website statements claiming that a particular business or industry has reduced greenhouse gas emissions, to speeches expressing views on the environmental impacts of an industry, to reports or mandatory disclosures projecting future reductions, and everything in between.

175. Unlike the prohibitions on making "false and misleading" statements that existed prior to the Impugned Provisions, Subsections B.1 and B.2 are not based on the truth or falsity of the statements, nor is the truth, reasonableness, or defensibility of the statements a defence to liability.

176. Rather, they are based on whether the representations can be established by the party making the representation to have been based, at the time the

representation is made, on vague and uncertain standards of testing, verification, or substantiation, to the satisfaction of the Tribunal.

177. For environmental claims in relation to products, the representations in relation to the environment must be "based on an adequate and proper test", with no guidance on the meaning of these terms, beyond the established rule that what is adequate and proper will depend on the nature of the representation made and the meaning or impression conveyed by that representation.

Canada (Competition Bureau) v. Chatr Wireless Inc., 2013 ONSC 5315, para 295.

178. Case law suggests that whether a particular test or method of verification will be considered "adequate and proper" by an adjudicator will be based on a "flexible and contextual analysis", which may be guided by the following non-exhaustive list of potential factors or relevant considerations:

- the meaning of the claim as it would be understood by the common person;
- the risk or harm which the product is designed to prevent or assist in preventing;
- whether the test was done under controlled circumstances or in conditions that exclude external variables or take account in a measurable way for such variables;
- whether it was conducted on more than one independent sample;
- whether the testing was reasonable given the nature of the harm at issue; and
- whether it established that the product itself which causes the desired effect in a material manner.

The Commissioner of Competition v. Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group), 2008 CACT 2, para 128; *Canada (Competition Bureau) v. Chatr Wireless Inc.*, 2013 ONSC 5315, para 322.

179. Notably, the requirement for an "adequate and proper" test extends under the Impugned Provisions to all claims in relation to the environmental impacts of a product, rather than being limited to claims about its performance, efficacy, or length of life, the latter of which are more likely to be narrow and verifiable assertions that can be subject to testing (e.g. "this microwave will last 10 years" or "this car can drive 150 km/h").

180. In contrast to product performance claims, representations in relation to the environmental impacts or benefits of businesses or their activities must be "based on adequate and proper substantiation in accordance with internationally recognized methodology", with no guidance in the statute or elsewhere as to what may be considered adequate and proper substantiation, and no guidance as to what methodologies may be considered internationally recognized.

181. It is often impossible to know in advance whether any particular representation will be upheld by the Tribunal as meeting these vague, uncertain, and mercurial standards, for a number of reasons.

182. First, the applicable standards are vague, undefined, and uncertain, and hence subject, more than usual, to a wide range of individual-adjudicator applications and considerable discretion. This makes it difficult or not impossible to determine in advance what expression will or will not result in liability.

183. Second, many such statements may contain an element of aspirations, goals, estimations, or projections, which often cannot be "tested" or proven to be objectively true or false, and which may be partially based on both known and unknown risks and uncertainties.

184. Often, such representations involve statements about anticipated future events or intentions that, by definition, cannot be proven or substantiated in advance. This may involve a business or industry group developing environmental goals and communicating plans to achieve them, including by investing in promising but yet unproven technology, in the knowledge that the actual results may be better or worse than anticipated.

185. As such, both actual results and future events could differ materially from those anticipated in making such statements, and a statement that is true or defensible one day may be untrue or indefensible the next, based on unanticipated events or changes, whether in the broader world or in a business's or industries' circumstances.

186. Third, the "tests" or "methodologies" in relation to environmental impacts or benefits, where they exist, are also not static, nor are they always or even frequently subject to a clear consensus. They are constantly developing and changing as new information, ideas, and research is spread, shared, assessed, and debated, in economic, political, and academic forums.

187. The only way for such tests and methodologies to develop, improve, and to become adopted is for interested actors, often private businesses or industry representations, to develop, innovate, use, and rely on these different methodologies or standards, and share the information necessary to apply and improve them.

188. As a result, what may be considered an adequate and proper test one day may be inadequate and improper the next, and vice versa. Similarly, methodologies that are not "recognized 'internationally" may later become internationally recognized, while other methodologies that may be recognized internationally may be overtaken or proven to be misleading.

189. In light of the above, the direct impact of the Impugned Provisions is to render unlawful, at a minimum, the following categories of statements or representations:

a. Claims that are viewpoint or opinion-based, or that are reasonable or defensible on the available evidence, but cannot be easily proven by testing or verification;

b. Claims that are true, reasonable, or defensible on the available evidence, but not yet subject to a widespread consensus or agreement based on existing testing and methodologies;

c. Claims that can be proven to be true or reasonable based on the applicable standards of verification, but were not proven to be based on those standards *prior* to the statement being made;

d. Claims that are true, reasonable, or defensible on the known evidence, but for which the costs of verification sufficient to meet the applicable standards outweigh the value of making the statement;

e. Claims that are based on meaningful standards of verification, but based on tests that are not yet recognized or accepted as adequate and proper, or methodologies that are not yet internationally recognized;

f. Claims that are true, reasonable, or defensible at the time they were made, but that were not based on standards of verification deemed sufficient by the tribunal;

g. Claims that were not based on the applicable standards of verification at the time they were made, but that are later substantiated or proven to be true or consistent with adequate and proper testing or substantiation;

h. Claims that could be proven to be true, reasonable, defensible, or based on the applicable standards of verification, but where the costs of undertaking the government approved verification process outweighs the value of making the statements to the speaker; and

i. Claims that do not meet the applicable standards of verification, but are not demonstrably false or misleading, and that were made honestly and in good faith, or otherwise based on a defensible view of the known evidence.

190. The direct impact of the Impugned Provisions is therefore to prohibit, at a minimum, the above listed categories of statements in relation to the environmental impacts of businesses or industries, all of which are true, reasonable, defensible on the known evidence, or consistent with the applicable standards of verification, and thereby to deprive the public of the information and viewpoints in relation to these claims.

ii. The "Chilling Effect" – Expression Indirectly Discouraged or Deterred by the Impugned Provisions

191. In addition to the expression that is directly prohibited by the Impugned Provisions, the indirect impact of the Impugned Provisions is to create a significant "chilling effect", in which the representations in question would turn out to be lawful under the Impugned Provisions, following adjudication, but are nevertheless not expressed, and hence are not available to inform the public.

192. This may occur for a range of reasons, driven by the inherent vagueness and uncertainty of the applicable standards, the dynamic nature of the relevant evidence or representations themselves, as well as rational decisions about the risk created by the Impugned Provisions.

193. In particular, the indirect impact of the Impugned Provisions will be to discourage or deter a broad range of statements, including but not limited to the following categories of representations:

a. Claims that would be found, following adjudication, to be based on the applicable standards of verification, but where there is sufficient uncertainty as to what standards of verification will be applied by an adjudicator to outweigh the value of making the statements;

b. Claims that would be found, following adjudication, to be based on the applicable standards of verification, but the representing party is unwilling to bear even a minor risk of an adverse finding, given the significant the reputation and financial harms that could result; and

c. Claims that would be found, following adjudication, to be based on the applicable standards of verification, but that are controversial or unpopular, and the party making the statement is unwilling to bear the risk of reputational harm and costs associated with a politically driven tribunal proceeding.

194. Although the chilling effect of the Impugned Provisions will be significant for all those subject to them, this impact will be especially pronounced for individuals and small or medium-sized businesses without the financial resources or wherewithal to engage in elaborate or sophisticated processes of substantiation,

to obtain expert or legal advice prior to making such statements, or to defend their statements in a tribunal or court setting.

195. Such individuals and businesses will have particularly strong incentives to not engage in any expression pertaining to the environmental benefits of products, businesses or activities, no matter how true, reasonable, defensible, or honestly believed the statements may be.

196. In addition, there is a significant risk that any person associated with or representing a "business interest" will be found to be making a statement "promoting, directly or indirectly, any business interest, by any means whatever", when they are offering arguments, expert opinions, or public policy advice in relation to environmental matters.

197. The enactment of the Impugned Provisions has created significant uncertainty and concern among business entities, industry groups, and their representatives, in terms of what they can or cannot say, and the potential risks they face, even where they are confident that their representations are accurate, reasonable, defensible or verifiable.

198. Following the enactment of the Impugned Provisions, a large number of businesses and industry groups have removed material and information pertaining to the environment from their websites, social media accounts, and other platforms, and refrained from providing additional information and viewpoints relating to the environment.

III. LEGAL BASIS

199. The Plaintiff pleads and relies on the following:

a. *Judicature Act*, RSA 2000, c J-2;

b. *Alberta Rules of Court*, Alta Reg 124/2010;

c. *Competition Act*, RSC 1985, c C-34 ("***Competition Act***");

d. *Fall Economic Statement Implementation Act, 2023* (the "***Implementation Act***");

e. *Constitution Acts, 1867* to *1982*;

f. *Constitution Act, 1982*, in particular s. 52;

g. *Canadian Charter of Rights and Freedoms* (the *"**Charter***"), in particular ss. 2(b) and 24(1); and

h. The inherent jurisdiction of the Court.

200. The Plaintiffs, in their own right and on behalf of their membership, have standing to challenge the Impugned Provisions and raise the important constitutional issues addressed in this Statement of Claim, and in particular, have:

a. direct or private interest standing, as organizations made of up members of the business community whose own expression, and access to others' expression, will be limited by the Impugned Provisions;

b. public interest standing, on the basis that (1) there is a serious justiciable issue raised in this claim, (2) the Plaintiffs and their members have a real stake and a genuine interest in that issue, and (3) the proposed action is a reasonable and effective way to bring that issue before the Court.

201. For the reasons set out below, the Impugned Provisions, being sections 236(1) and 254 of the *Implementation Act* amending sections 74.01(1) and 103.1 of the *Competition Act*, violate section 2(b) of the *Charter*, are not demonstrably justified under section 1 of the *Charter*, and must therefore be declared void and of no force or effect.

A. Section 2(b) of the Charter – Core Principles

202. The guarantee of freedom of expression in section 2(b) of the *Charter* is built on the core assumptions of liberal democracy, including that society is composed of rational actors capable of evaluating the veracity and value of assertions and opinions, and there can be no state-enforced "truth" in relation to contentious public policy matters to which all must either subscribe or be forced to stay silent.

203. To the contrary, the entire purpose of freedom of expression is to protect the expression of information and viewpoints that may be unpopular, idiosyncratic, or distasteful; that may be considered untrue or unverified; that may be contrary to the views of the government; or that may challenge the scientific or societal consensuses of the day.

See e.g. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 968; *R. v. Zundel*, [1992] 2 SCR 731, at 753; *R. v. Sharpe*, 2001 SCC 2, paras 21-23.

204. Section 2(b) recognizes that the state is inherently incapable of, and cannot reasonably justify, attempting to enforce a particular version of 'truth' on the population, particularly as it relates to controversial policy matters. As the Court held in *Dolphin Delivery*, quoting the words of John Stuart Mill:

> The importance of freedom of expression has been recognized since early times: see John Milton, *Areopagitica; A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England* (1644), and as well John

Stuart Mill, "On Liberty" in *On Liberty and Considerations on Representative Government* (Oxford 1946), at p. 14:

> If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

And, after stating that "All silencing of discussion is an assumption of infallibility, he said, at p. 16:

> Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.

Nothing in the vast literature on this subject reduces the importance of Mill's words. The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy.

RWDSU v. Dolphin Delivery Ltd., [1986] 2 SCR 573, at 583; see also *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326, at 1337.

205. Consistent with these fundamental premises, section 2(b) is intended to protect and promote a range of essential values in a liberal democracy, including:

a. the value of seeking and attaining truth, and fostering a vibrant and creative society, through the “marketplace of ideas”;

b. the value of the vigourous and open debate essential to social and political decision making, democratic governance, and the preservation of our rights and freedoms; and

c. the value of a society which fosters the self-actualization, self-fulfillment, human flourishing, and freedom of its members.

Ford v. Quebec (Attorney General), [1988] 2 SCR 712, at 765-767; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 976; *R. v. Keegstra*, [1990] 3 SCR 697, at 863-864, per McLachlin J..

206. Amongst these core principles is the “marketplace of ideas”, which is premised on the fact that, as there is often no single, immutable truth that the government can ascertain, much less enforce, truth can only emerge through the open and free competition between conflicting information, ideas, and viewpoints.

207. Put simply, “the best test of truth is the power of the thought to get itself accepted in the competition of the market”. That is why, as U.S. Supreme Court Justice Louis Brandeis once explained, the remedy for objectionable speech “is more speech, not enforced silence”.

Abrams v. United States, 250 U.S. 616 (1919) at 630, Holmes J., quoted in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573, at 583-584; *Whitney v. California*, 274 U.S. 357 (1927), at 377, Brandeis J., quoted in *R. v. Keegstra*, [1990] 3 SCR 697, at 803-804, per McLachlin J.

208. Similarly, freedom of expression recognizes that “people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them”.

Va. Pharmacy Bd. v. Va. Consumer Council, 425 US 748 (1976), at 770, quoted in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at 757.

209. These principles reflect the fact that section 2(b) “protects listeners as well as speakers”, and as such, members of the public have a constitutional right to hear expression on matters of public interest, which may in turn inform their personal, economic, and political decision-making.

Edmonton Journal v. Alberta (Attorney General), [1989] 2 SCR 1326, 1339-1340.

210. As noted by Chief Justice McLachlin and Justice Major, dissenting in *Harper* (although not on this point):

> [17] Freedom of expression protects not only the individual who speaks the message, but also the recipient. Members of the public — as viewers, listeners and readers — have a right to information on public governance, absent which they cannot cast an informed vote; see *Edmonton Journal, supra*, at pp. 1339-40. Thus the *Charter* protects listeners as well as speakers; see *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at pp. 766-67.
>
> [18] This is not a Canadian idiosyncrasy. The right to receive information is enshrined in both the Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), and the International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47. Canada is a signatory to both. American listeners enjoy the same right; see *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), at p. 390; *Martin v. City of Struthers*, 319 U.S. 141 (1943), at p. 143. The words of Marshall J., dissenting, in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), at p. 775, ring as true in this country as they do in our neighbour to the south:

> [T]he right to speak and hear — including the right to inform others and to be informed about public issues — are inextricably part of [the First Amendment]. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the means indispensable to the discovery and spread of political truth. [Citations omitted.]
>
> *Harper v. Canada (Attorney General)*, 2004 SCC 33, paras 17-18.

211. Thus, section 2(b) is built on a number of essential principles which must be safeguarded for it to achieve its purposes, including that:

    a. the government does not hold a monopoly on truth, much less one it could be justified to enforce, particularly in relation to contentious public policy issues;

    b. that, absent exceptional circumstances, the public can be presumed to be rational and able to assess the veracity and value of expression; and

    c. that the free dissemination, exchange, and competition of ideas and information in the marketplace of ideas is indispensable to truth seeking in a liberal democracy.

212. It is only by recognizing these core principles that the rights of speakers to express information and opinions, and the right of listeners to receive, consider and assess information and opinion, can be fully and robustly protected, as intended by section 2(b).

B. The Purpose and Effect of the Impugned Provisions – Contrary to Section 2(b)

213. Both the purpose and effect of the Impugned Provisions are fundamentally inconsistent with the core, essential principles underlying freedom of expression.

214. The purpose and effect of these provisions is not to eliminate knowing falsehoods, nor even statements that are provably or demonstrably false or misleading, which objectives are suitably protected by the *Competition Act* provisions in place prior to the Impugned Provisions.

215. Rather, the actual and anticipated effect of the Impugned Provisions is to prohibit or deter the dissemination and receipt of information and ideas, in relation to one particular policy area (i.e. the environment), and only with respect to those speakers (i.e. members of the business community) whose views and statements are likely to run contrary to a particular political agenda.

216. At best, the Impugned Provisions are premised on the inability of the population to discern, through rational discourse, debate, and contrary expression, the veracity or value of the expression on matters of public interest, and the ability of the government to enforce its own views, by prohibiting any statements that cannot be proven to the government's satisfaction to be subject to adequate standards of verification.

217. At worst, the Impugned Provisions represent a deliberate attempt to manipulate public discourse and the "marketplace of ideas" in such a manner that would minimize the dissemination and receipt of information with which the government disagrees, and thereby artificially promote the views of the government of the day on important and hotly-contested public policy issues.

218. Either purpose is fundamentally inconsistent with the values and principles underling section 2(b), and in particular, the value of fostering a vibrant and informed society through the marketplace of ideas.

219. Even if the purpose of the Impugned Provisions were not itself unconstitutional, the effect of the Impugned Provisions is to prohibit or restrict the dissemination and receipt of information, statements, representations, views, and opinions, which cannot be demonstrated to have been based, at the time they were made, on standards of verification subsequently deemed sufficient by a government adjudicator.

220. This will include all forms of representations pertaining to the environmental impacts of products, businesses or their activities, including a wide range of claims that can be proven to be true, reasonable, defensible, or, at the very least, made in good faith in light of the available evidence.

221. Importantly, these representations are not only relevant to the making of purchasing, investment, or other economic decisions. The actions taken (or not taken) by businesses or industries, and the effects of that action or inaction, are essential to the public policy debate surrounding what regulatory measures or public policies should be adopted in the environmental context.

222. That is, statements in relation to the environmental impact of businesses and industries are essential to determining not only the scope of any problems that exist, but also the appropriate political or policy-based solutions to those problems, and how those can be balanced with a commitment to economic development upon which the public depends.

223. The direct effect of the Impugned Provisions, then, is to prohibit or restrict the dissemination and receipt of a wide range of valuable representations important to economic and political decision-making, including representations that are true, reasonable, defensible, or subsequently verifiable, but that cannot be

proven, to the satisfaction of a government arbiter, to have been based on certain vague and uncertain standards of verification at the time they were made.

224. The impact on freedom of expression is significantly exacerbated in this case by the additional indirect or "chilling effect" that the Impugned Provisions will have on free and open discourse in relation to the environment.

225. The constitutional relevance of a "chilling effect" on expression was described by Justice McLachlin as follows in *Keegstra* (dissenting, but not on this point):

> A second characteristic peculiar to freedom of expression is that limitations on expression tend to have an effect on expression other than that which is their target. In the United States this is referred to as the chilling effect. Unless the limitation is drafted with great precision, there will always be doubt about whether a particular form of expression offends the prohibition. There will always be limitations inherent in the use of language, but that must not discourage the pursuit of the greatest drafting precision possible. The result of a failure to do so may be to deter not only the expression which the prohibition was aimed at, but legitimate expression. The law-abiding citizen who does not wish to run afoul of the law will decide not to take the chance in a doubtful case. Creativity and the beneficial exchange of ideas will be adversely affected. This chilling effect must be taken into account in performing the balancing required by the analysis under s. 1. It mandates that in weighing the intrusiveness of a limitation on freedom of expression our consideration cannot be confined to those who may ultimately be convicted under the limit, but must extend to those who may be deterred from legitimate expression by uncertainty as to whether they might be convicted.
>
> *R. v. Keegstra*, [1990] 3 SCR 697, at 850.

226. The additional indirect effect (i.e. the chilling effect) of the Impugned Provisions will necessarily be to restrict the expression and receipt of a significant range of information, views, and statements that go well beyond those directly prohibited by the Impugned Provisions.

227. That is because of the considerable uncertainty as to whether any particular statement will be found to meet the vague standards of verification, which cannot be known in advance, as well as the significant costs and to participate in a government tribunal process, which can be initiated at any time by any opponent of the statement, product, business, or industry in question, even in the complete absence of any evidence or basis to believe the statement or representation is in any way false or misleading.

228. In light of these elements of the Impugned Provisions, representatives of businesses and industries will often refrain from disseminating information or

viewpoints, depriving the public of that information and those views, even if they have confidence that they can be verified, due to the exorbitant financial and reputational costs of proceeding through the government tribunal process – and the ruinous financial consequences if they are found to be wrong.

229. The most significant harmful effect of these provision is not to prevent businesses from engaging in commercial expression, but to deprive the public of information, views, and opinions essential to informing their own personal, economic, and political decision-making.

230. In addition, the Impugned Provisions will significantly distort the broader public discourse or "marketplace of ideas" in relation to the appropriate balance between economic and environmental goals, by only prohibiting or deterring those with information, views, an opinions from one side of these often contentious debates and discussions.

231. As a result, the effect of the Impugned Provisions will be to prohibit or deter valuable expression, including true, reasonable, defensible or verifiable representations, and to manipulate public discourse and the "marketplace of ideas" in such a manner that advances a particular political or policy agenda, at the expense of those who disagree with that agenda, or who prefer a different balance between prosperity and environmental protection.

232. Therefore, the restrictions on expressive activities set out in the Impugned Provisions clearly breach section 2(b), in both purpose and effect.

C. No Justification Under Section 1

233. The Government bears the burden of demonstrating that any restriction on section 2(b) is demonstrably justifiable in a free and democratic society.

234. In this respect, it is well-established that political expression – which includes expression of information and opinions that can inform the public's understanding of important political issues, policy development, and voting preferences – come within the very core of the section 2(b) guarantee, and as such, will be the most difficult to justifiably restrict under section 1.

Harper v. Canada (Attorney General), 2004 SCC 33, para 84.

235. Public debate and discussion surrounding how best to protect the environment while preserving the prosperity and necessary to create jobs, and fund public services, are among the most fraught, and highly contentious, public policy issues facing society and governments in modern Canadian society.

236. An essential element of such discourse is information, views, and opinions from businesses and industries in relation to their environmental impacts, which

necessarily must inform the political and policy-based debates regarding how to balance these important objectives.

237. The public is constitutionally entitled to as broad a range of information about these policy and political issues as possible, from as many diverse sources as possible, particularly in light of the constantly evolving state of human knowledge in these areas, and the absence of any clear or infallible consensus.

238. Moreover, the fact that expression may be offered for a commercial purpose does not deprive it of robust constitutional protection. In *Ford*, the Supreme Court of Canada expressly rejected the "view that commercial expression serves no individual or societal value in a free and democratic society and for this reason is undeserving of any constitutional protection".

> *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712 ("***Ford***"), at 767.

239. As the Court explained:

> Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy.
>
> *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712 ("***Ford***"), at 767.

240. This is especially the case where such expression is also relevant and essential to important public policy issues, as is the case with statements, information, and views about the environmental impacts of businesses and industries.

241. As noted above, this takes the expression out of the realm of purely commercial expression relevant only to economic decisions, and into the realm of political expression essential to meaningful democratic debate and discourse.

242. As the US Supreme Court has explained, certain expression, albeit with a commercial element, may be important both as a matter of general public interest, and as providing essential information relevant to public policy debates about proper, necessary, and adequate government regulation:

> Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest. The facts of decided cases furnish illustrations: advertisements stating that referral services for legal abortions are available, *Bigelow* v. *Virginia, supra;* that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals, see *Fur Information & Fashion Council, Inc.* v. *E. F. Timme & Son,* 364 F. Supp. 16 (SDNY

> 1973); and that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs, cf. *Chicago Joint Board* v. *Chicago Tribune Co.,* 435 F. 2d 470 (CA7 1970), cert. denied, 402 U. S. 973 (1971).
>
> (…)
>
> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. See *Dun & Bradstreet, Inc. v. Grove*, 404 U. S. 898, 904-906 (1971) (Douglas, J., dissenting from denial of certiorari). See also *FTC v. Procter & Gamble Co.*, 386 U. S. 568, 603-604 (1967) (Harlan, J., concurring). And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal. [emphasis added]
>
> *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 US 748 (1976), at 764-765.

243. This reasoning applies with considerable force in relation to the expression that is prohibited or deterred by the Impugned Provisions, as it relates directly to the environmental impacts of businesses and industries, which is essential to the debate over their proper regulation.

244. Restricting the expression and dissemination, along with the receipt and consideration, of information and opinions in this area interferes in a profound way with freedom of expression and the marketplace of ideas, particularly where only one source or one side of a contentious public policy debate is being so restricted.

245. There is no overriding societal interest to justify these extreme restrictions on free speech under the *Charter of Rights and Freedoms*.

246. The Impugned Provisions are not designed to advance the protection of consumers or ensure public safety, *per se*, as is the case with consumer protection legislation.

247. Nor are they necessary to protect fair competition by prohibiting false and misleading representations, or unverified claims about a product's performance, to ensure a level competitive playing field.

248. Prior to the enactment of the Impugned Provisions, the *Competition Act* already prohibited representatives of businesses or industries from making false or misleading claims about the environmental impacts of products, businesses, and business activities, as well as unverified claims about the performance of a product, including those relating to the environment.

249. There is no basis to conclude that these measures, along with the considerable investigation and enforcement mechanisms in the *Competition Act*, were inadequate or insufficient to address concerns over false and misleading environmental claims.

250. The Impugned Provisions go much further than necessary to ensure that such representations are not false and misleading, or to ensure that narrow claims about a product's performance are based on adequate testing or verification, both of which are adequately addressed by the pre-existing provisions.

251. Rather, the purpose and effect of the Impugned Provisions is to directly prohibit, or indirectly deter, a wide range of statements that are true, reasonable, defensible, or verifiable, or that may otherwise properly inform public debate and discussion in these critical issues.

252. Nor is there any risk of economic harm – whether to individuals or to the economy more broadly – that could be caused as a result of statements that cannot be proven to be false or misleading, but are nevertheless prohibited or deterred by the Impugned Provisions.

253. And even if there were any such economic harm, that would not be sufficient to justify such extreme restrictions on freedom of expression, as the Court held in *Pepsi-Cola*:

> [72] Protection from economic harm is an important value capable of justifying limitations on freedom of expression. Yet to accord this value absolute or pre-eminent importance over all other values, including free expression, is to err. The law has never recognized a sweeping right to protection from economic harm. … [emphasis added]

R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., 2002 SCC 8, para 72.

254. The ultimate effect of the Impugned Provisions is to control and influence public opinion of how best to protect the welfare of the present and future generations in the face of the environmental challenges confronting the world today, by depriving the public of essential information and opinions offered by, and often in the sole possession of, businesses and industries.

255. There is no legitimate societal interest in requiring, for instance, the resource industry to ensure that anything said in defence of their activities, or their intended steps to reduce or eliminate harmful emissions, must be based on the government's vague, uncertain, and undefined standards of verification in advance, or else be subject to significant financial and reputational penalties.

256. That is particularly the case when there is no similar restrictions on what critics of the industry can say, including those in government, who are not subjected by the Impugned Provisions to any constraints in relation to representations about their own performance or future objectives in relation to the environment.

257. This creates a lop-sided policy debate within the Canadian society, whereby opponents of certain industries, including governments, can make unverifiable or even false claims about businesses or industries, while contrary information or opinions from the business community are silenced, even if those claims are true, reasonable, defensible, or verifiable on the evidence.

258. While the government of the day can promote its policy initiatives in this area, it cannot preclude the industries and businesses that are subject to these initiatives from speaking out against them or challenging the assertions underlying those initiatives.

259. However, that is the effect of the Impugned Provisions, by imposing significant penalties on business or industry representatives if they cannot establish that such claims were based on the government's vague, uncertain, and undefined standards of verification, or are unwilling to face the substantial risk of financial or reputational harm, even if the statements may later be found to meet those standards.

260. And, by restricting expression and the public's receipt of and access to essential information and viewpoints in relation to environmental impacts of businesses and industries, the Impugned Provisions will undermine the search for truth driven by such representations and exchanges.

261. This will not only undermine development and innovation in relation to environmental protection, but will obstruct and obscure fully informed democratic and policy debates in relation to the problems and solutions in this highly contentious policy area.

262. Such a stark restriction upon free expression, resulting in the manipulation of the public discourse and the marketplace of ideas, represents a profound intrusion upon the mechanisms of self-government in a liberal democratic society, and can only be justified by the most extreme and emergent harms; and none are present in this case.

263. Finally, where businesses and industries are subject to liability for sharing their plans and targets for future progress in environmental protection, even if defensible and held honestly and in good faith, they will necessarily be discouraged and deterred from undertaking such initiatives at all, as it reduces the incentive businesses have to undertake such measures.

264. Thus, there are no pressing and substantial objectives that would justify the Impugned Measures, any valid concerns in relation to false or misleading advertising are sufficiently protected through the pre-existing restrictions in the *Competition Act*, and the harmful effects of the Impugned Provisions on freedom of expression and democratic governance far outweigh any minimal benefits.

265. As such, there is no compelling public justification for the Impugned Provisions under section 1, rendering those impugned provisions unconstitutional.

Remedy sought:

266. A declaration that the Impugned Provisions breach section 2(b) of the *Charter*, are not justified under section 1 of the *Charter*, and therefore are void and of no force and effect under section 52 of the *Constitution Act, 1982.*

Date: December 3, 2024

GALL LEGGE GRANT ZWACK LLP

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NOTICE TO THE DEFENDANT(S)

You only have a short time to do something to defend yourself against this claim:

- 20 days if you are served in Alberta
- 1 month if you are served outside Alberta but in Canada
- 2 months if you are served outside Canada.

You can respond by filing a statement of defence or a demand for notice in the office of the clerk of the Court of King's Bench at Calgary, Alberta, AND serving your statement of defence or a demand for notice on the plaintiff's(s') address for service.

WARNING

If you do not file and serve a statement of defence or a demand for notice within your time period, you risk losing the law suit automatically. If you do not file, or do not serve, or are late in doing either of these things, a court may give a judgment to the plaintiff(s) against you.