

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

THE CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Plaintiff
(Moving party)

- and -

THE ATTORNEY GENERAL OF ONTARIO

Defendant
(Respondent to motion)

**FACTUM OF THE DEFENDANT (RESPONDENT TO MOTION),
THE ATTORNEY GENERAL OF ONTARIO
(motion for summary judgment returnable July 6, 2020)**

June 11, 2020

MINISTRY OF THE ATTORNEY GENERAL
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M5G 1J5

S. Zachary Green (LSO# 48066K)
Tel: (416) 992-2327
Email: Zachary.Green@Ontario.ca

Padraic Ryan (LSO# 61687)
Tel: (647) 588-2613
Email: Padraic.Ryan@Ontario.ca

Of Counsel for the Defendant
(Respondent to motion),
the Attorney General of Ontario

TO: THE REGISTRAR
Superior Court of Justice
393 University Ave
Toronto, ON M5G 1E6

AND TO: GOWLING WLG (CANADA) LLP
Barristers & Solicitors
1 First Canadian Place
100 King St. W, Suite 1600
Toronto ON M5X 1G5

Steven Sofer (LSO No. 27110G)
Tel: 416-369-7240
Fax: 416-862-7661
steven.sofer@gowlingwlg.com

Sandra Barton (LSO No. 43220G)
Tel: 416-824-5674
Fax: 416-862-7661
sandra.barton@gowlingwlg.com

Counsel for the Plaintiff (Moving Party)

PART I – OVERVIEW 1

PART II – FACTS AND STATUTORY SCHEME 1

 A. The impugned provisions of the *Federal Carbon Tax Transparency Act, 2019* 1

 B. Ontario’s expert evidence 3

PART III – ISSUES AND THE LAW 8

 A. This *Charter* challenge lacks an adequate factual foundation 9

 B. The Plaintiff should not be granted public interest standing 13

 C. The impugned provisions of the Act do not infringe *Charter* s. 2(b) 17

 D. Any infringement is justified under *Charter* s. 1 24

PART IV – ORDER REQUESTED 28

SCHEDULE A – LIST OF AUTHORITIES 29

SCHEDULE B – LEGISLATION 31

PART I – OVERVIEW

1. This is a motion for summary judgment in an action seeking a declaration that sections 2, 4 and 5 [“the impugned provisions”] of the *Federal Carbon Tax Transparency Act, 2019*, SO 2019, c. 7, Sch. 23 [“the Act”] are an unjustified infringement of the freedom of expression protected by s. 2(b) of the *Charter* and are therefore of no force and effect.

2. The parties have agreed under Rule 20.04(2)(b) to have the claim determined by summary judgment and have agreed that the Court may grant judgment to either party.¹ The parties agree there is no genuine issue requiring a trial.

3. The Defendant, the Attorney General of Ontario [“Ontario”] submits that the action should be dismissed. The Plaintiff has failed to adduce an adequate factual foundation for the challenge and has failed to demonstrate public interest standing. In any event, the impugned provisions of the Act do not infringe s. 2(b) of the *Charter*, because they do not limit the ability of gasoline retailers to express themselves and they do not associate gasoline retailers with a message with which they disagree. In the alternative, the Act is justified under s. 1 of the *Charter*. By promoting informed consumer choice and price transparency, the Act furthers rather than frustrates the purposes of freedom of expression.

PART II – FACTS AND STATUTORY SCHEME

A. The impugned provisions of the *Federal Carbon Tax Transparency Act, 2019*

4. The impugned provisions of the Act are straightforward.² Subsection 2(1) of the Act requires that a person who is licensed to operate a retail outlet at which gasoline is sold at a gasoline pump and put into the fuel tanks of motor vehicles shall obtain copies of a

¹ *Samuel v. Benson Kearley IFG*, 2020 ONSC 1123 at [para. 49](#); *Meridian Credit Union Limited v. Baig*, 2016 ONCA 150 at [para. 17](#).

² The full text of the Act is reproduced in Schedule B to this factum.

prescribed notice with respect to the price of gasoline sold in Ontario and ensure that this notice is affixed to each gasoline pump at the retail outlet in the prescribed manner.³

5. Subsection 3(1) of the Act provides that contravention of the obligation to obtain and affix the prescribed notice is an offence. On conviction for a first offence, an individual is liable to a fine of up to \$500 for every day or part of a day on which the offence occurs or continues, and for a second or subsequent offence, to a daily fine of up to \$1,000. For corporations, the maximum daily fines are \$5000 for a first offence and \$10,000 for a subsequent offence. The set fine amount under Part I of the *Provincial Offences Act*, however, is \$150.⁴ It is also an offence to obstruct an inspector and for directors and officers of corporations to fail to take reasonable care to comply with the prescribed notice requirements.

6. Subsection 5(1) of the Act authorizes the Lieutenant Governor in Council to make regulations, including regulations prescribing the notice to be affixed on gas pumps. Subsection 5(2) of the Act provides that the prescribed notice “shall set out information with respect to the effect of the charge referred to in subsection 17(1) of the *Greenhouse Gas Pollution Pricing Act* (Canada) on the price of gasoline sold in Ontario, which may include information as estimated or otherwise determined by the Minister” and that the notice “may set out other information with respect to the price of gasoline sold in Ontario, which may include information as estimated or otherwise determined by the Minister.”

7. Apart from the requirement that the notice must “set out information with respect to

³ Under s. 2(2), this obligation does not apply to retail outlets located on a reserve or in an Indian Settlement located on Crown land, the Indian inhabitants of which are treated by Indigenous Services Canada in the same manner as Indians residing on a reserve.

⁴ <https://www.ontariocourts.ca/ocj/files/setfines/changes/2019/schedule-17-1-2019-08-30.pdf> (the Order made by Chief Justice Lise Maisonneuve pursuant to [s. 91.1\(1\)](#) of the *Provincial Offences Act*).

the effect of the charge referred to in subsection 17(1) of the *Greenhouse Gas Pollution Pricing Act* (Canada) on the price of gasoline sold in Ontario”, the impugned provisions of the Act do not stipulate the form or content of the prescribed notice. The form of the notice is prescribed not in the impugned provisions of the Act, but in Ontario Regulation 275/19.

B. Ontario’s expert evidence

8. Ontario relies on the expert evidence of Dr. Benjamin Zycher, an economist and scholar with over 45 years of experience in the analysis of energy and environmental economics and particular expertise in public finance, climate policy and carbon taxation.⁵

9. In his detailed and scholarly report, Dr. Zycher explained the economic rationale for transparency in taxation and how this principle applies to the disclosure to consumers at gasoline pumps of the effect on the price of gasoline of a government charge intended to create incentives for consumers to make behavioral changes with respect to their consumption of gasoline. Dr. Zycher’s principal conclusions are summarized below:

- a) The Canadian *Greenhouse Gas Pollution Pricing Act*,⁶ which is intended to reduce emissions of greenhouse gases, includes a “fuel charge” which is applicable in Ontario. The fuel charge on gasoline sold in Ontario began at about 4.4 cents per liter in April 2019 and was scheduled to rise to about 6.6 cents per liter in April 2020, 8.8 cents per liter in April 2021, and 11.1 cents per liter in April 2022.
- b) Applying the standard economic and ordinary dictionary definitions of a tax, the charge on gasoline imposed by the *GGPPA* is a tax.⁷ More specifically, economists

⁵ Affidavit of Dr. Benjamin Zycher sworn November 22, 2019 [“Zycher affidavit”] at paras. 2-9.

⁶ [S.C. 2018, c. 12, s. 186](#) [“GGPPA”]

⁷ Merriam-Webster gives the principal definition of “tax” as “a charge usually of money imposed by authority on persons or property for public purposes”, while the *Canadian*

would call it a “Pigouvian” tax, which is a tax on activities that are said to generate negative externalities (e.g. pollution).⁸

- c) “In the context of the Ontario sticker requirement, the standard efficiency principles of public finance and public choice analysis are straightforward. Taxpayers and voters must know (or know to a greater rather than lesser degree) the economic cost of given goods and services (or policies) provided publicly, relative to the economic cost of other goods and services provided publicly, and relative to the cost (prices) of goods and services provided in the private sector. The Ontario sticker requirement is consistent with those principles because for taxpayers and voters it reduces the cost of acquiring such information.”⁹
- d) “...incentives on the part of individuals and large, diffused groups to seek out, produce, and publicize information about the benefits and costs of public policies are weak. In addition, public officials --- including policymakers --- have weak incentives to produce information on the costs of public policies. Proponents of public policies have incentives to overstate the benefits of those proposals and to understate or not to provide information on their costs. Accordingly, individuals (voters and taxpayers) who are assessing the value of these policies would benefit from getting accurate information about their costs.”¹⁰
- e) “In order for individuals to be able to satisfy their preferences more rather than less fully in their market behavior, they must have information sufficient to make

Encyclopedia states that “Taxes are compulsory payments by individuals and corporations to government. They are levied to finance government services, redistribute income, and influence the behaviour of consumers and investors.” See Zycher affidavit at paras. 12-14.

⁸ Zycher affidavit at paras. 10-14.

⁹ Zycher affidavit at para. 16.

¹⁰ Zycher affidavit at para. 24.

decisions consistent with those preferences. The same is true in the context of their voting decisions as inputs for the formulation of public policies...Information is a crucial input in resource allocation driven by individual and aggregate decision-making shaped by individual preferences. In order to make decisions consistent with their preferences, individuals must have accurate information, crucially about prices. The same is true for taxpayers and voters in their role as consumers of goods, services, and policies produced by government, even if the value of such goods as environmental protection is difficult to measure.”¹¹

- f) “The Ontario sticker requirement corrects for the problem of weak individual incentives for the acquisition or provision of information about the cost of the gasoline carbon tax. It corrects also for the reality that the proponents of the gasoline carbon tax have incentives to obscure the costs of the gasoline carbon tax and to overstate its purported benefits. For these reasons, the Ontario sticker requirement facilitates informed decision-making by individual taxpayers and voters, thus increasing the consistency between their preferences and the policies that are adopted.”¹²
- g) “In order to give effect to their individual preferences in choosing among public policies, taxpayers and voters need to have information about their costs that can be assessed against the expected benefits (and alternatives). The provision of information about the costs of the policy, as in the Ontario requirement for the stickers on the gasoline pump dispensers, is fully consistent with the objective of allowing taxpayers and voters to make choices reflecting their preferences on this

¹¹ Zycher affidavit at paras. 39-42.

¹² Zycher affidavit at para. 62.

policy, and perhaps also with a related objective of facilitating other forms of communication with public officials. A reduction in the availability of information about the cost of the tax would not be consistent with these goals.”¹³

- h) “...it would be a mistake to assume that only critics of carbon taxes support increased visibility of the cost of carbon taxes. Indeed, proponents of carbon taxes should also favor providing information at the point of gasoline purchase on the effect of the tax on the price per liter of gasoline. This is because there is some research indicating that an increase in the “salience” (or visibility) of the gasoline carbon tax would enhance its downward effect on gasoline consumption...Whether one is a proponent or a critic of carbon tax policies, it is difficult to argue against providing consumers with information about their costs.”¹⁴
- i) “The revenues from the gasoline carbon tax and other provisions of the federal carbon pollution pricing system will be rebated for the most part to individuals and families under a “Climate Action Incentive Payments” system...Given that any given individual or household will know the size of their rebate (at least upon receipt of that rebate at tax time), it follows that they should know also the cost of their contributions. The sticker requirement is an obvious and straightforward means with which to provide that information.”¹⁵
- j) “The amount of the gasoline carbon tax imposed per liter of gas purchased is the same for every purchaser wherever the tax applies in Ontario. In contrast, the amount of the rebate differs from purchaser to purchaser, and is available only to individuals who file income tax returns and who meet the listed criteria. Not every

¹³ Zycher affidavit at para. 73.

¹⁴ Zycher affidavit at paras. 74-80.

¹⁵ Zycher affidavit at paras. 81-83.

purchaser of gasoline who pays the gasoline carbon tax will receive a rebate. The “average” rebate would apply to only some subset of fuel purchasers, a subset that might be comparatively small under a broad range of conditions. Listing the average or median rebate would be misleading in some significant number of cases, and, in any event, people will know the size of their actual rebate when they receive it, as noted above. Accordingly, it is the *absence* of information on the magnitude of the gasoline carbon tax that would be misleading.”¹⁶

- k) “While other taxes could also be listed on the sticker (adding to its complexity), the sticker does list an internet website where such information is provided for those in pursuit of it. More generally, the complexity issue is important: It is costly for individuals to absorb or to learn information. A sticker with ever-more information inexorably will prove to be less informative. In any event, the issue is whether the information provided on the sticker leads to resource allocation that is more rather than less consistent with individual preferences. For the reasons discussed above, the answer is “yes.” The provision of information about the cost of the gasoline carbon tax at the point of purchase makes it more rather than less likely that resource allocation across both the private and public sectors will be consistent with individual preferences. Moreover, if consumers would value the provision of additional information more highly than the cost of providing it, fuel sellers would have an incentive to provide it: there is nothing preventing them from doing so.”¹⁷
- l) “Other means of providing information about the gasoline carbon tax are available; advertising of various sorts (e.g., billboards, radio and television advertisements,

¹⁶ Zycher affidavit at para. 86 (emphasis in original).

¹⁷ Zycher affidavit at paras. 87-88.

etc.) is one possibility. However, the sticker is likely to be significantly less expensive, and more effective as well, since it provides the relevant information at the point of sale, just as ordinary price information for almost all goods and services is provided similarly. That the latter is the universal practice in almost all market transactions tells us that price information at the point of sale is efficient. As the per-liter gasoline carbon tax is a price, providing information about that price at the point of purchase is likely to be efficient.”¹⁸

10. The Plaintiff did not cross-examine Dr. Zycher and did not lead any expert evidence to contradict him. His expert evidence must be taken as unchallenged.

PART III – ISSUES AND THE LAW

11. This motion raises the following issues:
- a) Has the Plaintiff adduced an adequate factual foundation for its *Charter* challenge?
 - b) Should the Plaintiff be granted public interest standing to bring the action?
 - c) If the answer to both “a” and “b” is yes, do the impugned provisions of the Act infringe the freedom of expression protected by s. 2(b) of the *Charter*?
 - d) If the answer to “c” is yes, are the impugned provisions of the Act justified under s. 1 of the *Charter*?
12. Ontario submits that the action should be dismissed as the Plaintiff has not adduced an adequate factual foundation for the constitutional challenge and has not demonstrated that it should be granted public interest standing. In the alternative, Ontario submits that

¹⁸ Zycher affidavit at para. 89.

the impugned provisions of the Act do not infringe s. 2(b) of the *Charter*. In the further alternative, Ontario submits that any infringement is justified under s. 1.

A. This *Charter* challenge lacks an adequate factual foundation

13. The Supreme Court has recently confirmed that “Where a person challenging a law’s constitutionality fails to provide an adequate factual basis to decide the challenge, the challenge fails.”¹⁹ As the Supreme Court held in *MacKay*, “If the deleterious effects are not established there can be no *Charter* violation and no case has been made out. Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants’ position”:

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions...*Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.²⁰

14. The Plaintiff has not adduced an adequate factual foundation for its challenge. There is no evidence from any licensed operator of a gasoline retail outlet, even though such licensees are the only persons who have obligations under s. 2(1) of the Act. There is no evidence about the impact (if any) of the prescribed notice requirement in the Act on the operations of gasoline retail outlets or on the ability of gasoline retailers to express themselves. There is no evidence from the very persons whose *Charter* rights are alleged to be infringed.

15. There is no evidence of how the impugned notice requirement compares to all of the other legally-required postings that apply to commercial premises including gas stations,

¹⁹ *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 at [para. 22](#) per Cromwell J.

²⁰ *MacKay v. Manitoba*, [\[1989\] 2 SCR 357](#) at 361-62 and 366. See also *R. v. Edwards Books and Art Ltd.*, [\[1986\] 2 SCR 713](#) at 767-68 per Dickson CJ; *Danson v. Ontario (Attorney General)*, [\[1990\] 2 SCR 1086](#) at 1100.

such as employment standards²¹ and occupational health and safety²² posters, stickers on gas pumps indicating weights and measures inspections,²³ the required listing of HST amounts on purchases,²⁴ prescribed signs for tobacco sales,²⁵ calorie counts for foods offered for sale,²⁶ and food safety inspection notices,²⁷ among others.

16. There is no evidence comparing the size of the prescribed notice to the size of the gasoline pumps to which they must be affixed or to the size of retail premises more broadly that is available for the posting of commercial or other messages. There is no evidence of the nature and size of the messages that are commonly placed on gasoline pumps or elsewhere on the premises of gasoline retail outlets (advertising oil changes, food and drink, car washes, loyalty points programs, methods of payment accepted, etc., as well as the price of gasoline), and no evidence that the notice requirement has even a trivial impact on the ability of gasoline retailers to communicate these or other messages. There is also no evidence from any gasoline customer, and no expert evidence adduced by the Plaintiff.

17. Instead of leading such evidence, the Plaintiff makes speculative and unfounded assertions in its factum that the “first impression given by the sticker is that it is the gas station owner’s sticker” and that “a cursory examination of the sticker does not suggest that the sticker’s message is attributable to Ontario, rather than to the gas retailer”²⁸ while also asserting, inconsistently, that the “gas stickers parrot Ontario’s advertising, and convey Ontario’s political position” and that the prescribed notice promotes “the government’s

²¹ *Employment Standards Act*, SO 2000, c. 41, [s. 2\(5\)](#).

²² *Occupational Health and Safety Act*, RSO 1990, c. O.1, [s. 25\(2\)\(i\)](#).

²³ *Weights and Measures Regulations*, CRC, c. 1605, [s. 31](#) and Part I of Sched. I.

²⁴ *Excise Tax Act*, RSC 1985, c. E-15, [s. 223](#).

²⁵ *Smoke-Free Ontario Act*, SO 2017, c. 26, Sch. 3, [s. 7](#); O. Reg. 268/18, [ss. 12-14](#).

²⁶ *Healthy Menu Choices Act, 2015*, SO 2015, c. 7, Sch. 1, [s. 2](#).

²⁷ See *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)*, [2004 CanLII 34445](#) (Div. Ct), *aff’d* [2005 CanLII 36152](#) (ONCA), leave to appeal *ref’d* [2006 CanLII 16457](#) (SCC).

²⁸ Plaintiff’s factum dated May 11, 2020 at paras. 60-61.

political message.”²⁹ There is no evidence to support any of these assertions. As in *MacKay*, the challenge here is based not on admissible evidence but rather “upon the unsupported hypotheses of enthusiastic counsel.”³⁰

18. The only affiant relied on by the Plaintiff is Ms. Zwibel, a CCLA staff lawyer. Most of her evidence is devoted to excerpting and paraphrasing media clippings.³¹ These media reports are inadmissible hearsay – indeed they are double hearsay, since neither the writers of the reports nor the persons purportedly quoted by them have given sworn evidence. Nowhere does the affiant state that she believes the media reports to be true.³² These media reports cannot be admitted for the truth of their contents, much less to establish the kind of “legislative facts” necessary to ground a breach of the *Charter*:

I held in the previous order that the two newspaper articles sought to be adduced by the PSBAA do not constitute “legislative fact”. The two columns represent the opinion of two individuals writing in daily newspapers who may or may not have the underlying facts straight and whose opinion may or may not be valid. The authors cannot be cross-examined. The contents are apparently controversial. No basis has been made out by the applicants for admission of this material. It will therefore be rejected.³³

19. In addition, statements made outside the Assembly by government officials are also inadmissible to establish legislative intent. As the Court of Appeal has held:

The appellants introduced affidavits that contain newspaper reports of comments made by the Premier and other government officials outside the legislature. These comments are inadmissible. Ignoring their hearsay aspect, extra-legislative comments by individual members of the legislature are not admissible to show the legislature’s intention.³⁴

²⁹ Plaintiff’s factum dated May 11, 2020 at paras. 44 and 75.

³⁰ *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at 366.

³¹ See e.g. Zwibel affidavit affirmed September 3, 2019 at footnotes 11-22; Zwibel affidavit affirmed December 19, 2019 at footnotes 2, 3, 5 and 6.

³² Rules 20.02(1) and 39.01(4) allow affidavit evidence on information and belief only “if the source of the information and the fact of the belief are specified in the affidavit.”

³³ *Public School Boards’ Assn. of Alberta v. Alberta*, 2000 SCC 2 at [para. 14](#).

³⁴ *R. v. Banks*, 2007 ONCA 19 at [para. 62](#).

20. As this Court has recently held, “‘Speeches and public declarations by prominent figures in the public and political life’ are political and are not credible sources of statutory or regulatory intention.”³⁵

21. Even statements made inside the Assembly are of “limited reliability and weight” for determining legislative intent because “the practice of relying on statements by individual members of a legislature – statements that are neither voted on nor necessarily agreed to by other legislators – is fundamentally at odds with the typical conception of a legislature as an institution which acts only through the corporate legislative expression of its membership on the proposed course of action set out in a bill.”³⁶

22. In all of the Plaintiff’s evidence, there is a single paragraph in which the affiant states that she communicated with an unspecified number of gasoline retailers in an effort “to find a gas retailer to act as a co-plaintiff in this matter.”³⁷ The identity of these persons is not provided. The affiant does not state the source of her information or the fact of her belief. Accordingly, these hearsay comments are not admissible under Rules 20.02(1) and 39.01(4). This Court has repeatedly held that a failure to state the source of information and the fact of belief is not a technical defect due to the lack of “magic words” but a substantive omission rendering such statements inadmissible.³⁸

23. Even taken at face value, the hearsay statements attributed to these unidentified gasoline retailers do not purport to offer any evidence about the effect of the Act on their

³⁵ *Tesla Motors Canada ULC v. Ontario*, 2018 ONSC 5062 at [para. 58](#); see also ; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297 at 319.

³⁶ *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at [para. 47](#); *Frank v. Canada (Attorney General)*, 2019 SCC 1 at para. [135-136](#) (per Côté and Brown JJ. dissenting but not on this point).

³⁷ Zwibel affidavit affirmed September 3, 2019 at para. 30.

³⁸ *Airia Brands Inc. et al v. Air Canada et al*, 2011 ONSC 4003 at [paras. 22-24](#); *Ontario v. Rothmans et al.*, 2011 ONSC 5356 at [para. 36](#); *OLA Staffing v 2156775 Ontario Inc*, 2017 ONSC 7318 at [paras. 29-30](#). See also *R. v. Quansah*, 2015 ONCA 237 at [para. 83](#).

freedom of expression or on their ability to communicate any message. Nor do these hearsay statements explain why gasoline retailers could not give evidence as witnesses (under summons, if necessary) even if they were not willing to become co-plaintiffs.

24. In the absence of any evidence from the persons actually affected by the impugned provisions, the Court is left to consider the Plaintiff's *Charter* challenge in a factual vacuum. Indeed, the Plaintiff's affiant candidly admits that she does not know whether individual gas retailers are free to provide additional information to consumers beyond what is included in the prescribed notice.³⁹ This Court has recently and repeatedly dismissed *Charter* challenges where the challenger has adduced "little to no evidence about the impact or effect" of the impugned law on the persons to whom it applies.⁴⁰

25. A party who seeks summary judgment must "put its best foot forward" and "lead trumps or risk losing."⁴¹ The Court is "entitled to assume that both parties have put before the court all of the evidence they would intend to adduce at trial."⁴² Here, the meagre evidence adduced by the Plaintiff does not provide a sufficient factual foundation for the constitutional challenge, and the action should therefore be dismissed summarily.

B. The Plaintiff should not be granted public interest standing

26. Another reason that the action should be dismissed is that the Plaintiff has failed to demonstrate that it should be granted public interest standing.

27. This case is really a private reference. The Plaintiff is not a gasoline retailer and has

³⁹ Zwibel affidavit affirmed December 19, 2019 at para. 11.

⁴⁰ See e.g. *Campisi v. Ontario*, 2017 ONSC 2884 at [para. 15](#), aff'd [2018 ONCA 869](#), leave to appeal dismissed [2019 CanLII 55714](#) (SCC); *Hamilton v. Attorney General of Ontario*, 2018 ONSC 3307 at [para. 24](#); *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 at [para. 219](#) (Div Ct.)

⁴¹ *Toronto-Dominion Bank v. P.M.J. Holdings Limited*, 2019 ONSC 7297 at [para. 24](#).

⁴² *2313103 Ontario Inc. v. JM Food Services Ltd.*, 2015 ONSC 4029 at [para. 40](#).

no mandate to represent the interests of gasoline retailers. While the Plaintiff relies on cases such as *Manitoba Métis Federation*⁴³ and *Downtown Eastside Sex Workers*⁴⁴ to support its claim for public interest standing, in those cases the public interest litigants were organizations with an established history of advancing the interests of the particular disadvantaged groups directly affected by the impugned laws.

28. This Plaintiff has no similar basis to purport to represent gasoline retailers. This fact is particularly problematic given that the actual association for gasoline retailers, the Canadian Independent Petroleum Marketers Association [“CIPMA”], has declined the Plaintiff’s invitation to participate in this action. Indeed, CIPMA’s submission to the Ontario Government was that “In general, CIPMA supports the Act, as currently drafted.”⁴⁵

29. Assuming that this case raises a serious issue, the Plaintiff has not met its burden to establish either that it has a genuine interest in the outcome or that this case is a reasonable and effective means to bring the issue to court.⁴⁶ While the Plaintiff may have a genuine interest in the *Charter* or freedom of expression more generally, it has no established interest or expertise in the retail sale of gasoline or the legal rules under which gasoline retailers operate. The Plaintiff’s experience as a *Charter* litigant in other matters cannot constitute a standing invitation to bring its own proceeding challenging any law that it believes is contrary to the *Charter*.

30. Nor is this action a reasonable and effective way to have the validity of the impugned provisions tested in court. The Supreme Court has held that this factor includes

⁴³ *Manitoba Métis Federation v. Canada (Attorney General)*, 2013 SCC 14 at [para. 44](#).

⁴⁴ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [“*Downtown Eastside Sex Workers*”] at [paras. 5](#) and [58](#).

⁴⁵ “CIPMA Response: Federal Carbon Tax Transparency Act, 2019”, Response to Request to Admit and Request for Documents, Tab 2 [“CIPMA Response”].

⁴⁶ *Downtown Eastside Sex Workers* at [para. 37](#).

consideration of “whether the issue will be presented in a sufficiently concrete and well-developed factual setting,” whether the proceeding “may provide access to justice for disadvantaged persons in society whose legal rights are affected,” “whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination,” and whether “those with a more direct and personal stake in the matter have deliberately refrained from suing.”⁴⁷ All of these factors weigh against granting standing in this case.

31. In a previous challenge brought by this same Plaintiff, the Court of Appeal denied the CCLA public interest standing because of the insufficiency of its factual record.

Charron J.A. (as she then was) held that where a plaintiff seeks public interest standing, the Court must engage in “a consideration of the sufficiency of the evidence”:⁴⁸

...it would seem to me quite clear that the lack of a proper evidentiary basis could have a bearing on considerations such as “the proper allocation of judicial resources”, “ensuring that issues are fully canvassed”, “promoting the use of the judicial process to decide live disputes between parties as opposed to hypothetical ones” and determining “whether the full dimensions of the issue can be expected to be aired before the court”.⁴⁹

32. The Court of Appeal denied the CCLA public interest standing because it had adduced “no relevant adjudicative facts” in its evidence and instead relied on legal arguments made about the impugned statute on its face.⁵⁰ The Court of Appeal held that the evidence led by the CCLA from its general counsel was of no evidentiary value on the merits of the application.⁵¹ The same reasoning applies equally here.

33. More recently, this Court’s decision in *Campisi* (affirmed by the Court of Appeal)

⁴⁷ All quotes from *Downtown Eastside Sex Workers* at [para. 51](#).

⁴⁸ *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, 1998 CarswellOnt 2808 (CA) at [para. 29 \[WL\]](#), leave denied in [\[1998\] S.C.C.A. No. 487](#) [“CCLA”].

⁴⁹ *CCLA* at [para. 30](#).

⁵⁰ *CCLA* at [paras. 83-86](#).

⁵¹ *CCLA* at [paras. 44-47](#).

rejected a claim for public interest standing because the “factual underpinning for the constitutional claims that are being advanced is grossly inadequate” since there was “little to no evidence about the impact or effect” of the law on “actual claimants”, and repeated the Supreme Court’s injunction that “*Charter* decisions should not and must not be made in a vacuum” and that “the absence of a factual base...is fatal.”⁵²

34. *Downtown Eastside Sex Workers* is plainly distinguishable. In that case, the public interest litigant was an “organization that is run ‘by and for’ current and former sex workers...working against all forms of violence against sex workers.”⁵³ Its record included “affidavits from more than 90 current or past sex workers,” providing “a concrete factual background” and “a context suitable for adversarial determination.”⁵⁴ There was “no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions” and “no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim.”⁵⁵ The facts of this case, by contrast, demonstrate the opposite.

35. The Plaintiff relies on *Alford*, but that case was not a *Charter* case and instead concerned legislative competence over parliamentary privilege.⁵⁶ The Court of Appeal held that the issue raised in *Alford* was a “pure question of law” and that a “factual context can have no appropriate bearing on this constitutional challenge.”⁵⁷ But the same is not

⁵² *Campisi v. Ontario*, 2017 ONSC 2884 at [para. 15](#), aff’d [2018 ONCA 869](#), leave to appeal dismissed [2019 CanLII 55714](#) (SCC);

⁵³ *Downtown Eastside Sex Workers* at [para. 58](#).

⁵⁴ *Downtown Eastside Sex Workers* at [para. 74](#).

⁵⁵ *Downtown Eastside Sex Workers* at [para. 73](#).

⁵⁶ *Alford v. Canada (Attorney General)*, [2019 ONCA 657](#) [“*Alford*”].

⁵⁷ *Alford* at [para. 3](#).

true in *Charter* cases, as the Supreme Court and this Court have held.⁵⁸

36. No matter how important the Plaintiff considers this action to be, it cannot bring a private reference. Concern for the welfare of others⁵⁹ or disdain for government action⁶⁰ are not sufficient bases to grant a plaintiff standing. The Supreme Court has cautioned that “Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter” and that public interest standing is not “licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.”⁶¹ Here, there is no evidence that gasoline retailers are in fact poor or marginalized or that they require the Plaintiff’s help to access justice. On the contrary, the evidence is that they are represented by an association that “supports the Act, as currently drafted”⁶² and that they have deliberately chosen not to sue or to participate in the Plaintiff’s suit. As the Plaintiff cannot establish standing, the action must be dismissed.

C. The impugned provisions of the Act do not infringe *Charter* s. 2(b)

37. In any event and in the alternative, Ontario submits that the impugned provisions of the Act do not infringe the freedom of expression protected by s. 2(b) of the *Charter*.

38. The Act does not prohibit gasoline retailers or anyone else from saying anything. Nor is there any evidence that the impugned provisions restrict or interfere with any attempt by gasoline retailers to convey any meaning to anyone. Indeed, there is no evidence from any gasoline retailer about the effect of the Act at all. The Plaintiff has

⁵⁸ See *Campisi v. Ontario*, 2017 ONSC 2884 at [para. 16](#), aff’d [2018 ONCA 869](#), distinguishing public interest standing in *Charter* cases as compared to other cases.

⁵⁹ *Campisi* at [paras. 7-8](#).

⁶⁰ *Marchand v. Ontario* (2006), 81 O.R. (3d) 172 at [para. 24](#); *Landau v. Ontario (AG)*, 2013 ONSC 6152 at [para. 16](#); *R. v. Jayaraj*, [2014 ONSC 6367](#) (Div. Ct.), leave to appeal to SCC refused [2016 CanLII 60515](#).

⁶¹ *Downtown Eastside Sex Workers* at [paras. 1](#) and [51](#).

⁶² See para. 28 above.

failed to establish that the impugned provisions, in purpose or effect, limit any expression by gasoline retailers.⁶³

39. Nor do the impugned provisions compel expression from gasoline retailers. The Supreme Court has held that the s. 2(b) protection against compelled expression is engaged when the law seeks “to put a particular message into the mouth of the plaintiff.”⁶⁴ By contrast, if the law “does not really deprive one of the ability to speak one’s mind or does not effectively associate one with a message with which one disagrees, it is difficult to see how one’s right to pursue truth, participate in the community, or fulfill oneself is denied.”⁶⁵

40. In the cases in which the Supreme Court has held that a law or state action compelled expression, the claimants were required to express the government’s message as though it were their own and were prohibited from expressing any different message. In *National Bank* and in *Slaight Communications*, the impugned state action required the employer to write a letter over the employer’s own signature and purporting to be the employer’s own message, while dictating the content of the message and forbidding the employer from providing any contrary or different message.⁶⁶ As the Supreme Court noted:

in *Slaight Communications* the...employer was obliged to send out a letter of reference displaying its signature and was expressly prohibited from saying anything else in relation to the dismissed employee. As in the case of *National Bank* it was the combination of these factors which grounded the s. 2(b) breach.⁶⁷

⁶³ *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 at [para. 83](#); *Irwin Toy Ltd. v. Quebec (Attorney General)*, [\[1989\] 1 SCR 927](#).

⁶⁴ *Lavigne v. Ontario Public Service Employees Union*, [\[1991\] 2 SCR 211](#) at 267 [“*Lavigne*”].

⁶⁵ *Lavigne* at [279-280](#).

⁶⁶ *National Bank of Canada v. Retail Clerks’ International Union*, [\[1984\] 1 SCR 269](#); *Slaight Communications Inc. v. Davidson*, [\[1989\] 1 SCR 1038](#).

⁶⁷ *Lavigne* at [279](#).

41. Similarly, in *RJR-MacDonald* it was the combination of a requirement on tobacco companies to place an unattributed health warning on their packages together with a prohibition on any contrary message that infringed *Charter* s. 2(b):

The combination of the unattributed health warnings and the prohibition against displaying any other information which would allow tobacco manufacturers to express their own views, constitutes an infringement of the right to free expression guaranteed by s. 2(b) of the *Charter*.⁶⁸

42. Both of these factors are absent here: the impugned provisions of the Act neither attribute any message to gasoline retailers nor prevent them from expressing any message of their own. There is no evidence that the impugned provisions, in purpose or effect, “put a particular message into the mouth of the plaintiff” or “really deprive one of the ability to speak one’s mind” or “effectively associate one with a message with which one disagrees.” It follows that the *Charter* s. 2(b) claim must fail.

43. The requirement to post a government notice in a commercial premises is not compelled expression contrary to s. 2(b). The Court of Appeal has held, in the context of a requirement to post a government inspection notice in a commercial restaurant, that “The *Charter* does not prohibit governments from communicating messages that contradict commercial messages. We do not accept the submission that by requiring restaurant owners to post the inspection notices, the by-law restricts their freedom of expression.”⁶⁹ This decision of the Court of Appeal, not cited by the Plaintiff in its factum, is binding on this Honourable Court and is a complete answer to the *Charter* s. 2(b) claim in this case.

44. Legal requirements to post signs or otherwise convey government information in commercial premises are in fact ubiquitous. As noted above, just in the context of gasoline

⁶⁸ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at [para. 124](#).

⁶⁹ *Ontario Restaurant Hotel & Motel Association v. Toronto (City)*, 2005 CanLII 36152 (ON CA) at [para. 11](#), leave to appeal dismissed [2006 CanLII 16457](#) (SCC).

retail outlets, these requirements include employment standards and occupational health and safety posters, food inspection and tobacco signs, calorie listings, weights and measures stickers, and the disclosure of amounts chargeable under the *Excise Tax Act*.⁷⁰

45. Nor is it a question of these many and various posting requirements each being justified under s. 1 of the *Charter*. The Court of Appeal and the Divisional Court have held that mandatory posting of government notices in commercial premises does not infringe s. 2(b) of the *Charter* at all and therefore does not require justification under s. 1.⁷¹ This is precisely because such requirements neither attribute their message to commercial operators nor prohibit or limit operators from conveying any other or contrary messages.⁷² There is no need to justify a requirement that does not infringe freedom of expression.

46. Indeed, the Supreme Court has noted that “To hold that minor restrictions or requirements with respect to [commercial] packaging violate the s. 2(b) guarantee of freedom of expression might be to trivialize the guarantee.”⁷³ The same may be said of requirements on vendors to provide specified information to customers at the point of purchase, which are ubiquitous in commercial premises and transactions.⁷⁴

47. In *JTI*, the Supreme Court held that a “requirement that [tobacco] manufacturers place the government’s warning on one half of the surface of their [cigarette] package

⁷⁰ See para. 14 above.

⁷¹ *Ontario Restaurant Hotel & Motel Assn v. Toronto (City)*, 2005 CanLII 36152 (ON CA) at [para. 11](#), affirming 2004 CanLII 34445 (Div Ct.) at [paras. 46-48](#).

⁷² *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)*, 2004 CanLII 34445 (Div. Ct) at [para. 48](#).

⁷³ *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at [para. 132](#).

⁷⁴ See e.g. *Consumer Protection Act, 2002*, SO 2002, c. 30, Sch. A, ss. [38](#) [internet agreements], [35](#) [direct agreements], [45](#) [remote agreements], [60](#) [vehicle repair premises], [65.5](#) [towing and storage services], [79](#) [credit agreements], [85.3](#) [cheque cashing services], [89](#) [lease agreements].

arguably rises to the level of interfering with how they choose to express themselves.”⁷⁵ In *JTI*, however, there was substantial evidence from tobacco manufacturers about the marketing uses to which cigarette packages are put and the impediment posed by a government warning occupying half of the package.⁷⁶ In this case, by contrast, there is no evidence that the prescribed notices interfere at all with any marketing by retailers (whether on the gas pumps themselves or across the entire retail premises more generally), and indeed common sense reveals that the few square inches taken up by the prescribed notice on a gas pump cannot reasonably be compared to the government taking up half of the vendor’s property with its own message.

48. The Plaintiff complains that the prescribed notice is insufficiently attributed to the Government, but there is no evidence to support the conjecture that anyone has or reasonably could mistake the prescribed notice for the retailer’s own message, especially since the prescribed notice includes both the Government of Ontario’s logo and its website.

⁷⁵ *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at [para. 132](#).

⁷⁶ See e.g. *JTI MacDonal Corporation v Canada (Attorney General)*, 2002 CanLII 46639 (QC CS) at [para. 949](#), noting that “Packaging and its design, is an integral part of the promotional communications mix of a firm. Package designs are subject to extensive research efforts and investments of time, talent and money. Package designs are frequently revisited and revised...Packaging is, therefore, employed as a tool to realize the strategic goals of appealing to new smokers and reassuring and retaining existing smokers goals manifest in non-packaging documents...Research guides package design down to fine details (e.g. the uses of fine lines, background tints, the weight of a trademark cat). Research is careful to avoid package designs with even remote associations that might remind some consumers of health risks, illness or death...Warnings constitute a “major challenge” to the industry.” See also [paras. 957-958](#): “A cigarette package is unique because the consumer carries it around with him all day...It’s part of a smoker’s clothing, and when he saunters into a bar and plunks it down, he makes a statement about himself...Cigarette pack[s]...will have to work harder than ever, not only at the point of sale to provide increased « stand out », but also whilst in use to communicate the values of the brand to the consumer – to reassure and build loyalty. This is particularly so because of the role of cigarettes as “badge products” with which the consumer identifies personally and which he uses to communicate his own identity to others.” Needless to say, in this case there is no evidence that gasoline pumps are “badge products” with which gasoline consumers identify personally and use to communicate their identity to others.

In any event, nothing in the impugned provisions of the Act has the effect of attributing the notice to the retailer.⁷⁷ A “patently incorrect understanding of a provision cannot ground a finding of unconstitutionality.”⁷⁸

49. The Plaintiff further argues that the prescribed notice is “politically-charged”⁷⁹ because it refers to the charge imposed by the federal *GGPPA* as a “carbon tax”, notwithstanding the Court of Appeal for Ontario’s decision that the federal charge is not an unconstitutional tax contrary to s. 53 of the *Constitution Act, 1867*.⁸⁰ But whatever its correct constitutional characterization, the federal charge is plainly referred to in ordinary speech by the public as the “carbon tax”, as evidenced by the media reports relied on by the Plaintiff in this case.⁸¹ Even the CCLA’s own Executive Director referred to the federal charge as the “carbon tax” without reservation or qualification in his testimony before a legislative committee considering the Act,⁸² and no one suggests that this fact means that he endorses Ontario’s legal position about the federal charge’s constitutional invalidity under s. 53 of the *Constitution Act, 1867*.⁸³

50. Dr. Zycher’s expert evidence, unchallenged by the Plaintiff, was that the charge is a

⁷⁷ *Little Sisters Book and Art Emporium v. Canada*, 2000 SCC 69 at [para. 82](#). See also *Alford v. Law Society of Upper Canada*, 2018 ONSC 4269 at [paras. 25-29](#) and [42](#); *JN v. Durham Regional Police Service*, 2012 ONCA 428 at [paras. 16](#) and [25](#).

⁷⁸ *R. v. Khawaja*, 2012 SCC 69 at [para. 82](#).

⁷⁹ Plaintiff’s factum dated May 11, 2020 at para. 49.

⁸⁰ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at [paras. 150-163](#). An appeal from this decision is scheduled to be heard on September 22-23, 2020.

⁸¹ See e.g. CBC News, “Ontario’s top court set to rule on whether federal carbon tax is unconstitutional” June 28, 2019, Zwibel affidavit affirmed December 19, 2019 at Exhibit B, Tab 11.

⁸² Legislative Assembly of Ontario, Standing Committee on Finance and Economic Affairs, Official Report of Debates (Hansard) No. 95, 1st Session, 42nd Parliament, Tuesday 7 May 2019, [p. F-732](#).

⁸³ In fact, when asked “Mr. Bryant, do you support a carbon tax?” he replied “Oh, I have no view on it”: see *ibid.* at [p. F-733](#).

“tax” under both standard economic definitions and ordinary dictionary definitions.⁸⁴ The Government can hardly be faulted for addressing the public in the same terms commonly used by the public. In any event, the impugned provisions of the Act do not stipulate how the federal charge should be named in the prescribed notice.

51. The Plaintiff argues that the impugned provisions are analogous to a law requiring homeowners to post signs on their lawns stating “Trudeau is a bad PM. Vote Conservative.”⁸⁵ The analogy is fanciful and inapt. A prescribed notice requiring a commercial vendor to advise a purchaser in commercial premises and at the very point of purchase about a government charge payable on the commodity purchased can hardly be compared to a requirement to post partisan election signs on homeowners’ front lawns.

52. The purpose and effect of the impugned provisions is to require gasoline retailers to post a notice informing gasoline customers at the point of purchase of the effect of the federal *GGPPA* on the price of the gasoline that they are about to purchase. By promoting informed consumer choice and price transparency, the Act promotes rather than frustrates the purposes that freedom of expression is intended to serve, namely the pursuit of truth and participation in social and political decision-making.⁸⁶ This is true whether gasoline consumers are in favour of, opposed to or undecided towards carbon taxation generally or the *GGPPA* charge in particular. As Dr. Zycher put it in his unchallenged expert evidence:

it would be a mistake to assume that only critics of carbon taxes support increased visibility of the cost of carbon taxes. Indeed, proponents of carbon taxes should also favor providing information at the point of gasoline purchase on the effect of the tax on the price per liter of gasoline...

⁸⁴ See para. 9 above.

⁸⁵ Plaintiff’s factum dated May 11, 2020 at para. 58.

⁸⁶ *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 at [para. 74](#); *Irwin Toy Ltd. v. Quebec (Attorney General)*, [\[1989\] 1 SCR 927](#).

Whether one is a proponent or a critic of carbon tax policies, it is difficult to argue against providing consumers with information about their costs.”⁸⁷

53. It follows that the impugned provisions of the Act do not warrant constitutional disapprobation, and that the Plaintiff’s challenge should be dismissed.

D. Any infringement is justified under *Charter* s. 1

54. In the further alternative, any infringement of s. 2(b) is justified under s. 1.

55. The best way of discerning a Legislature’s purpose “will usually be to look to the legislation itself.”⁸⁸ In this case, the text of the Act reveals that its purpose is to promote informed consumer choice and transparency in relation to the effect on the price of gasoline sold in Ontario of the charge referred to in subsection 17(1) of the *GGPPA*. This is a pressing and substantial objective. Information about the effect of the *GGPPA* charge on the price of gasoline sold in Ontario is salient and important information for gasoline consumers to receive at the time and in the place that they are making the decision to purchase gasoline.

56. The impugned provisions are rationally connected to their objective. A rational connection can be established “on the basis of reason or logic.”⁸⁹ It need only be “reasonable to suppose that the limit may further the goal, not that it will do so.”⁹⁰ As Dr. Zycher explained in his unchallenged evidence, there is a cost to consumers in seeking out information about applicable taxes and charges on their own, and each individual consumer has a weak incentive to do so.⁹¹ The Act remedies this collective action problem by

⁸⁷ Zycher affidavit at paras. 74-80.

⁸⁸ *Frank v. Canada (Attorney General)*, 2019 SCC 1 at [para. 130](#) (per Côté and Brown JJ. dissenting but not on this point).

⁸⁹ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at [paras. 153-54](#).

⁹⁰ *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at [para. 48](#) [*Hutterian*].

⁹¹ Zycher affidavit at paras. 48-54.

ensuring that information about the effect of the *GGPPA* charge on the price of gasoline is provided to consumers at the point of purchase in a highly salient way.⁹²

57. The Plaintiff argues that the prescribed notice is “incomplete” because it omits information about other taxes applicable to gasoline, thus undermining the rational connection to the objective.⁹³ Any such result is not attributable to the impugned provisions of the Act, which expressly provide that the prescribed notice may include “other information with respect to the price of gasoline sold in Ontario.”⁹⁴ In any event, however, Dr. Zycher’s expert evidence on this point was unchallenged: additional information would add to the complexity of the notice, making it less informative; the notice already includes a link to a website where more information on gasoline taxes can be found for people who desire it; and nothing prevents gasoline retailers from posting additional information should they choose to do so.⁹⁵

58. The Plaintiff’s argument that the Act must also require the posting of information about the federal rebate in order to be constitutionally valid should similarly be rejected.

As Dr. Zycher explained in his unchallenged expert evidence:

The amount of the gasoline carbon tax imposed per liter of gas purchased is the same for every purchaser wherever the tax applies in Ontario. In contrast, the amount of the rebate differs from purchaser to purchaser, and is available only to individuals who file income tax returns and who meet the listed criteria. Not every purchaser of gasoline who pays the gasoline carbon tax will receive a rebate. The “average” rebate would apply to only some subset of fuel purchasers, a subset that might be comparatively small under a broad range of conditions. Listing the average or median rebate would be misleading in some significant number of cases, and, in any event, people will know the size of their actual rebate when they receive it, as noted above. Accordingly, it is the

⁹² Indeed, the uncontested expert evidence is that increasing the salience (or visibility) of the *GGPPA*’s charge may have the effect of reducing the consumption of gasoline, which is the purpose of the federal charge: see Zycher affidavit at paras. 74-80 and Exhibit 13.

⁹³ Plaintiff’s factum dated May 11, 2020 at paras. 50 and 73.

⁹⁴ Act, s. 5(2)(b).

⁹⁵ Zycher affidavit at paras. 87-88.

absence of information on the magnitude of the gasoline carbon tax that would be misleading.⁹⁶

Given that any given individual or household will know the size of their rebate (at least upon receipt of that rebate at tax time), it follows that they should know also the cost of their contributions. The sticker requirement is an obvious and straightforward means with which to provide that information.⁹⁷

59. The purpose of the Act is not to provide individualized tax planning for each individual gasoline purchaser, and the Act cannot reasonably be faulted for failing to do so. The federal *Excise Tax Act* similarly requires vendors to disclose to customers the amount of federal sales tax payable on their purchases, without requiring disclosure of any other taxes that might apply to their purchases or any tax rebates or credits that might be available to the purchaser,⁹⁸ but it could not reasonably be argued that the federal Act is unconstitutional because it does not compel vendors to provide this more “complete” information. The same reasoning applies here.

60. More fundamentally, the argument that the Act would be constitutionally sound if only it compelled the posting of *even more* expressive content is difficult to reconcile with the justification analysis under section 1: a mandatory sticker that included “complete information” about the federal rebate would be very large indeed,⁹⁹ and would take up a good deal more space on gasoline pumps than the current prescribed notice. The Plaintiff’s contention that the prescribed notice is in fact *underinclusive* and should compel gasoline retailers to display even more information is inconsistent with its position on minimal impairment. In any event, under the Act today, any gasoline retailer who wishes to post information about the federal rebate or any other information is free to do so.

⁹⁶ Zycher affidavit at para. 86 (emphasis in original).

⁹⁷ Zycher affidavit at paras. 81-83.

⁹⁸ *Excise Tax Act*, RSC 1985, c. E-15, [s. 223](#).

⁹⁹ The eligibility rules relating to the federal rebate are found at Exhibits 16 and 17 of the Zycher affidavit and take up 8 pages.

61. Under minimal impairment, “the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective.”¹⁰⁰ Here, the impugned provisions go no further than reasonably necessary in meeting the Act’s objective, since they only require retailers to post a prescribed notice at the point of purchase containing relevant information about the effect of the *GGPPA* charge on the price of the commodity being purchased.

62. The Plaintiff argues that Ontario should have relied on the alternatives of media advertising campaigns and voluntary notices rather than a mandatory notice.¹⁰¹ As in *Hutterian*, the Plaintiff’s “proposal, instead of asking what is minimally required to realize the legislative goal, asks the government to significantly compromise it”¹⁰² by relying on less effective means of promoting informed consumer choice and transparency. The uncontested expert evidence is that private retailers have weak incentives to voluntarily provide such information to consumers, who in turn each have relatively weak incentives to seek it out,¹⁰³ and that the prescribed notice requirement is likely to be more effective than other means of communicating the information

...since it provides the relevant information at the point of sale, just as ordinary price information for almost all goods and services is provided similarly. That the latter is the universal practice in almost all market transactions tells us that price information at the point of sale is efficient. As the per-liter gasoline carbon tax is a price, providing information about that price at the point of purchase is likely to be efficient.¹⁰⁴

63. Finally, the salutary effects of promoting informed consumer choice and transparency concerning the effect of the charge referred to in subsection 17(1) of the

¹⁰⁰ *Hutterian* 37 at [para. 54](#).

¹⁰¹ Plaintiff’s factum dated May 11, 2020 at para. 73.

¹⁰² *Hutterian* at [para. 60](#).

¹⁰³ Zycher affidavit at paras. 48-54.

¹⁰⁴ Zycher affidavit at para. 89.

GGPPA on the price of gasoline sold in Ontario are not disproportionate to any deleterious effect on gasoline retailers. Indeed, there is no evidence of any deleterious effects at all.

64. The salutary effects, by contrast, are established in the unchallenged expert evidence reviewed above, and warrant any modest intrusion on retailer's gasoline pumps. Gasoline consumers are provided with relevant and salient information at the point of purchase to better inform them in making their own consumer choices. The promotion of informed choice and transparency for gasoline consumers outweighs any deleterious effect on commercial vendors.

PART IV – ORDER REQUESTED

65. Ontario requests that the action be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 11, 2020



S. Zachary Green and Padraic Ryan

Of counsel for the Defendant (Respondent to motion),
the Attorney General of Ontario

SCHEDULE A – LIST OF AUTHORITIES

Cases

1. *2313103 Ontario Inc v JM Food Services Ltd*, [2015 ONSC 4029](#)
2. *Airia Brands Inc et al v Air Canada et al*, [2011 ONSC 4003](#)
3. *Alberta v Hutterian Brethren of Wilson Colony*, [2009 SCC 37](#)
4. *Alford v Canada (Attorney General)*, [2019 ONCA 657](#)
5. *Campisi v Ontario*, [2017 ONSC 2884](#) aff'd [2018 ONCA 869](#), leave to appeal dismissed [2019 CanLII 55714](#) (SCC)
6. *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, [2012 SCC 45](#)
7. *Canada (Attorney General) v JTI-Macdonald Corp*, [2007 SCC 30](#)
8. *Canadian Civil Liberties Assn v Canada (Attorney General)*, [1998 CarswellOnt 2808](#) (CA) [WL], leave denied in [\[1998\] SCCA No. 487](#)
9. *Canadian National Railway Co v Canada (Attorney General)*, [2014 SCC 40](#)
10. *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, [2018 ONSC 579](#) (Div Ct)
11. *Danson v Ontario (Attorney General)*, [\[1990\] 2 SCR 1086](#)
12. *Ernst v Alberta Energy Regulator*, [2017 SCC 1](#)
13. *Frank v Canada (Attorney General)*, [2019 SCC 1](#)
14. *Hamilton v Attorney General of Ontario*, [2018 ONSC 3307](#)
15. *Irwin Toy Ltd v Quebec (Attorney General)*, [\[1989\] 1 SCR 927](#)
16. *JTI MacDonald Corporation v Canada (Attorney General)*, [2002 CanLII 46639](#) (QC CS)
17. *Landau v Ontario (AG)*, [2013 ONSC 615](#)
18. *Lavigne v Ontario Public Service Employees Union*, [\[1991\] 2 SCR 211](#)
19. *Little Sisters Book and Art Emporium v Canada*, [2000 SCC 69](#)
20. *MacKay v Manitoba*, [\[1989\] 2 SCR 357](#)

21. *Manitoba Métis Federation v Canada (Attorney General)*, [2013 SCC 14](#)
22. *Marchand v Ontario* (2006), [81 OR \(3d\) 17](#)
23. *Meridian Credit Union Limited v. Baig*, [2016 ONCA 150](#).
24. *Montréal (City) v 2952-1366 Québec Inc.*, [2005 SCC 62](#)
25. *National Bank of Canada v Retail Clerks' International Union*, [\[1984\] 1 SCR 269](#)
26. *OLA Staffing v 2156775 Ontario Inc.*, [2017 ONSC 7318](#)
27. *Ontario v Rothmans et al.*, [2011 ONSC 5356](#)
28. *Ontario Restaurant Hotel & Motel Ass v Toronto (City)*, [2004 CanLII 34445](#) (Div Ct), aff'd [2005 CanLII 36152](#) (CA), leave to appeal ref'd [2006 CanLII 16457](#) (SCC)
29. *Public School Boards' Assn of Alberta v Alberta (Attorney General)*, [2000 SCC 2](#)
30. *R v Banks*, [2007 ONCA 19](#)
31. *R v Edwards Books and Art Ltd.*, [\[1986\] 2 SCR 713](#)
32. *R v Jayaraj*, [2014 ONSC 6367](#) (Div Ct), leave to appeal to SCC refused [2016 CanLII 60515](#)
33. *R v Khawaja*, [2012 SCC 69](#)
34. *R. v. Quansah*, [2015 ONCA 237](#)
35. *Reference re Greenhouse Gas Pollution Pricing Act*, [2019 ONCA 544](#)
36. *Reference re Upper Churchill Water Rights Reversion Act*, [\[1984\] 1 SCR 297](#)
37. *RJR-MacDonald Inc v Canada (Attorney General)*, [\[1995\] 3 SCR 199](#)
38. *Samuel v. Benson Kearley IFG*, [2020 ONSC 1123](#)
39. *Slaight Communications Inc v Davidson*, [\[1989\] 1 SCR 1038](#)
40. *Tesla Motors Canada ULC v Ontario*, [2018 ONSC 5062](#)
41. *Toronto-Dominion Bank v PMJ Holdings Limited*, [2019 ONSC 7297](#)

Other Authorities

1. Legislative Assembly of Ontario, Standing Committee on Finance and Economic Affairs, [Official Report of Debates \(Hansard\) No. 95, 1st Session, 42nd Parliament, Tuesday 7 May 2019](#)

SCHEDULE B – LEGISLATION

1. *Federal Carbon Tax Transparency Act, 2019*, [SO 2019 c 7 Sch 23](#)
2. *Provincial Offences Act*, [RSO 1990, c P.33](#)
3. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11
4. *Rules of Civil Procedure*, [RRO 1990, Reg 194](#)
5. *Provincial Offences Act*, [RSO 1990, c P.33](#)
6. *Greenhouse Gas Pollution Pricing Act*, [SC 2018, c 12, s 186](#)
7. Ontario Regulation [275/19](#)
8. *Employment Standards Act*, [SO 2000, c 41](#)
9. *Occupational Health and Safety Act*, [RSO 1990, c O.1](#)
10. Weights and Measures Regulations, [CRC, c 1605](#)
11. *Excise Tax Act*, [RSC 1985, c E-15](#)
12. *Smoke-Free Ontario Act*, [SO 2017, c 26, Sch 3](#)
13. Ontario Regulation [268/18](#)
14. *Healthy Menu Choices Act, 2015*, [SO 2015, c 7, Sch 1](#)
15. *Consumer Protection Act, 2002*, [SO 2002, c 30, Sch A](#)

Federal Carbon Tax Transparency Act, 2019, [SO 2019 c 7 Sch 23](#)

Definitions

1 In this Act,

“gasoline” means any gas or liquid that is subject to tax under subsection 2 (1) of the Gasoline Tax Act, but is not subject to tax under subsection 2 (2), (3) or (4) of that Act; (“essence”)

“Minister” means the Minister of Energy, Northern Development and Mines or such other member of the Executive Council to whom responsibility for the administration of this Act may be assigned or transferred under the Executive Council Act. (“ministre”)

Notice on gasoline pumps

2 (1) The person who is licensed under the Technical Standards and Safety Act, 2000 to operate a retail outlet at which gasoline is sold at a gasoline pump and put into the fuel tanks of motor vehicles shall,

(a) obtain from the Minister copies of the prescribed notice with respect to the price of gasoline sold in Ontario; and

(b) ensure the notice referred to in clause (a) is affixed to each gasoline pump at the retail outlet in such manner as may be prescribed.

Exception, reserves

(2) Subsection (1) does not apply with respect to a retail outlet located,

(a) on a reserve, as defined in the Indian Act (Canada); or

(b) in an Indian Settlement located on Crown land, the Indian inhabitants of which are treated by Indigenous Services Canada in the same manner as Indians residing on a reserve.

Inspections

3 (1) Any person authorized by the Minister for the purpose of this section may at all reasonable times enter into any retail outlet with respect to which subsection 2 (1) applies and inspect or examine the gasoline pumps at the retail outlet for the purpose of determining compliance with this Act.

Obstruction

(2) No person shall hinder, obstruct or interfere with or attempt to hinder, obstruct or interfere with a person doing anything that the person is authorized by subsection (1) to do.

Offences

Contravention of notice requirements

4 (1) Every person who contravenes subsection 2 (1) is guilty of an offence and on conviction is liable,

(a) in the case of an individual,

(i) for a first offence, to a fine of not more than \$500 for every day or part of a day on which the offence occurs or continues, and

(ii) for a second or subsequent offence, to a fine of not more than \$1,000 for every day or part of a day on which the offence occurs or continues; and

(b) in the case of a corporation,

(i) for a first offence, to a fine of not more than \$5,000 for every day or part of a day on which the offence occurs or continues, and

(ii) for a second or subsequent offence, to a fine of not more than \$10,000 for every day or part of a day on which the offence occurs or continues.

Obstruct inspection

(2) Every person who contravenes subsection 3 (2) is guilty of an offence and on conviction is liable to a fine of not less than \$500 and not more than \$10,000.

Duty of directors and officers

(3) A director or officer of a corporation that is licensed under the Technical Standards and Safety Act, 2000 to operate a retail outlet referred to in subsection 2 (1) shall take all reasonable care to ensure that subsection 2 (1) is complied with.

Contravention of duty of directors and officers

(4) A person who has the duty imposed by subsection (3) and fails to carry it out is guilty of an offence and on conviction is liable to the penalty provided for in subsection (1).

Same

(5) A person may be prosecuted and convicted under subsection (4) even if the corporation has not been prosecuted or convicted.

Regulations

5 (1) The Lieutenant Governor in Council may make regulations for the purpose of carrying out the provisions of this Act, including,

- (a) prescribing anything that may be prescribed under this Act;
- (b) providing for time limits within which the requirements under clauses 2 (1) (a) and (b) must be complied with.

Contents of the prescribed notice

(2) The notice prescribed under subsection (1) for the purpose of clause 2 (1) (a),

(a) shall set out information with respect to the effect of the charge referred to in subsection 17 (1) of the Greenhouse Gas Pollution Pricing Act (Canada) on the price of gasoline sold in Ontario, which may include information as estimated or otherwise determined by the Minister; and

(b) may set out other information with respect to the price of gasoline sold in Ontario, which may include information as estimated or otherwise determined by the Minister.

6 Omitted (provides for coming into force of provisions of this Act).

7 Omitted (enacts short title of this Act).

Provincial Offences Act, [RSO 1990, c P.33](#)

Set fines

Chief Justice

91.1 (1) The Chief Justice of the Ontario Court of Justice may specify an amount as the set fine for the purpose of proceedings under Part I or II for any offence.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS,
Part I of the *Constitution Act, 1982*,
being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Rules of Civil Procedure, [RRO 1990, Reg 194](#)

RULE 20 SUMMARY JUDGMENT

EVIDENCE ON MOTION

20.02 (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

DISPOSITION OF MOTION

General

20.04

(2) The court shall grant summary judgment if,

...

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS

EVIDENCE BY AFFIDAVIT

Generally

39.01

...

Contents — Motions

(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

*Greenhouse Gas Pollution Pricing Act, [SC 2018, c 12, s 186](#)***PART 1****Fuel Charge**

...

DIVISION 2**Application of Charge****SUBDIVISION A****General Application of Charge to Fuel and Combustible Waste****Charge — delivery by registered distributor**

17 (1) Subject to this Part, a particular registered distributor in respect of a type of fuel that delivers, at a particular time, fuel of that type in a listed province to another person must pay to Her Majesty in right of Canada a charge in respect of the fuel and the listed province in the amount determined under section 40. The charge becomes payable at the particular time.

PART 1**Provinces and Areas for the Purposes of Part 1 of the Act****TABLE 1**

List of Provinces

Item	Name of Province
1	Ontario
2	New Brunswick
3	Manitoba
4	Saskatchewan
4.1	Alberta
5	Yukon
6	Nunavut

Ontario Regulation [275/19](#)**Prescribed notice**

1. For the purpose of clause 2 (1) (a) of the Act, the prescribed notice is,

(a) the notice in English identified as the Federal Carbon Tax Transparency Sticker — English version, dated July 2019 and available on a website of the Government of Ontario; or

(b) the notice in French identified as the Federal Carbon Tax Transparency Sticker — French version, dated July 2019 and available on a website of the Government of Ontario.

Manner of affixing notice

2. The notice prescribed by clause 1 (a) or (b) shall be affixed to the gasoline pump upright and in a prominent location within the top two-thirds of the side of the gasoline pump that faces motor vehicles when the pump is used to put gasoline into their fuel tanks, and shall not be obscured from view.

Notice removed or defaced

3. If a notice is removed or defaced, the requirements under clauses 2 (1) (a) and (b) of the Act must be complied with as soon as possible.

4. Omitted (provides for coming into force of provisions of this Regulation).

Employment Standards Act, [SO 2000, c 41](#)

**PART II
INFORMATION CONCERNING RIGHTS AND OBLIGATIONS**

Copy of poster to be provided

2 (5) Every employer shall provide each of his or her employees with a copy of the most recent poster published by the Director under this section.

Occupational Health and Safety Act, [RSO 1990, c O.1](#)

25(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

...

(i) post, in the workplace, a copy of this Act and any explanatory material prepared by the Ministry, both in English and the majority language of the workplace, outlining the rights, responsibilities and duties of workers;

Weights and Measures Regulations, [CRC, c 1605](#)

PART I **Devices**

Marking of Devices

31 (1) An inspector who, under section 15 of the Act, examines a weighing or measuring machine set out in column I of Part I of Schedule I that is or is to be used in the category of trade set out in column II or who, under section 15.1 of the Act, examines a weighing or measuring machine that is or is to be used in trade and, in either case, determines that the machine meets the requirements of the Act and these Regulations shall mark the machine by placing on it an examination sticker.

(2) An inspector who, under paragraph 17(1)(b) or subsection 21(2) of the Act, examines a weighing or measuring machine that is or is to be used in trade and determines that it meets the requirements of the Act and these Regulations shall mark the machine by placing on it a sticker bearing the examination mark.

(3) An inspector who, under section 15 of the Act, examines a weight set out in column I of Part I of Schedule I that has a lead plug and that is or is to be used in the category of trade set out in column II or who, under section 15.1, paragraph 17(1)(b) or subsection 21(2) of the Act, examines a weight that has a lead plug that is or is to be used in trade and, in either case, determines that the weight meets the requirements of the Act and these Regulations shall

SCHEDULE I **(Section 4)**

Units Based on the International System of Units **PART I**

Basic Units of Measurement

	<i>Basic Unit</i>	<i>Symbol</i>	<i>Definition</i>
1	metre	m	the unit for the measurement of length, being the metre as defined by the 26 ^e Conférence générale des poids et mesures as reported in the Comptes rendus de la 26 ^e Conférence générale des poids et mesures published by the Bureau international des poids et mesures, as amended from time to time
2	kilogram	kg	the unit for the measurement of mass, being the kilogram as defined by the 26 ^e Conférence générale des poids et mesures as

<i>Basic Unit</i>	<i>Symbol</i>	<i>Definition</i>
		reported in the Comptes rendus de la 26 ^e Conférence générale des poids et mesures published by the Bureau international des poids et mesures, as amended from time to time
3 second	s	the unit for the measurement of time, being the second as defined by the 26 ^e Conférence générale des poids et mesures as reported in the Comptes rendus de la 26 ^e Conférence générale des poids et mesures published by the Bureau international des poids et mesures, as amended from time to time
4 ampere	A	the unit for the measurement of electric current, being the ampere as defined by the 26 ^e Conférence générale des poids et mesures as reported in the Comptes rendus de la 26 ^e Conférence générale des poids et mesures published by the Bureau international des poids et mesures, as amended from time to time
5 kelvin	K	the unit for the measurement of thermodynamic temperature, being the kelvin as defined by the 26 ^e Conférence générale des poids et mesures as reported in the Comptes rendus de la 26 ^e Conférence générale des poids et mesures published by the Bureau international des poids et mesures, as amended from time to time
6 candela	cd	the unit for the measurement of luminous intensity, being the candela as defined by the 26 ^e Conférence générale des poids et mesures as reported in the Comptes rendus de la 26 ^e Conférence générale des poids et mesures published by the Bureau international des poids et mesures, as amended from time to time
7 mole	mol	the unit for the measurement of the amount of substance, being the mole as defined by the 26 ^e Conférence générale des poids et mesures as reported in the Comptes rendus de la 26 ^e Conférence générale des poids et mesures published by the Bureau international des poids et mesures, as amended from time to time

Excise Tax Act, [RSC 1985, c E-15](#)

PART IX
Goods and Services Tax

DIVISION V
Collection and Remittance of Division II Tax

SUBDIVISION A
Collection

Disclosure of tax

223 (1) If a registrant makes a taxable supply, other than a zero-rated supply, the registrant shall indicate to the recipient, either in prescribed manner or in the invoice or receipt issued to, or in an agreement in writing entered into with, the recipient in respect of the supply,

(a) the consideration paid or payable by the recipient for the supply and the tax payable in respect of the supply in a manner that clearly indicates the amount of the tax; or

(b) that the amount paid or payable by the recipient for the supply includes the tax payable in respect of the supply.

Indication of total

(1.1) If a registrant makes a taxable supply, other than a zero-rated supply, and, in an invoice or a receipt in respect of the supply issued to the recipient or in an agreement in writing in respect of the supply, the registrant indicates the tax payable or the rate or rates at which tax is payable in respect of the supply, the registrant shall indicate in that invoice, receipt or agreement

(a) the total tax payable in respect of the supply in a manner that clearly indicates the amount of that total; or

(b) the total of the rates at which tax is payable in respect of the supply.

Exception

(1.2) If a registrant makes a taxable supply in a participating province and is entitled under subsection 234(3) to deduct an amount in respect of the supply in determining the net tax of the registrant, the registrant is not required to include under subsection (1) or (1.1) tax under subsection 165(2), or the rate of that tax, in the total tax payable or the total of the rates of tax payable in respect of the supply.

Exception

(1.3) Subsection (1) does not apply to a registrant when the registrant is not required to collect the tax payable in respect of the taxable supply made by the registrant.

Particulars

(2) A person who makes a taxable supply to another person shall, on the request of the other person, forthwith furnish to the other person in writing such particulars of the supply as may be required for the purposes of this Part to substantiate a claim by the other person for an input tax credit or rebate in respect of the supply.

Smoke-Free Ontario Act, [SO 2017, c 26, Sch 3](#)

Signs in retail stores

7 No person shall, in any place, sell or offer to sell tobacco products, vapour products or a prescribed product or substance at retail unless the prescribed signs are posted at the place in the prescribed manner.

Ontario Regulation [268/18](#)

SIGNS

Signs

12. (1) All signs required to be posted under the Act and this Regulation shall be posted in a conspicuous manner and shall not be obstructed from view. O. Reg. 268/18, s. 12.

(2) Where this Regulation requires a sign to be a copy of a sign accessible through a website of the Government of Ontario, it is sufficient to copy the information and informational symbols on such a sign without copying a Trillium or “Smoke-Free” logo in an exact fashion, or copying it at all. O. Reg. 430/19, s. 1.

Rules for informational signs

13. The following are the prescribed conditions for the purposes of subsection 4 (3) of the Act:

1. No more than three of the signs described in that subsection may be posted in the place.
2. None of the signs may be more than 968 square centimetres in area.
3. Each sign must have a white background and only black text and graphics.
4. A sign must not include a text or graphic that identifies or reflects a brand of a product mentioned in that subsection or any element of such a brand.

Signs at retail

14. (1) For the purposes of section 7 of the Act, a person who sells or offers to sell any product described in that section at retail shall post, as applicable, the age restriction signs described in subsections (2) and (3) of this section and the identification signs described in subsections (4) and (5) of this section at any location where the products are sold or supplied in a place where each sign is clearly visible to the person who sells or supplies the products and to the person to whom the products are sold or supplied. O. Reg. 268/18, s. 14 (1).

(2) In the case of a person who sells or offers to sell a tobacco product at retail, the age restriction sign referred to in subsection (1) must meet the following requirements:

1. The sign must be 18 centimetres in height and 35 centimetres in width.
2. The sign must be a copy of the sign entitled “Tobacco Product Age Restriction”, dated April 1, 2020 and accessible through a website of the Government of Ontario. O. Reg. 268/18, s. 14 (2); O. Reg. 430/19, s. 2 (1); O. Reg. 197/20, s. 3.

(3) In the case of a person who sells or offers to sell a vapour product at retail, the age restriction sign referred to in subsection (1) shall meet the following requirements:

1. The sign must be 18 centimetres in height and 35 centimetres in width.
2. The sign must be a copy of the sign entitled “Vapour Product Age Restriction”, dated April 1, 2020 and accessible through a website of the Government of Ontario. O. Reg. 268/18, s. 14 (3); O. Reg. 430/19, s. 2 (2); O. Reg. 197/20, s. 3.

(4) In the case of a person who sells or offers to sell a tobacco product at retail, the identification sign referred to in subsection (1) must meet the following requirements:

1. The sign must be 9 centimetres in height and 18 centimetres in width.
2. The sign must be a copy of the sign entitled “Tobacco Product Identification”, dated April 1, 2020 and accessible through a website of the Government of Ontario. O. Reg. 268/18, s. 14 (4); O. Reg. 430/19, s. 2 (3); O. Reg. 197/20, s. 3.

(5) In the case of a person who sells or offers to sell a vapour product at retail, the identification sign referred to in subsection (1) shall meet the following requirements:

1. The sign must be 9 centimetres in height and 18 centimetres in width.
2. The sign must be a copy of the sign entitled “Vapour Product Identification”, dated April 1, 2020 and accessible through a website of the Government of Ontario.

Healthy Menu Choices Act, 2015, [SO 2015, c 7, Sch 1](#)

Information to be displayed

2. (1) Every person who owns or operates a regulated food service premise shall ensure that there is displayed, in accordance with the requirements of this section, the following information:

1. The number of calories of every standard food item that is sold or offered for sale at the regulated food service premise.
2. Any other information required by the regulations. 2016, c. 5, Sched. 11, s. 1.

Where displayed, in regulated food service premise

(2) The information required to be displayed under subsection (1) with respect to a standard food item shall be displayed,

- (a) on each menu on which the standard food item is listed or depicted at the regulated food service premise; and
- (b) where the standard food item is put on display at the regulated food service premise, on a label or tag identifying the standard food item.

Where displayed, otherwise

(3) In addition to the display required under subsection (2), where a regulated food service premise lists or depicts a standard food item on a menu that is distributed or available outside the regulated food service premise, the information required to be displayed for the purposes of subsection (1) shall be displayed on that menu.

Application of subs. (1)

(4) The requirement under subsection (1) applies with respect to each variety, flavour and size of standard food item that is sold or offered for sale at the regulated food service premise.

Combination meals

(5) If a combination of standard food items is sold or offered for sale as a combination meal, the requirements under this section apply with respect to the combination meal as if the combination meal was also an individual standard food item.

Signs

(6) Every person who owns or operates a regulated food service premise shall ensure that there are publicly posted at the regulated food service premise, in a manner that is in accordance with the regulations, one or more signs that contain any caloric or nutritional information that may be required by the regulations.

How displayed

(7) The information required to be displayed for the purposes of this section shall be displayed in accordance with the rules provided for in the regulations.

What displayed

(8) For the purposes of this section, the number of calories of each standard food item shall be determined as provided for in the regulations.

Consumer Protection Act, 2002, [SO 2002, c 30, Sch A](#)

Cancellation: cooling-off period

35 (1) A consumer may, without any reason, cancel a personal development services agreement at any time within 10 days after the later of receiving the written copy of the agreement and the day all the services are available.

Cancellation: failure to meet requirements

(2) In addition to the right under subsection (1), a consumer may cancel a personal development services agreement within one year after the date of entering into the agreement if the consumer does not receive a copy of the agreement that meets the requirements under section 30.

...

Disclosure of information

38 (1) Before a consumer enters into an internet agreement, the supplier shall disclose the prescribed information to the consumer.

Express opportunity to accept or decline agreement

(2) The supplier shall provide the consumer with an express opportunity to accept or decline the agreement and to correct errors immediately before entering into it.

Manner of disclosure

(3) In addition to the requirements set out in section 5, disclosure under this section shall be accessible and shall be available in a manner that ensures that,

- (a) the consumer has accessed the information; and
- (b) the consumer is able to retain and print the information.

...

Disclosure of information

45 Before a consumer enters into a remote agreement, the supplier shall disclose the prescribed information to the consumer and shall satisfy the prescribed requirements.

...

Posting signs

60 A repairer shall post the prescribed signs in accordance with the prescribed requirements.

...

Posting identifiers and other information

65.5 A tow and storage provider shall post the prescribed price information and other prescribed information, which may include stickers, labels and other visual identifiers, in accordance with the prescribed requirements.

...

Initial disclosure statement

79 (1) Every lender shall deliver an initial disclosure statement for a credit agreement to the borrower at or before the time that the borrower enters into the agreement, unless the lender has adopted the loan broker's initial disclosure statement as his, her or its own. 2004, c. 19, s. 7 (23).

Contents of statement, fixed credit

(2) The initial disclosure statement for a credit agreement for fixed credit shall disclose the prescribed information. 2002, c. 30, Sched. A, s. 79 (2).

Contents of statement, open credit

(3) The initial disclosure statement for a credit agreement for open credit shall disclose the prescribed information. 2002, c. 30, Sched. A, s. 79 (3).

Brokerage fee

(4) If a loan broker assists in arranging a credit agreement, the initial disclosure statement shall disclose the prescribed information.

...

Disclosure of information

85.3 A supplier under a consumer agreement to which this Part applies shall display the prescribed information in the prescribed manner and in accordance with the prescribed requirements.

...

Disclosure statement

89 (1) Every lessor shall deliver a disclosure statement for a lease to the lessee before the earlier of,

(a) the time that the lessee enters into the lease; and

(b) the time that the lessee makes any payment in connection with the lease. 2002, c. 30, Sched. A, s. 89 (1); 2004, c. 19, s. 7 (34).

Contents of statement

(2) The disclosure statement for a lease shall disclose the prescribed information.

Court File No.: CV-19-00626685-0000

**THE CORPORATION OF THE CANADIAN
CIVIL LIBERTIES ASSOCIATION**
Plaintiff (Moving party)

- and - **THE ATTORNEY GENERAL OF ONTARIO**
Defendant (Respondent to motion)

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at Toronto

FACTUM OF THE DEFENDANT
(Respondent to motion)
(motion for summary judgment)

**MINISTRY OF THE ATTORNEY
GENERAL**

Constitutional Law Branch
McMurtry-Scott Building
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9
Fax: (416) 326-4015

S. Zachary Green (LSO# 48066K)
Padraic Ryan (LSO# 61687)
Tel: (416) 992-2327
Email: Zachary.Green@Ontario.ca

Of Counsel for the Defendant (Respondent),
the Attorney General of Ontario