Summary of Arguments from ALBERTA ENTERPRISE GROUP AND INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION v. CANADA (ATTORNEY GENERAL)

Note: I've grouped the main themes (and my responses) from the Statement of Claim into seven arguments, rougly from most important to least.

A. Unnecessary: We didn't need the new rules. This argument has three sub-arguments:

1. Misleading and false statements were already prohibited under the previously existing rules.

   Response:

   - Prior to the amendments, there were already rules requiring that (1) persons not mislead or lie about a product or a business activity in a material respect and (2) persons not make any statements about a product's performance, etc., without substantiating the statement in accordance with an adequate and proper test (with what's called a "reverse onus").

   - But there were gaps in these rules that were particularly tricky for catching greenwashing, to which the new rules respond:

     - 1) It was unclear whether the substantiation requirement extended to all environmental benefits of a product → new rule that says if you make a statement that your product benefits the environment, or mitigates the causes or effects of climate change, you must base that statement on "an adequate and proper test"

     - 2) The substantiation requirement only applied to claims about *products* → new rule says if you make a statement that a business or business activity protects or restores the environment or mitigates the causes or effects of climate change, you must base this on substantiation "in accordance with internationally recognized methodology" (Note this rule would capture statements for instance that a company is reducing their emissions, going to achieve net zero, taking steps to reduce their impacts on habitat, etc.)

   - Shouldn't the general prohibition against misleading or misleading statements cover anything a company could say about the environmental benefits of products or activities?

     - Theoretically, yes. But in practice, this is tricky.

     - The new rules both have a "reverse onus" – this means that the company must prove that they *have* followed the rule, rather than the complainant having to prove that they *haven't*. This reverse onus was in the

substantiation rule already in the Competition Act. The reverse onus is necessary to counter the informational asymmetry between the company (who has all the information) and the public (who does not): it is a very tall order otherwise for the public (or the Competition Bureau) to prove that the statement is misleading or false; the company is in a better position to defend themselves.

- Greenwashing is different from other public-facing claims that are often testable over time, with the informational asymmetry being bigger than lots of claims: e.g., you know that a company has misled you re the quality of a product if it breaks; if you can't find a replacement part when they said it would be repairable. But with greenwashing, it's difficult for the public/government/other companies to ever know.

- The fact that government had already included a substantiation rule for performance claims is proof that the general rule against misleading statements is insufficient in certain cases.

  - The pre-existing performance substantiation rule has withstood constitutional scrutiny – including the argument that it was unnecessary because there was already a general rule against misleading or deceptive marketing statements.

  - The court has concluded that this additional rule was a reasonable additional rule to achieve the government's objective.

2. The Competition Bureau's large investigative powers under the deceptive marketing rules are already so vast that it didn't need additional rules.

   Response: The Competition Bureau does have large investigatory powers where it suspects that a company is violating the deceptive marketing rules. However, the Competition Commissioner does not have limitless resources. It cannot afford to randomly investigate every company it has a *hunch* might be making false or misleading statements. This would be highly inefficient.

3. Other legislation already covered this.

   Response: The Statement of Claim makes a half-hearted attempt to argue this. I respond to two arguments:

   - Provincial consumer protection legislation already covers this: They acknowledge that consumer protection legislation is meant to protect consumers, whereas the Competition Act is meant to the protect the *market*. And provincial consumer protection legislation focuses very specifically on *products* and *services* and not on general statements about a company. So, while there may at first glance be some overlaps, these types of legislation do not respond to the same issues and the Competition Act fills an important gap.

- Other laws, including securities laws: Securities laws, for instance, apply to public companies only (a small fraction of companies in Canada), so if there is any overlap it is minimal. These laws do not do what the Competition Act does.

B. Chilling Effect: The uncertainty in the new rules will cause companies who are not 100% certain whether their statements violate the law to self-censor and not talk about their environmental impacts even though they are accurate.

- **Response**: The impact of laws can be uncertain before they are given shape by case law. This is typical. Case law and guidance from the Competition Bureau – which the Bureau is working on – will clarify uncertainties.

- **Response**: While uncertainties are ironed out, there is a defence of due diligence built into the Competition Act. I.e. if you do your best, if you follow substantiation standards that *you think* in good faith likely follow the law, then you're not going to be subject to penalties even if it turns out you were wrong. Additionally, maximum penalties, which are imposed only in the most egregious cases, are not representative of the risks raised by the amendments given that there is a list of aggravating and mitigating factors the Tribunal must consider. The due diligence defence and the aggravating/mitigating factors have been severely underplayed by opponents to the amendments, and this exaggeration of the risks of uncertainty is scaremongering that is itself likely to cause a chilling effect.

- **Response**: The Statement of Claim argues that the fact that some businesses have taken statements off their websites is evidence of the chilling effect. This is a problematic logical leap: the rules may in fact be having the intended effect. One would need to know more about the nature of the statements, the evidence backing them, and indeed their misleading or potentially deceptive nature, before you can draw the conclusion that taking down the statements was due to a chilling effect.

C. Political Info: The new rules prevent businesses from providing valuable information and unique viewpoints in the public policy debate about how best to tackle the environmental crisis.

- **Response**: This misrepresents the kinds of representations that the Competition Act rules respond to. These rules do not prevent businesses from making political statements, but they do prevent them from publicly saying misleading or false things about their products or activities. These are not "opinions" about how best to tackle competing interests in the energy transition, for instance, but rather commercial speech in marketing statements (e.g., company will be net-zero by X, or is reducing their emissions, etc.).

D. Accurate Info: The new rules would prohibit accurate and truthful information that just doesn't adhere to the rules from reaching the public (i.e. it captures a wider net than just untruthful statements).

- **Response**: It is true that even without substantiation, some of the statements made by businesses are going to be true. So, the rules capture both misleading/false statements and truthful statements that are unsubstantiated. But when you're making scientifically verifiable statements, you don't want to just accidentally be correct.

- **Response**: The Statement of Claim says that businesses are nervous even "where they are confident that their representations are accurate, reasonable, defensible or verifiable." But this begs the question, how can a business be confident that the statements they are making are defensible if they haven't substantiated those claims? If they are so confident (which means they must have run tests) then this change to the law shouldn't affect them either at all (if they are already relying on internationally recognized methodology) or little.

E. Definitive Proof is Impossible: Statements about future impacts or intentions cannot be definitively proven or substantiated in advance.

- **Response**: This is a straw man argument. The new rules do not require definitive proof or substantiation of future impacts. They require that all environmental claims about a product or business activity be substantiated in accordance with a proper test or an internationally recognized methodology. It's okay if there are unknowns, of course, and many methodologies make space for this: e.g., if you're making a net-zero claim, the methodology might require a company to set interim goals and substantiate how they are measuring up to those goals as they come due – not have definitive certainty and proof.

F. Rules Target Businesses Only (It's Not Fair): The rules impact businesses but not civil society groups and are therefore lopsided in their impact, which contributes to their unconstitutionality.

- **Response**: The Competition Act's purpose is to protect market competition. Environmental groups, NGOs, etc., are not prohibited from making statements by the Competition Act because they aren't advancing business interests. The fact that the rules only target businesses' representations is not evidence they are politically motivated; it is simply evidence of the purpose of the Competition Act.

G. Politically Motivated Frivolous Claims: The private right of access to the Competition Tribunal under the deceptive marketing rules that will come into force in June 2025 will lead to a flood of politically motivated frivolous claims targeting industry.

- **Response**: The amendments are unlikely to spark a wave of frivolous greenwashing suits by NGOs and environmental activists. The Competition Tribunal will only grant leave to cases that are in the public interest, providing a safeguard against frivolous claims.

- **Response**: The potentially high costs on NGOs if they lose a case will deter baseless lawsuits.