

December 3, 2015

Via online complaint form

Commissioner of Competition
Competition Bureau
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Gatineau, QC K1A 0C9

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Re: False and misleading representations about the reality, causes and consequences of global warming and climate change, in contravention of the *Competition Act*

Dear Mr. Pecman,

I write to you on behalf of six Canadian residents who together submit the following application for an inquiry under subsection 9(1) of the *Competition Act*. Please address any correspondence in the matter to me.

Sincerely,



Charles Hatt
Barrister & Solicitor

- cc** Stephen Lewis, former Canadian Ambassador to the UN and chair of the 1988 World Conference on the Changing Atmosphere
- Tzaporah Berman, author and adjunct professor, York University Faculty of Environmental Studies
- Dr. Thomas Duck, atmospheric scientist, Dalhousie University Department of Physics & Atmospheric Science

Dr. David Schindler, Killam Memorial professor of ecology, University of Alberta
Department of Biological Sciences

Dr. Danny Harvey, IPCC lead author Working Group III – The Mitigation of Climate Change
(Ch 9), University of Toronto Department of Geography and Planning

Devon Page, Executive Director, Ecojustice

Enclosures

Application for Inquiry: Climate science misrepresentations

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PART I - OVERVIEW

Climate change poses a serious threat to our civilization and economic activity. The burning of fossil fuels is universally understood, by every national government, science academy, and professional scientific organization, to be the principal source of this threat.

Canadians – as consumers, investors, and voters – are constantly making choices to which climate change is relevant. However, the ability of Canadians to make rational, informed decisions is hindered by false and misleading representations about climate change science (“climate science misrepresentations”).

These climate science misrepresentations are made by groups that prominently and regularly deny the reality, causes and consequences of global warming and climate change (“denier groups”). They are made without scientific basis and they contribute to public confusion about the scientific consensus on climate change.

Climate science misrepresentations are inherently harmful to the proper functioning of markets in Canada. The confusion they sow makes low-carbon technologies less competitive and distorts capital investment toward high-carbon industries, risking a carbon bubble.

This submission is an application under s. 9(1) of the *Competition Act* for an inquiry into climate science misrepresentations by denier groups that contravene the Act’s prohibitions against false and misleading representations.

The climate science misrepresentations identified in this application are made to the public for the purpose of promoting business interests. They do so in several ways. First, the climate science misrepresentations promote the denier groups’ own business interests, as non-profits dependent on outside funding for their continued existence. More importantly, the climate science misrepresentations promote the business interests of deep-pocketed individuals and corporations that appear to fund the denier groups. These funders are antagonistic to economic decision-making that factors in the reality, causes and consequences of global warming and climate change. In essence the denier groups serve as front groups, allowing their funders to publically deny and misrepresent climate change science without the prospect of public accountability.

We request that the Commissioner inquire into the climate science misrepresentations identified in this application. Based on the publically available evidence presented in this application, we believe there are ample grounds for such an inquiry.

PART II - THE CLIMATE CHANGE DENIAL STRATEGY

A. Denier groups use the strategy created by tobacco industry front groups – attack science with misrepresentations to create public doubt about scientific consensus

US litigation against the tobacco industry established that the industry used front groups to confuse and mislead the public about the health risks of smoking.¹ Among other activities, these front groups misrepresented established science in order to sow doubt about the scientific consensus that smoking causes cancer. This benefitted the tobacco industry by delaying, for decades, corrective market and regulatory action that they knew would harm their business interests.

The courts have characterized these activities as part of the "open question" strategy.² By virtue of those false and misleading representations questioning the scientific consensus that smoking causes cancer, the public was led to believe causation was still an open question. Public doubt about the science and its consequences provided the vacuum in which consumers and investors would continue to make decisions inconsistent with the scientific consensus that smoking is harmful to health.

The open question strategy has been employed by front groups on various public health and environmental issues in North America since the days of "Big Tobacco".³ In Canada, several denier groups are currently using the same playbook to deceive Canadians about the science of climate change.

Denier groups misrepresent climate change science to promote their own business interests and those of their anonymous funders. While the denier groups do not publically disclose the identities of their funders,⁴ available public information suggests their funding comes at least in part from individuals and corporations with business interests in the production and use of fossil fuels.⁵

Denier groups misrepresent climate change science in various ways. Just as with tobacco, these misrepresentations are designed to sow doubt in the public's mind about the reality, causes, and consequences of global warming and climate change. Climate science misrepresentations generally adhere to the following propositions:

- the earth's climate system is not warming
- humans are not causing any warming that is occurring
- actions to reduce greenhouse gas ("GHG") emissions are not warranted, or
- any climate change that occurs is beneficial.

¹ For a paradigmatic example see *United States v. Philip Morris USA Inc.*, 449 F. Supp.2d 1 (D.D.C. 2006), *aff'd in part & vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009) (per curiam), *cert. denied*, 130 S. Ct. 3501 (2010), in particular pp 15-212.

² *Ibid.*

³ A number of examples, including climate change, are profiled at length in Naomi Oreskes & Erik M. Conway, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (London: Bloomsbury Press, 2010).

⁴ This is a pernicious development since the time of Big Tobacco, when at least it was known that certain major institutions such as the Tobacco Institute and the Tobacco Industry Research Council/Centre for Tobacco Research were funded by the tobacco industry.

⁵ See, for example, Mike deSouza, "Talisman Energy kick-started University of Calgary climate skeptic fund", *Postmedia News* (13 September 2011), online: <http://mikedesouza.com/2012/12/07/talisman-energy-kick-started-university-of-calgary-climate-skeptic-fund/>.

These claims are contrary to the established scientific consensus on global warming and climate change. This consensus is embodied in the reports of the Intergovernmental Panel on Climate Change (“IPCC”),⁶ the scientific body that synthesizes and distills climate change science for the world. IPCC reports support efforts under the United Nations Framework Convention on Climate Change to combat climate change. IPCC reports show that the scientific consensus is against the denier groups on all four propositions identified above:

- the earth’s climate system is warming⁷
- human-caused emissions of GHGs to the atmosphere are the dominant cause of warming⁸
- failing to reduce GHG emissions now will cause continued warming and increase the risk of dangerous, irreversible climate change,⁹ and
- continued climate change increases the likelihood of severe, pervasive, and irreversible impacts for people and ecosystems.¹⁰

B. Climate science misrepresentations have affected public understanding and acceptance of climate change science in Canada

The scientific consensus on global warming and climate change is longstanding and overwhelming. Analyses of published peer reviewed papers on the issue since 1991 show consensus of at least 97%.¹¹

The latest date that can be given as to when the scientific consensus that human activities drive global warming and climate change was reached is 2001. That was the year the IPCC’s watershed Third Assessment Report concluded that human activities have “likely” caused (i.e. greater than 66% certainty) the majority of global warming since 1950.¹² That same year the Royal Society of Canada and

⁶ The most recent authoritative report of the IPCC is its Fifth Assessment Report, released in 2014: see IPCC, *Climate Change 2014: Synthesis Report, Summary for Policymakers*, Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)] (IPCC: Geneva, Switzerland) [“IPCC AR5”].

⁷ *Ibid*, at SPM 1.1 “Observed changes in the climate system”, p 2.

⁸ *Ibid*, at SPM 1.2 “Causes of climate change”, p 4.

⁹ *Ibid*, at SPM 3.2 “Climate change risks reduced by mitigation and adaptation”, p 17.

¹⁰ *Ibid*, at SPM 2 “Future climate changes, risks and impacts”, p 8.

¹¹ The figure of 97% was recently confirmed by John Cook *et al*, “Quantifying the consensus on anthropogenic global warming in the scientific literature” (2013) 8:2 Environ Res Lett 024024, available online:

<http://iopscience.iop.org/article/10.1088/1748-9326/8/2/024024/pdf>. An earlier analysis found that 97–98% of the climate researchers most actively publishing in the field supported the anthropogenic climate change hypothesis, and that the relative expertise and prominence of scientists who do not accept the hypothesis is low: see William R.L. Anderegg *et al*, “Expert credibility in climate change” (2010) 107:27 PNAS, available online: <http://www.pnas.org/content/107/27/12107.full>. James Lawrence Powell has critiqued the Cook *et al* study and finds that the number of published peer reviewed papers rejecting the hypothesis of human-caused global warming is less than 0.01%: see James Lawrence Powell website, <http://www.jamespowell.org/index.html>.

¹² IPCC, 2001: *Climate Change 2001: Synthesis Report*, Contribution of Working Groups I, II, and III to the Third Assessment Report of the Intergovernmental Panel on Climate Change [Watson, R.T. and the Core Writing Team (eds.)] (Cambridge University Press, Cambridge, United Kingdom, and New York, NY, USA), at Table SPM-3, available online: <https://www.ipcc.ch/ipccreports/tar/vol4/english/pdf/spm.pdf>.

sixteen other national science academies endorsed the IPCC's conclusions as representing the consensus view of climate change science.¹³

This overwhelming consensus contrasts with recent polling indicating that only 61% of Canadians understand and accept the scientific consensus on human-caused global warming and climate change.¹⁴ A full 37% believe that whether global warming is happening and, if so, whether it is human-caused, are open questions. Troublingly, this "open question" trend has slightly *increased* since first tracked in 2007.

C. Climate science misrepresentations distort markets in Canada

Where a representation is false or misleading under the *Competition Act*, it is *per se* harmful to competition.¹⁵ In other words, it is not necessary to prove that a false or misleading representation has harmed competition in order to establish a violation of the Act. However, we nevertheless think it important to show in a general way how climate science misrepresentations might affect competition in Canada. Ensuring the competitiveness of key markets is important for driving our society toward the low carbon economy required in the 21st century.

The global economy's transition from a carbon-intensive economy powered by fossil fuels to a low carbon economy powered by non-polluting energy sources is an economic imperative for the 21st century. The transition brings enormous economic opportunities,¹⁶ while delaying the transition creates unnecessary costs.¹⁷ It is in Canada's public interest to capitalize on opportunities and not saddle future generations with the costs of delay.

For example, trade in low carbon energy technologies¹⁸ will be a growing part of the global economy in the coming decades. The Canadian clean technology industry (which includes sectors other than the low

¹³ Joint Statement of the Royal Society of Canada and sixteen other national science academies, "The Science of Climate Change" (17 May 2001), available online: https://royalsociety.org/~media/Royal_Society_Content/policy/publications/2001/10029.pdf. This joint statement said that the IPCC's Third Assessment Report "represents the consensus of the international scientific community on climate change science."

¹⁴ Environics Institute for Survey Research, "Focus Canada 2015: Public opinion on climate change" (2015), at p 3, available online: <http://www.environicsinstitute.org/uploads/institute-projects/environicsinstitute-dsf%20focus%20canada%202015%20-%20climate%20change%20survey%20-%20final%20report%20-%20english.pdf>.

¹⁵ *Commissioner of Competition v Premier Career Management Group Corp*, 2009 FCA 295, at para 61.

¹⁶ For a comprehensive survey see The Global Commission on the Economy and Climate, "The New Climate Economy Report - Better Growth, Better Climate (Executive Summary)" (September 2014), available online: <http://newclimateeconomy.report/>.

¹⁷ Citi Global Perspectives & Solutions, "Energy Darwinism II: Why a Low Carbon Future Doesn't Have to Cost the Earth" (August 2015), available online: <https://ir.citi.com/hsg32Jl1m4alzicMqH8sBkPnbsqfnwy4Jgb1J2klPYWlw5eM8yD3FY9VbGpK%2Baax>. Between a scenario in which sufficient action is taken to maintain GHG emissions below levels that risk dangerous climate change, and a business as usual scenario, the costs of not acting are almost \$2 trillion greater.

¹⁸ Low carbon energy technologies include renewable energy sources (e.g. solar, wind, geothermal, biofuels and tidal energy systems), electric and fuel cell propulsion technologies, electric and thermal energy storage systems, intelligent power control technologies, heat pump technologies, energy conservation technologies, and other technologies being developed and promoted to reduce and replace the use of fossil fuels.

carbon energy technology sector) is already worth \$12 billion.¹⁹ Regrettably, Canada's renewable energy and energy efficiency manufactured environmental goods sector has become less competitive internationally since 2005, losing 71% of its market share.²⁰ This makes Canada the biggest loser of market share among the top 24 exporting countries in this sector.

The transition to a low carbon economy will also require capital markets to begin accounting for the global "carbon budget."²¹ The concept of a carbon budget builds off the scientific consensus that humans can burn only so much carbon-based fossil fuel before atmospheric concentrations of GHGs reach a level that exposes the world to an unacceptable risk of dangerous and irreversible climate change. Any surplus fossil fuel reserves beyond that amount is "unburnable carbon".

Many well-capitalized global companies are, and will continue to be, dependent on the extraction and use of fossil fuels for their income. In Canada, capital markets are heavily weighted toward fossil fuel companies.²² At the same time, fossil fuel reserves, including most reserves in Canada, far exceed the amount we can safely burn.²³ Eventually, the knowledge that we can only burn a fraction of global fossil fuel reserves must be priced into the values of fossil fuel dependent companies. This will make low carbon economic activities more competitive in capital markets. The longer this re-evaluation is delayed, however, the greater the risk of creating a "carbon bubble" that could pop, resulting in financial instability.

The carbon budget and its implications for capital markets has already been accepted by high level regulators. Mark Carney, Governor of the Bank of England and Chairman of the UK Financial Stability Board, discussed the issue in a recent speech.²⁴ He noted the scientific consensus on climate change, the existence of a carbon budget, its implications for fossil fuel dependent companies, and the risks to financial stability. As a regulator with a mandate to ensure financial stability, Mr. Carney understands the role that capital markets play in mitigating this risk:

The speed at which such re-pricing [of fossil fuel based assets] occurs is uncertain and could be decisive for financial stability. ... Risks to financial stability will be minimised if the transition begins early and follows a predictable path, thereby helping the market anticipate the transition to a 2 degree world.

¹⁹ Analytica Advisors, "Canadian Clean Technology Industry Report (Synopsis)" (2015), available online: http://www.analytica-advisors.com/assets/file/2015%20Report%20Synopsis%20Final_wcovers.pdf.

²⁰ *Ibid.*

²¹ Carbon Tracker Initiative, "Unburnable Carbon – Are the world's financial markets carrying a carbon bubble?" (2011) available online: <http://www.carbontracker.org/report/carbon-bubble/>.

²² The energy sector comprises approximately 20% of the S&P/TSX Composite Index, see "Sector Breakdown" under the tab for "Sector & Top 10 – S&P/TSX Composite Index": <http://web.tmxmoney.com/indices.php?section=tsx&index=^TSX#indexInfo>.

²³ Christophe McGlade and Paul Ekins, "The geographical distribution of fossil fuels unused when limiting global warming to 2°C" (8 January 2015) 517 Nature 187 at 190, available online: <http://www.nature.com/nature/journal/v517/n7533/full/nature14016.html>.

²⁴ Mark Carney, "Breaking the Tragedy of the Horizon – climate change and financial stability" (Speech delivered at Lloyd's of London, 29 September 2015), available online: <http://www.bankofengland.co.uk/publications/Pages/speeches/2015/844.aspx>.

Mr. Carney aptly summarized the problem when he said “[t]he more we invest with foresight; the less we will regret in hindsight.”²⁵

The competitiveness of low carbon technology markets and capital markets are undermined by climate science misrepresentations. These markets are key to stimulating the transformation of Canada’s economy into a low carbon economy for the 21st century. The denier groups making climate science misrepresentations deceive the public in order to promote their own business interests and those of their anonymous funders. Public confusion about the reality, causes and consequences of global warming and climate change alters decision-making in these markets and lessens the competition we need to help achieve a low carbon economy.

PART III - APPLICATION OF THE *COMPETITION ACT* TO CLIMATE SCIENCE MISREPRESENTATIONS

A. *Competition Act* scheme

Section 52(1) of the *Competition Act* sets out the criminal prohibition against false and 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.

Section 74.01(1) sets out the civil prohibition (known as “reviewable conduct”):

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

The difference between the two prohibitions is that a false or misleading representation must be made “knowingly or recklessly” to engage the criminal prohibition.

The prohibitions are contravened if the evidence proves the following:

1. A person has made a representation to the public by any means whatever
2. For the purpose of promoting, directly or indirectly
 - any business interest
3. The representation is
 - false in a material respect, or
 - misleading in a material respect; and
4. The representor knew or was reckless to the representation’s falsity or misleading nature
[Criminal only]

²⁵ *Ibid.*

This application identifies specific climate science misrepresentations made by three denier groups – the “Friends of Science”, the “International Climate Science Coalition”, and the “Heartland Institute”. We believe that these climate science misrepresentations satisfy all of the elements set out above.

B. Climate science misrepresentations identified

The table below summarizes the specific climate science misrepresentations we have identified for the purposes of this application. Images of each misrepresentation are included in Appendix A to this application.²⁶

Table of climate science misrepresentations				
ID	False or misleading representation	Format	Misrepresenter	Date displayed
A	The sun is the main driver of climate change. Not you. Not CO2.	Billboard	Friends of Science ²⁷	2014 (ending on Nov 30, 2014)
B	Global Warming Stopped Naturally 16+ Years Ago.	Billboard	Friends of Science	2014 (ending on Nov 30, 2014)
C	Climate change is influenced the most by ... You? Or the sun?	Video billboard	Friends of Science	July 2015
D	Global Warming? Not for 18+ years!	Billboard	Friends of Science	Ongoing
E1	Climate – Change your Mind. Is it you? Is it really CO2?	Billboard	Friends of Science	Ongoing
E2	Climate – Change your mind.	Billboard	Friends of Science	Ongoing
F	Six things everyone should know about climate change: <ol style="list-style-type: none"> 1. The earth's atmosphere is not warming. 2. The Sun causes climate change. 3. Al Gore was wrong about CO2. 4. Violent weather isn't getting worse. 5. It's been hotter. 	Website ²⁸	Friends of Science	Ongoing

²⁶ The links provided in the “Format” column connect to the appropriate image in the Appendix A.

²⁷ The Friends of Science Society website lists its address as PO Box 23167, Mission Post Office, Calgary AB, T2S 3B1.

²⁸ Friends of Science website: <http://www.friendsofscience.org/>.

	6. Climate computer models are proven wrong.			
G	<p>Core Principles</p> <p><i>Climate Science</i></p> <ol style="list-style-type: none"> 1. Global climate is always changing in accordance with natural causes and recent changes are not unusual. 2. Science is rapidly evolving away from the view that humanity's emissions of carbon dioxide and other 'greenhouse gases' are a cause of dangerous climate change. 3. Climate models used by the IPCC* fail to reproduce known past climates without manipulation and therefore lack the scientific integrity needed for use in climate prediction and related policy decision-making. 4. The UN IPCC Summary for Policymakers and the assertions of IPCC executives too often seriously mis-represent the conclusions of their own scientific reports. 5. Claims that 'consensus' exists among climate experts regarding the causes of the modest warming of the past century are contradicted by thousands of independent scientists. 6. Carbon dioxide is not a pollutant - it is a necessary reactant in plant photosynthesis and so is essential for life on Earth. 7. Research that identifies the Sun as a major driver of global climate 	Website ²⁹	International Climate Science Coalition ³⁰	Ongoing

²⁹ International Climate Science Coalition website, "Core Principles":

http://www.climatescienceinternational.org/index.php?option=com_content&view=article&id=121&Itemid=67.

³⁰ The International Climate Science Coalition website lists its address as PO Box 23013, Ottawa ON, K2A 4E2.

	<p>change must be taken more seriously.</p> <p>8. Global cooling has presented serious problems for human society and the environment throughout history while global warming has generally been highly beneficial.</p> <p>9. It is not possible to reliably predict how climate will change in the future, beyond the certainty that multi-decadal warming and cooling trends, and abrupt changes, will all continue, underscoring a need for effective adaptation.</p> <p>10. Since science and observation have failed to substantiate the human-caused climate change hypothesis, it is premature to damage national economies with 'carbon' taxes, emissions trading or other schemes to control 'greenhouse gas' emissions.</p> <p>* United Nations' Intergovernmental Panel on Climate Change (IPCC)</p>			
H	<p>Here are some basic facts about global warming:</p> <ul style="list-style-type: none"> - There is no scientific consensus on the human role in climate change. - Future warming due to human greenhouse gas emissions will be much less than the United Nations forecasts. - Carbon dioxide has not caused weather to become more extreme, polar ice and sea ice to melt, or sea level rise to accelerate. 	<p>Poster - "Crisis or Delusion"³¹</p>	<p>Heartland Institute³²</p>	<p>Ongoing</p>

³¹ The poster "Crisis or Delusion" is promoted as a free download on the Heartland Institute website: <https://www.heartland.org/policy-documents/crisis-or-delusion>.

³² The Heartland Institute website lists its address as 3939 North Wilke Road, Arlington Heights, Illinois, 60004.

<ul style="list-style-type: none"> - Reducing carbon dioxide emissions is extremely expensive and won't affect the weather. - Public policies should aim at fostering economic growth to adapt to natural climate change. 			
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C. Applying the *Competition Act*'s prohibition on false and misleading representations to the climate science misrepresentations

Each climate science misrepresentation identified above satisfies the elements of the offence of false and misleading representations and/or reviewable conduct under the *Competition Act*.

i. Climate science misrepresentations have been made to the public

The climate science misrepresentations identified above were all made to the public, through various means:

Climate science misrepresentation ID	Means for making misrepresentation
A, B, C, D, E1, E2	Billboard advertisements
F, G	Representations on public websites
H	Poster (free download encouraged on website)

This information is sufficient to prove the first element of the offence and/or reviewable conduct.

In proving the first element, it is unnecessary to prove that: (a) any person was deceived or misled; (b) any member of the public to whom the representation was made was within Canada; or (c) the representation was made in a place to which the public had access.³³

ii. Climate science misrepresentations are made for the purpose of promoting business interests

The climate science misrepresentations are made for the purpose of promoting the business interests of the denier groups and their anonymous funders.

First, the climate science misrepresentations directly promote the business interests of the denier groups as non-profits dependent on outside funding for their continued existence.

The *Competition Act* defines "business" broadly.³⁴ The Ontario Court of Appeal has held that the phrase "any business interest" must be given a "very wide meaning" and can refer to the alleged violator's

³³ *Competition Act*, ss. 52(1.1) and 74.03(4).

³⁴ *Competition Act*, ss. 2(1).

business interest with the public generally, not just with the applicants.³⁵ The Act's definition of business includes "the raising of funds for charitable or other non-profit purposes."

It is reasonable to assume that the climate science misrepresentations help the denier groups raise funds as non-profits. It is also likely the case that some climate science misrepresentations are made in exchange for specific funding from donors.

For example, public information shows that Talisman Energy Inc., Canada's largest independent oil and gas exploration and production company, donated \$175,000 to Friends of Science in 2004 to fund the production of a specific video and other activities.³⁶ More recently, Friends of Science placed conventional and video billboard advertisements in major Canadian cities in 2014 and 2015. These billboards constitute some of the specific climate science misrepresentations identified in this application. The cost of these billboard ads would be a considerable expense for an organization that claims to "operate on an extremely limited budget."³⁷

Second, and more importantly, the climate science misrepresentations promote the business interests of the denier groups' anonymous funders. What little public information exists about these funders indicates that they include organizations and persons that profit from continued extraction and use of fossil fuels.³⁸

The connection between the business interests of funders who profit from the continued extraction and use of fossil fuels and the denier groups' climate science misrepresentations is clear. By contributing to public confusion about the reality, causes and consequences of global warming and climate change, the climate science misrepresentations reduce competition from less carbon-intensive economic activities.

The Commissioner has broad investigatory powers under the *Competition Act*, including the ability to apply for court orders for the production of written records and the oral examination of witnesses,³⁹ as well as search warrants.⁴⁰ As part of this application, we ask the Commissioner to use these powers to ascertain the precise nature of the business interests that the climate science misrepresentations promote, including by determining the identity of funders to the denier groups.

We believe that the Commissioner will find the climate science misrepresentations are made to promote the business interests of: (1) the denier groups themselves, as non-profits dependent on outside funding for their continued existence, and (2) organizations and persons that profit from the continued extraction and use of fossil fuels. These organizations and persons fund the denier groups in order to maintain and increase public confusion about the reality, causes and consequences of global warming and climate change, which in turn reduces competition from less carbon-intensive economic activities.

³⁵ *Apotex Inc v Hoffmann La-Roche Ltd* (2000), 195 DLR (4th) 244 (Ont CA), at para 13.

³⁶ Mike deSouza, *supra* note 5.

³⁷ Friends of Science website: <http://www.friendsofscience.org/index.php?id=1>.

³⁸ The Friends of Science funding drive that garnered a \$175,000 contribution from Talisman Energy Inc also garnered a \$50,000 contribution from the Kahanoff Foundation, a charity established in 1979 by Sydney Kahanoff, a Calgary oil and gas executive and philanthropist. See deSouza, *supra* note 5.

³⁹ *Competition Act*, s. 11.

⁴⁰ *Competition Act*, s. 15.

iii. Climate science misrepresentations are false or misleading in a material way

The scientific consensus on human-caused global warming and climate change is longstanding and overwhelming.⁴¹ The climate science misrepresentations made by the denier groups are false, misleading, or both, when compared with the established science. The climate science misrepresentations also fail on the “general impression” test.⁴²

The example of the Friends of Science billboards are used below to further demonstrate these points.

(i) Comparison with established science

The billboards make the following climate science misrepresentations:

Billboard A: “The sun is the main driver of climate change. Not you. Not CO₂.”

Billboard B: “Global Warming Stopped Naturally 16+ Years Ago.”

Billboard C: “Climate Change is influenced the most by ... You? Or the sun?”

Billboard D: “Global Warming? Not for 18+ years!”

Billboard E1: “Climate – Change your Mind. Is it you? Is it really CO₂?”

Billboard E2: “Climate- Change your mind.”

The representation on Billboard A is both false and misleading compared with the established science. The IPCC’s conclusion that human activities are the dominant cause of observed global warming has only increased over time – from “likely” (greater than 66% probability) in 2001 to “extremely likely” (95-100% probability) in 2014.⁴³

The representations on Billboards B and D are also both false and misleading. The IPCC has explained how global average surface temperature has continued to rise each decade, even though the rate of increase has varied depending on the start and end date of a period:

Each of the last three decades has been successively warmer at the Earth’s surface than any preceding decade since 1850. The period from 1983 to 2012 was likely the warmest 30-year period of the last 1400 years in the Northern Hemisphere, where such assessment is possible (medium confidence). The globally averaged combined land and ocean surface temperature data as calculated by a linear trend show a warming of 0.85 [0.65 to 1.06] °C 2 over the period 1880 to 2012, when multiple independently produced datasets exist.

In addition to robust multi-decadal warming, the globally averaged surface temperature exhibits substantial decadal and interannual variability (Figure SPM.1a). Due to this natural variability, trends based on short records are very sensitive to the beginning and end dates and do not in general reflect long-term climate trends. As one example, the rate of warming

⁴¹ See subsection entitled “Climate science misrepresentations have affected public understanding and acceptance of climate change science in Canada” above.

⁴² *Competition Act*, ss. 52(4), 74.03(5).

⁴³ IPCC AR5, *supra* note 6, at SPM 1.2; See also, Skeptical Science, “Sun & climate: moving in opposite directions”, online: <http://www.skepticalscience.com/solar-activity-sunspots-global-warming-advanced.htm>.

over the past 15 years (1998–2012; 0.05 [–0.05 to 0.15] °C per decade), which begins with a strong El Niño, is smaller than the rate calculated since 1951 (1951–2012; 0.12 [0.08 to 0.14] °C per decade).⁴⁴

It is also worth noting that recently published research suggests the rate of warming since 2000 reported by the IPCC is actually an underestimate, and that the rate of warming from 1998-2012 has not decreased versus the rate observed in the latter half of the 20th century.⁴⁵

Finally, the representations on Billboards C, E1 and E2 are misleading on the general impression test, but cannot be false as they do not make falsifiable claims. The general impression left by these representations is that whether human activities or the sun are the dominant cause of global warming is an “open question”. As shown above, the established science is conclusive on this point.

(ii) General impression test

None of the climate science misrepresentations pass the general impression test. According to the Supreme Court of Canada in *Richard v Time Inc.*,⁴⁶ the test to be applied is whether the billboards would appear false or misleading on first impression to a credulous and inexperienced person. This person can be expected to have little in depth knowledge about climate science. The text, the layout, and the graphic design of the billboard ads must all be considered in evaluating them on the general impression test.

Each of the billboards feature text without necessary context and qualifications. They are designed to appeal as common sense propositions to the average person who might not be completely familiar with the scientific consensus on human-caused global warming and climate change. The design of the billboards also contributes to their misleading nature. [Billboard A](#), [Billboard E1](#) and [Billboard E2](#) feature pictures of enormous eruptions on the face of the Sun next to a relatively small Earth. The average person might accept it as common sense that the Sun would have a larger effect since it is much larger than the Earth. [Billboard B](#) and [Billboard D](#) show temperature data out of context. Billboard B also colours the temperature line a suggestive icy blue as it gets nearer to 2014. The colouring of the billboard appears designed to encourage the viewer’s first impression that global warming has in fact cooled off. The text of [Billboard C](#) asks misleading rhetorical questions against a video backdrop depicting a smaller earth giving way in the foreground to a massive, raging sun. As with Billboards A, E1 and E2, it appears designed to deceive the average person, who might accept it as common sense that the Sun would have a larger effect since it is much larger than the Earth.

(iii) Materiality

The climate science misrepresentations are false and misleading in material respects – namely, in respect of the reality, causes and consequences of global warming and climate change.

⁴⁴ IPCC AR5, *supra* note 6, at SPM 1.1, pp 2-3; See also, Skeptical Science, “What has global warming done since 1998?”, online: <http://www.skepticalscience.com/global-warming-stopped-in-1998-intermediate.htm>.

⁴⁵ Thomas R. Karl, *et al* “Possible artifacts of data biases in the recent global surface warming hiatus” (26 June 2015) 348 Science 1469, available online: <http://www.sciencemag.org/content/348/6242/1469.abstract>.

⁴⁶ [2012] 1 SCR 265, 2012 SCC 8 at paras. The *Richard* decision has been applied in the context of the *Competition Act*, see for example *Canada (Competition Bureau) v Chatr Wireless Inc.*, 2013 ONSC 5315, at paras 123-132.

There is no case law interpreting the requirement of materiality outside of a plainly commercial context. In that context the Ontario Court of Appeal has held that a representation is material “if it is so pertinent, germane or essential that it could affect the decision to purchase.”⁴⁷

The equivalent proposition here is that the climate science misrepresentations are material if they are so pertinent, germane or essential that they affect a person’s decision to accept the scientific consensus on global warming and climate change. If they reject it, or believe it is still an open question, they may be less likely to take steps consistent with the scientific consensus, such as utilizing low carbon technology, investing in low carbon businesses or voting for politicians promising to regulate on the issue. They may also be more likely to donate to a denier group.

iv. Climate science misrepresentations are made knowingly or recklessly

We believe this is an appropriate case for the Commissioner to deal with the inquiry on the criminal track. The relevant Competition Bureau bulletin states that the Commissioner may refer the matter to the Attorney General in the criminal track for potential prosecution if the following two criteria are satisfied:

1. There must be clear and compelling evidence suggesting that the accused knowingly or recklessly made a false or misleading representation to the public. An example of such evidence is the continuation of a practice by the accused after complaints have been made by consumers directly to the accused; and
2. If there is clear and compelling evidence that the accused knowingly or recklessly made a false or misleading representation to the public, and this evidence is available, the Bureau must also be satisfied that criminal prosecution would be in the public interest.⁴⁸

With respect to the first criterion, the denier groups have continued to make climate science misrepresentations in spite of consumer complaints and adverse findings by advertising industry bodies.

For example, two Friends of Science billboards⁴⁹ were the subject of 96 complaints to Advertising Standards Canada (“ASC”) during their display in Montreal, QC in 2014. An ASC official stated that 10 complaints would normally be considered “a lot”.⁵⁰

In March 2015 the ASC Council reviewed the billboard ads against the *Canadian Code of Advertising Standards* and determined they are false and misleading advertising. Specifically, they determined “that the categorical and unequivocal claims made in both advertisements could not be supported by the preponderance of current evidence on the matters in dispute.”⁵¹ The ASC Council based their decision

⁴⁷ *Ibid*, at para 16

⁴⁸ Canada, Competition Bureau, “Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the *Competition Act*”, (Ottawa: Competition Bureau, 20 September 1999) at 2 [emphasis added].

⁴⁹ [Billboard A](#) and [Billboard B](#).

⁵⁰ Nicole Mortillaro, “Advertising Standards Canada upholds ruling against Friends of Science billboard”, *Global News* (21 May 2015), available online: <http://globalnews.ca/news/2009758/advertising-standards-canada-upholds-ruling-against-friends-of-science-billboard/>.

⁵¹ A case summary can be found at Advertising Standards Canada, “Ad Complaints Reports – 2015”, available online: <http://www.adstandards.com/en/standards/adComplaintsReports.aspx#upheld>.

on authoritative reports from the IPCC, The Royal Society of Canada and US National Academy of Science, as well as the position stated by the Government of Canada in its 2014 report “Canada in a Changing Climate: Sector Perspectives on Impacts and Adaptation.” The Friends of Science used the ASC’s appeal mechanism but the ruling was upheld.

Just months after the ASC decision was confirmed the Friends of Science ran a new video billboard that makes a climate science misrepresentation⁵² in Montreal.⁵³ In November 2015, the Friends of Science put up more billboards making climate science misrepresentations in Edmonton⁵⁴ and Calgary.⁵⁵ The Friends of Science’s continued display of more climate science misrepresentations – after numerous consumer complaints and a formal censure by the ASC – is clear and compelling evidence that such climate science misrepresentations are made knowingly or recklessly.

When combined with the overwhelming public importance of the context in which the climate science misrepresentations are made – including the effect of climate change on the Canadian economy, and the negative effects of climate science misrepresentations on competition in key markets for stimulating the transition to a low carbon economy in Canada – we believe the Commissioner’s inquiry should proceed on the criminal track. We expect that the evidence gathered in the Commissioner’s inquiry will support such a decision in respect of all climate science misrepresentations identified in this application.

PART V - REQUEST OF THE COMMISSIONER OF COMPETITION

A. A thorough, rigorous inquiry is needed

Based on all the foregoing, we submit that the Commissioner should conduct a thorough, rigorous inquiry of the denier groups and their climate science misrepresentations. The context of this application is the broader issue of climate change, including the necessity of transforming the Canadian economy into a low carbon economy for the 21st century. Climate science misrepresentations like those identified in this application hinder competition in key markets that could help stimulate this transformation.

Furthermore, the anti-public interest motives of the denier groups are transparent. Their tactics evoke the notorious disinformation campaigns of front groups controlled by the tobacco industry. Those front groups perpetuated the notion that the link between tobacco smoking and cancer was an “open question” in the minds of many members of the public, long after scientific consensus had established otherwise. The resulting public health harms in North America are well known – and tragic. With this history in mind, we believe the Commissioner must use his powers under the *Competition Act* to conduct a thorough, rigorous inquiry of denier groups and their climate science misrepresentations.

⁵² [Billboard C](#).

⁵³ Friends of Science, Media Release, “New Friends of Science Climate Change Billboards Welcome Montreal Grand Prix Revellers” (5 June 2015), available online: <http://www.prweb.com/releases/2015/06/prweb12770300.htm>.

⁵⁴ [Billboard D](#) and [Billboard E1](#): see Friends of Science, “Courting Controversy – Our New Edmonton Billboard Campaign! Complain here. Please.” (11 November 2015), available online: <https://friendsofsciencecalgary.wordpress.com/2015/11/11/courting-controversy-our-new-edmonton-billboard-campaign-complain-here-please/>.

⁵⁵ [Billboard E2](#): Friends of Science, “Calgary Climate Change Billboard Campaign Lights Up and Papers the City” (18 November 2015), available online: <https://friendsofsciencecalgary.wordpress.com/2015/11/18/calgary-climate-change-billboard-campaign-lights-up-and-papers-the-city/>.

B. Criminal conviction or civil liability could have a beneficial deterrent effect

We believe that a public finding of guilt or reviewable conduct could have a beneficial deterrent effect for four reasons.

First, either a finding of criminal guilt or reviewable conduct would demonstrate that climate science misrepresentations are contrary to law and harmful (since false and misleading representations for the promotion of business purposes are *per se* harmful). Second, a fine for a criminal conviction in respect of each climate science misrepresentation could deter the denier groups from continuing to make such misrepresentations with relative impunity. Third, the remedial options open to a court after a finding of reviewable conduct could deter and directly prevent future climate science misrepresentations. For example, a court could order that the denier groups not make the same or similar climate science misrepresentations for 10 years. That court could also levy an administrative monetary penalty on the denier groups. Fourth, donors who fund the denier groups to promote their business interests on the assumption of public anonymity would think twice before doing so, knowing that their identity could be revealed in public court proceedings.

All of this submitted by,



Charles Hatt
Barrister & Solicitor

On behalf of the co-applicants:

Stephen Lewis
Tzeporah Berman
Dr. David Schindler
Dr. Thomas Duck
Dr. Danny Harvey
Devon Page

Appendix A

A



Billboard on display in Calgary in 2014, see: <http://www.prweb.com/releases/2014/12/prweb12367758.htm>

B



Billboard on display in Ottawa in 2014, see: <http://www.prweb.com/releases/2014/11/prweb12352795.htm>

C



Video billboard on display in Montreal in 2015, see: <http://www.prweb.com/releases/2015/06/prweb12770300.htm>.

D



Billboard on display currently in Edmonton, see: <https://friendsofsciencecalgary.wordpress.com/2015/11/11/courting-controversy-our-new-edmonton-billboard-campaign-complain-here-please/>.

E1



Billboard on display currently in Edmonton, see: <https://friendsofsciencecalgary.wordpress.com/2015/11/11/courting-controversy-our-new-edmonton-billboard-campaign-complain-here-please/>.

E2



Billboard on display currently in Calgary, see: <https://friendsofsciencecalgary.wordpress.com/2015/11/18/calgary-climate-change-billboard-campaign-lights-up-and-papers-the-city/>.

F

SIX THINGS EVERYONE SHOULD KNOW ABOUT CLIMATE CHANGE:

1. The earth's atmosphere is not warming. [Click here.](#)
2. The Sun causes climate change. [Click here.](#)
3. Al Gore was wrong about CO2. [Click here.](#)
4. Violent weather isn't getting worse. [Click here.](#)
5. It's been hotter. [Click here.](#)
6. Climate computer models are proven wrong. [Click here.](#)

This debate matters! The science matters.

Please take time to review the many resources available by the left navigator menu. Contact your local MP [click here](#) and ask why Canada has committed billions of dollars for carbon dioxide (CO2) emissions reduction ([here](#)) to fight a problem that doesn't exist? CO2 emissions have only a tiny effect on temperatures, but strongly enhance plant growth.

FoS Extracts

See our FoS Extracts, a summary of current climate stories for 2015, [click here](#). FoS Extracts are emailed to members several times per month.

FoS Climate Science

See our comprehensive essay on climate change science, [click here](#).

Climate science misrepresentations on Friends of Science website, see: <http://www.friendsofscience.org/>

G

Core Principles

CLIMATE SCIENCE

1. Global climate is always changing in accordance with natural causes and recent changes are not unusual.
2. Science is rapidly evolving away from the view that humanity's emissions of carbon dioxide and other 'greenhouse gases' are a cause of dangerous climate change.
3. Climate models used by the IPCC* fail to reproduce known past climates without manipulation and therefore lack the scientific integrity needed for use in climate prediction and related policy decision-making.
4. The UN IPCC [Summary for Policymakers](#) and the assertions of IPCC executives too often seriously mis-represent the conclusions of their own [scientific reports](#).
5. Claims that 'consensus' exists among climate experts regarding the causes of the modest warming of the past century are contradicted by thousands of independent scientists.
6. Carbon dioxide is not a pollutant - it is a necessary reactant in plant photosynthesis and so is essential for life on Earth.
7. Research that identifies the Sun as a major driver of global climate change must be taken more seriously.
8. Global cooling has presented serious problems for human society and the environment throughout history while global warming has generally been highly beneficial.
9. It is not possible to reliably predict how climate will change in the future, beyond the certainty that multi-decadal warming and cooling trends, and abrupt changes, will all continue, underscoring a need for effective adaptation.
10. Since science and observation have failed to substantiate the human-caused climate change hypothesis, it is premature to damage national economies with 'carbon' taxes, emissions trading or other schemes to control 'greenhouse gas' emissions.

* United Nations' [Intergovernmental Panel on Climate Change](#) (IPCC)

Climate science misrepresentations on International Climate Science Coalition website, "Core Principles":
http://www.climatescienceinternational.org/index.php?option=com_content&view=article&id=121&Itemid=67

What You Should Know

Here are some basic facts about global warming:

- ✓ There is no scientific consensus on the human role in climate change.
- ✓ Future warming due to human greenhouse gas emissions will be much less than the United Nations forecasts.
- ✓ Carbon dioxide has not caused weather to become more extreme, polar ice and sea ice to melt, or sea level rise to accelerate.
- ✓ Reducing carbon dioxide emissions is extremely expensive and won't affect the weather.
- ✓ Public policies should aim at fostering economic growth to adapt to natural climate change.

important issue. We're trying to set the record straight so unnecessary taxes and regulations can be repealed.

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Climate science misrepresentations on the poster "Crisis or Delusion", promoted as a free download on the Heartland Institute website: <https://www.heartland.org/policy-documents/crisis-or-delusion>