2023 ADAM F. FANAKI COMPETITION LAW MOOT—WINNING FACTA / CONCOURS DE PLAIDOIRIE ADAM F. FANAKI 2023

NOTE FROM THE EDITORIAL BOARD

Dear Readers,

The Editorial Board is pleased to publish the problem as well as the winning facta from the fifth annual Adam F. Fanaki Competition Law Moot, held in Toronto in March, 2023. This annual competition, organized by the Competition Bureau, the Competition Tribunal and the Canadian Bar Association, honours the memory of Adam F. Fanaki, a pillar in the international competition and antitrust bar who practised at leading Canadian law firms and also spent several years with the Competition Bureau, rising to become the Senior Deputy Commissioner of Competition and the head of the Mergers Branch, and serving also as Special Counsel to the Commissioner of Competition. While Adam's contributions have already helped to shape the trajectory of competition law in Canada, the Fanaki Moot bears his name in recognition of his ongoing impact in our community.

The Fanaki Competition Law Moot provides law students across Canada with a unique opportunity to grapple with complex civil or criminal legal issues in the competition sphere. Mooters receive feedback from prominent members of the Canadian competition law community by arguing before judging panels comprised of practitioners, judicial members of the Competition Tribunal or other courts, and representatives of the Competition Bureau, the Department of Justice or the Public Prosecution Service of Canada.

This year, mooters contemplated an intricate deceptive marketing case focusing on the impact of privacy representations on consumers. Prizes were awarded for the Best Faculty, Best Oralist, Best Team, and Best Factum for both respondents and appellants. The Editorial Board would like to congratulate the Western University team (Mark Penner and Giovanni Perri) as the recipients of the Best Factum—Appellant Award and the University of Toronto team (Edmund Nilson and Max van der Weerd) as recipients

of the Best Factum—Respondent Award. We invite our readers to enjoy these exemplars of written advocacy from budding lawyers and to join us in congratulating all of those who took part in the 2023 Adam F. Fanaki Competition Law Moot.

A summary of the problem and of the principal arguments on both sides appears below, but we invite you to read them in their entirety in the following pages.

The Problem:

This year's Adam F. Fanaki Competition Law Moot problem grappled with the intersection of data privacy claims and the deceptive marketing provisions of the Competition Act (the "Act"). As part of its global marketing campaign to advertise its new smartphone, the "PearGab 6", Pear Inc. used several privacy-oriented taglines and vignettes to promote the device (the "Privacy Representations"). However, months after initially launching the new smartphone, Pear announced that it had fallen victim to a security breach that allowed an unauthorized party to access sensitive personal information stored on PearGab 6 devices. Despite the breach, Pear continued to feature the Privacy Representations in its marketing campaign for the new smartphone. The Commissioner of Competition brought an application for a temporary order under section 74.11 of the Act, requiring Pear to stop making the Privacy Representations. This provision of the Act has not been judicially interpreted by the courts, allowing the parties to make several submissions regarding the correct interpretation of the statutory language. The Competition Tribunal dismissed the Commissioner's request for a temporary order. While the Tribunal did find that "it appears" to the Tribunal that Pear had engaged in reviewable conduct under paragraph 74.01(1)(a), the Commissioner failed to establish that serious harm is likely to ensue unless the temporary order is issued. The Commissioner appealed the decision.

Appellant's Arguments:

The Appellants argued that the Tribunal erred in setting a higher bar than Parliament intended when interpreting the threshold "it appears to the court" in the language of s. 74.11(1). While the Appellants agreed with the Tribunal that Pear's Privacy Representations were reviewable conduct under paragraph 74.01(1)(a), the Appellants argued that the Tribunal erred in finding that the Privacy Representations were not related to performance, and therefore were not bound to the proper and adequate testing requirement of paragraph 74.01(1)(b). Lastly, the Appellants maintained that the Tribunal erred in finding that serious harm would not likely ensue absent

a temporary order being granted. Rather, the Appellants submitted that serious harm to both competition and consumers is likely to occur if the Privacy Representations continue.

Respondents' Arguments:

The Respondents argued that the Tribunal was correct in interpreting the threshold "it appears to the court" in s. 74.11(1) as requiring the Commissioner to establish evidence that Pear engaged in reviewable conduct on a balance of probabilities. The Respondents submitted that the Tribunal erred in finding that the Privacy Representations were false or misleading in a material respect, largely due to their application of the wrong consumer perspective in the general impression test, and holding that privacy was material to the ordinary consumer. The Respondents did agree with the Tribunal in finding that the Privacy Representations were not statements relating to the performance or efficacy of the PearGab 6, as these were only conveying Pear's values and were too vague to be subject to testing. Lastly, the Respondents sided with the Tribunal in holding that serious harm is not likely to ensue absent a temporary order.

NOTE DU COMITÉ DE RÉDACTION

Chers lecteurs,

Le Comité de rédaction a le plaisir de publier le problème ainsi que les mémoires gagnants de la cinquième édition du Concours de plaidoirie Adam-F.-Fanaki en droit de la concurrence, qui a eu lieu à Toronto en mars 2023. Ce concours annuel, organisé par le Bureau de la concurrence, le Tribunal de la concurrence et l'Association du Barreau canadien, honore la mémoire d'Adam F. Fanaki, un pilier de la communauté internationale du droit de la concurrence et du droit antitrust qui a exercé dans de grands cabinets juridiques canadiens et qui a également passé plusieurs années au Bureau de la concurrence. Me Fanaki est devenu sous-commissaire principal de la concurrence et chef de la Direction des fusions, et a agi également comme avocat spécial du commissaire de la concurrence. Bien que les réalisations d'Adam aient déjà contribué à façonner la trajectoire du droit de la concurrence au Canada, le concours porte son nom en reconnaissance de son impact continu dans notre communauté.

Le Concours de plaidoirie Adam-F.-Fanaki en droit de la concurrence offre aux étudiants et étudiantes en droit de partout au Canada une occasion unique de s'attaquer à des questions juridiques civiles ou criminelles complexes dans le domaine de la concurrence. Les participants reçoivent des

commentaires de membres éminents de la communauté du droit canadien de la concurrence en plaidant devant des comités d'évaluation composés de praticiens, de membres de la magistrature du Tribunal de la concurrence ou d'autres tribunaux, et de représentants du Bureau de la concurrence, du ministère de la Justice ou du Service des poursuites pénales du Canada.

Cette année, les participants ont travaillé sur une affaire complexe de pratiques commerciales trompeuses axée sur l'incidence des déclarations de confidentialité sur les consommateurs. Des prix pour la meilleure faculté, le meilleur plaidoyer, la meilleure équipe et le meilleur mémoire ont été décernés tant aux appelants et appelantes qu'aux défendeurs et défenderesses. Le Comité de rédaction tient à féliciter l'équipe de l'Université Western (Mark Penner et Giovanni Perri), lauréate du prix du meilleur mémoire—Partie appelante et l'équipe de l'Université de Toronto (Edmund Nilson et Max van der Weerd), lauréate du prix du meilleur mémoire—Partie défenderesse. Nous invitons nos lecteurs à profiter de ces exemples de plaidoyer écrits par des juristes en devenir et à se joindre à nous pour féliciter toutes les personnes qui ont participé au Concours de plaidoirie Adam F. Fanaki en droit de la concurrence 2023.

Vous trouverez ci-dessous un résumé du problème et des principaux arguments des deux côtés, mais nous vous invitons à les lire dans leur intégralité dans les pages suivantes.

Le problème :

Cette année, le problème du concours portait sur le recoupement des allégations relatives à la protection des données et des dispositions concernant les pratiques commerciales trompeuses de la Loi sur la concurrence (la « Loi »). Dans le cadre de sa campagne publicitaire mondiale visant à promouvoir son nouveau téléphone intelligent, le « PearGab 6 », Pear inc. a utilisé plusieurs slogans et capsules axés sur la confidentialité pour promouvoir l'appareil (les « déclarations de confidentialité »). Toutefois, quelques mois après avoir lancé son nouveau téléphone intelligent, Pear a annoncé avoir été victime d'une violation de sécurité qui permettait à une partie non autorisée d'accéder à des renseignements personnels sensibles stockés sur des appareils PearGab 6. Malgré la violation, Pear a continué de présenter les déclarations de confidentialité dans sa campagne de marketing pour le nouveau téléphone. Le commissaire de la concurrence a présenté une demande d'ordonnance temporaire en vertu de l'article 74.11 de la Loi exigeant que Pear cesse de faire les déclarations de confidentialité. Cette disposition de la Loi n'a pas fait l'objet d'une interprétation judiciaire par les

tribunaux, ce qui a permis aux parties de présenter plusieurs observations concernant l'interprétation correcte du libellé. Le Tribunal de la concurrence a rejeté la demande d'ordonnance temporaire du commissaire. Même si le Tribunal a conclu « d'après lui » que Pear avait eu un comportement susceptible d'examen en vertu de l'alinéa 74.01(1)a), le commissaire n'a pas établi qu'un préjudice grave est susceptible de s'ensuivre à moins que l'ordonnance temporaire ne soit rendue. Le commissaire a interjeté appel de la décision.

Arguments de la partie appelante :

La partie appelante a fait valoir que le tribunal a commis une erreur en fixant la barre plus haut que ce qui est prévu par le législateur lorsqu'il a interprété « d'après lui » le libellé du paragraphe 74.11(1). Bien que la partie appelante ait convenu tout comme le tribunal que les déclarations de confidentialité de Pear étaient susceptibles d'examen en vertu de l'alinéa 74.01(1) a), elle a fait valoir que le tribunal avait commis une erreur en concluant que les déclarations de confidentialité n'étaient pas liées au rendement de l'appareil et qu'elles n'étaient donc pas liées à l'épreuve suffisante et appropriée énoncée à l'alinéa 74.01(1)b). Enfin, la partie appelante a soutenu que le tribunal avait commis une erreur en concluant qu'un préjudice grave ne s'ensuivrait probablement pas en l'absence d'une ordonnance temporaire. Les appelants ont plutôt fait valoir qu'un préjudice grave à la concurrence et aux consommateurs est susceptible de se produire si les déclarations de confidentialité se poursuivent.

Arguments de la partie défenderesse :

La partie défenderesse a fait valoir que le Tribunal a eu raison d'interpréter « d'après lui » le paragraphe 74.11(1) comme exigeant du commissaire qu'il établisse la preuve que Pear a eu un comportement susceptible d'examen selon la prépondérance des probabilités. La partie défenderesse a soutenu que le Tribunal a commis une erreur en concluant que les déclarations de confidentialité étaient fausses ou trompeuses sur un point important, en grande partie en raison de son application du point de vue erroné du consommateur dans la prise en compte de l'impression générale, et en concluant que la confidentialité était importante pour le consommateur ordinaire. La partie défenderesse était d'accord avec la conclusion du Tribunal que les déclarations de confidentialité n'étaient pas des déclarations relatives à la performance ou à l'efficacité du PearGab 6, car celles-ci ne communiquaient que les valeurs de Pear et étaient trop vagues pour être soumises à une épreuve. Enfin, la partie défenderesse a donné raison au Tribunal

en estimant qu'un préjudice grave n'est pas susceptible de se produire en l'absence d'une ordonnance temporaire.

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COMMISSIONER OF COMPETITION V PEAR INC

A. Executive Summary

1. The Commissioner of Competition (the "**Commissioner**") has filed an application pursuant to subsection 74.11(1) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "**Act**"), seeking a temporary order requiring Pear Inc. ("**Pear**") not to engage in conduct that the Commissioner alleges is reviewable under Part VII.1 of the Act.

2. Pear is a leading producer of electronic devices and software products. Its product portfolio includes laptops, tablets and smartphones, together with the operating systems that power these devices and a large number of widely used applications, which it makes available through its own application store.

3. On March 15, 2022, Pear unveiled its newest smartphone, the PearGab 6, and an updated version of its mobile operating system (Rootz Deep Earth), which is currently only available for the PearGab 6. Contemporaneously, Pear launched a large scale, multi-channel advertising campaign for its new offering (the " **PearGab 6 Campaign**"). Each advertisement featured Pear's mascot, an anthropomorphic pear named Pyrus, and highlighted a different feature of the PearGab 6. Among the features highlighted in Pear's advertising campaign was "Pyrus' Privacy Promise", which was promoted using a number of taglines and marketing vignettes (collectively, the "**Privacy Representations**").

4. On August 6, 2022, Pear disclosed that it had detected a security breach affecting Rootz Deep Earth (the "**Security Breach**"). Two days later, Pear announced that its internal investigation had determined that an unauthorized third party appeared to have obtained access to sensitive data of PearGab 6 users. While Pear indicated that it had not yet been able to identify which users had their data accessed, its preliminary analysis indicated that the data of more than a million users was likely implicated.

5. Since the Security Breach, Pear has continued to run the PearGab 6 Campaign, including the Privacy Representations. The Commissioner's application seeks a temporary order requiring Pear not

to engage in making the Privacy Representations or substantially similar conduct.

6. For the reasons set out below, the Tribunal finds that Pear appears to be engaged in reviewable conduct under Part VII.1 of the Act; however, the Tribunal is not satisfied that serious harm is likely to ensue unless the order is issued.

7. Having found that the Commissioner has failed to establish that serious harm is likely to ensue absent the order sought, the Tribunal does not consider it necessary to consider whether the balance of convenience favours issuing the order, and the Commissioner's application is dismissed.

B. The Parties

8. The Commissioner is the public official appointed by the Governor in Council under section 7 of the Act to be responsible for the administration and enforcement of the Act.

9. Pear is a leading technology company. Headquartered in Chile, it is globally active and produces some of the world's most popular devices and software. Its innovative products, user-friendly design and cohesive ecosystem have allowed it to grow into one of the world's most valuable companies.

10. Pear's portfolio of personal electronic devices operate exclusively on Pear's own Rootz operating systems, which support both Pear's own software applications and third party applications. Pear's suite of applications includes a web browser, a mobile wallet (Bag of Seeds), an email client and a health and wellness application (Pear a Day), among many others. Through its broad product offering, Pear collects and maintains a large volume of user data.

C. Factual Background

I. I. PearGab 6 Launch and the PearGab 6 Campaign

11. Pear is considered a leading innovator and generally seen as a first mover, introducing product features and capabilities that set new standards, which others quickly rush to emulate. Consistent with Pear's overall reputation, the PearGab is one of the world's most popular smartphones. While the PearGab's advanced features command a premium price, typically over $1,000 for the latest

model, it is consistently ranked among the top five selling smartphones across Canada.

12. On March 15, 2022, Pear's CEO, Nelly Stench, unveiled the PearGab 6, which runs on an updated version of Pear's mobile operating system, Rootz Deep Earth, and would be available in select countries, including Canada, as of April 1, 2022. To coincide with the March 15 product launch, Pear initiated an international multichannel marketing campaign, which began the same day with TV commercials, online advertisements, promotional influencer posts, billboards and print advertisements in newspapers and magazines, with each of the foregoing channels activated in Canada.

13. The PearGab 6 Campaign highlighted five different features of the PearGab 6: its ability to capture 3D pictures, its "superfast" browsing speeds, its availability in seven new colours, including burnt greige, its lightweight large screen design and Pyrus' Privacy Promise. Certain marketing materials referred to each of these features, while others highlighted just one.

14. The Pyrus' Privacy Promise was described in the PearGab 6 Campaign, as well as on Pear's website more broadly, as a "robust set of features and tools designed to protect your data." The Pyrus' Privacy Promise marketing materials included:

    a. a print ad with an image of Pyrus sound asleep with the tag line "we're up worrying about your privacy so you don't have to be";

    b. a short video ad in which Pyrus is shown using the PearGab 6 for a range of activities including taking pictures of a newborn baby pear, applying for a mortgage and updating medical information, with a voiceover that states: "We know you trust us with the things that matter most; that's why data security is at the core of the PearGab 6. Privacy; that's Pyrus' promise to you."; and

    c. a digital display ad that featured a picture of a PearGab 6 device, with different images cycling through on its screen to promote each of the five highlighted features; one such image showed Pyrus dressed as a security guard in front of a bank vault with the "Pyrus' Privacy Promise" appearing across the bottom.

15. The advertising agency retained by Pear for the PearGab 6 Campaign, Wally's Wacky Publicity (WWP), described the campaign's central theme as "balance" and indicated that it has been specifically designed to ensure that each of the five highlighted features is given equal prominence over the course of the PearGab 6 Campaign. Pear's public financial reports described the PearGab 6 Campaign as "Pear's largest ever", with an annual worldwide budget of more than $800 million.

16. When the PearGab 6 became available on April 1, 2022, Pear announced that it had already sold 500,000 units globally, including 20,000 in Canada. Since that time, sales have grown considerably and Pear estimates that at least 150,000 PearGab 6 units have been sold in Canada to date.

II. Security Breach

17. On August 6, 2022, Pear released a short statement indicating that it had detected unusual activity on PearGab 6 devises, urging users to immediately install an update for the Rootz Deep Earth operating system and promising to provide more details as its internal investigation advanced.

18. On August 8, 2022, Pear held a press conference where it announced that its internal investigation had confirmed that there had been a "malicious breach" of Rootz Deep Earth and that an unauthorized third party had obtained access to user data stored on PearGab 6 devices, including users' financial information stored in Bag of Seeds and personal health information from Pear a Day. Pear's investigation remains ongoing and it has yet to identify all impacted users, but it estimates that at least one million users were impacted globally, with at least some affected users in Canada.

19. On August 10 and 14, respectively, Pear's two leading smartphone competitors, Frugle and Mattspoke, announced that certain of their own smartphone devices had been the victim of cyberattacks, pursuant to which their own users' data had been compromised.

20. While none of Pear, Frugle nor Mattspoke are yet to release the resultsof their respective internal investigations, industry experts believe all three attacks to be the work of JesterRoast, an anarchist collective that is believed to be responsible for seven other high profile cyberattacks over the past two years.

III. The Commissioner's Investigation

21. On September 9, 2022, the Competition Bureau (the "**Bureau**") sent a letter by registered mail to Pear advising it that it received complaints with respect to Pear's ongoing promotion of the Privacy Representations (the "**Complaints**") following the Security Breach and of the Bureau's role in enforcing the deceptive marketing provisions of the Act. The Bureau invited Pear to make any submissions it considered relevant to the Bureau's consideration of the Complaints. The Bureau also specifically requested that Pear provide to the Bureau testing to substantiate the Privacy Representations. The Bureau noted that, under the Act, the onus is on the advertiser to ensure that any statement or guarantee of performance is based on adequate and proper testing.

22. On September 15, 2022, Pear responded to the Bureau's letter, writing that truth in advertising is a vital value for Pear and that, in response to the Bureau's letter, it carefully reviewed the Privacy Representations and that it remained satisfied with the validity of such representations. Pear noted that the Security Breach in fact "demonstrated the sincerity of Pyrus' Privacy Promise; which was evidenced by the seriousness and urgency with which Pear responded to the breach." Pear asserted, however, that the Privacy Representations communicate an "ethos" and "underlying design principle", which are not conducive to testing. While data privacy "is front and center throughout Pear's development process", Pear indicated that no specific testing was undertaken in connection with the Privacy Representations.

23. On September 30, 2022, the Commissioner commenced an inquiry under subparagraph 10(1)(b)(ii) of the Act on the basis that she has reason to believe that grounds exist for the making of an order under Part VII.1 of the Act, specifically pursuant to paragraphs 74.01(1)(a) and 74.01(1)(b) of the Act.

24. The Commissioner's inquiry is ongoing and it brings this application in an effort to halt the Privacy Representations while she proceeds as expeditiously as possible to complete her inquiry.

D. Position of the Parties

25. Under subsection 74.11(1) of the Act, a court (which, as defined in section 74.09 of the Act, includes the Tribunal), may order a person

not to engage in conduct reviewable under Part VII.1 of the Act where it appears to the court that:

a. the person is engaging in conduct that is reviewable under Part VII.1 of the Act;

b. serious harm is likely to ensue unless the order is issued; and

c. the balance of convenience favours issuing the order.

26. The parties' positions with respect to each element are set out in turn below.

I. Reviewable Conduct under Part VII.1 of the Act

27. As a threshold matter, the Commissioner submits that in requiring "only" that "it appears to the court" that a person is engaging in reviewable conduct under Part VII.1 of the Act, subsection 74.11(1) establishes a low standard, which the Commissioner can discharge by demonstrating that her allegations are neither frivolous nor vexatious.

28. The Commissioner contends that, in the present case, this standard is satisfied with respect to both paragraphs 74.01(1)(a) and 74.01(1)(b) of the Act.

29. With respect to paragraph 74.01(1)(a), the Commissioner asserts that the Privacy Representations (i) were made to the public for purposes of promoting the PearGab 6, (ii) created the general impression that the PearGab 6 would safeguard the privacy of user data, (iii) were material as consumers may be induced into purchasing the PearGab 6 on the basis of the Privacy Representations and (iv) were demonstrably false in light of the Security Breach.

30. With respect to paragraph 74.01(1)(b), the Commissioner submits that Pyrus' Privacy Promise is explicitly framed as a "guarantee" of performance and that, by Pear's own admission, no specific testing was undertaken to support this claim.

31. Pear asserts that the Commissioner's interpretation of the threshold applicable to subsection 74.11(1) is wrong and maintains that, in any event, it is not engaged in reviewable conduct under Part VII.1 of the Act.

32. Pear submits that it is not sufficient for the Commissioner to demonstrate that her allegation of reviewable conduct is neither frivolous nor vexatious. Rather, Pear contends that, as a matter of statutory interpretation, by requiring that "it appears to the court" that reviewable conduct is being engaged in, the Act "clearly requires the Commissioner to put forward sufficient evidence so as to allow the Tribunal to reach an affirmative finding that the alleged transgression has occurred." While Pear impresses the importance of this issue as a matter of law, it contends that even under the Commissioner's own interpretation, the first requirement of subsection 74.11(1) is not satisfied here.

33. In response to the Commissioner's allegations under paragraph 74.01(1)(a), Pear disputes both that the Privacy Representations are "material" within the meaning of the Act and that they are "false or misleading." With respect to materiality, Pear contends that privacy protection is "at most, an ancillary feature of its products." As Pear's counsel put it in oral argument: "Pear sells smartphones, not data vaults." In furtherance of this claim, Pear referred to a consumer study it commissioned as part of its most recent product development cycle. The study found that the three most important smartphone features for users are (i) a wide range of available applications, (ii) excellent connectivity and (iii) a powerful camera; "data security" was not identified as the most important smartphone feature by any study participants. Moreover, the study found that 82% of consumers either had "no knowledge" or only "limited knowledge" of their smartphone's privacy settings.

34. Pear further contends that even if the Privacy Representations were considered material, they are not false or misleading. Pear submits that when considering the general impression of a representation, the analysis must not be "divorced from reality through consideration of a generic consumer"; and, rather, the "ordinary consumer within the context of the product at issue" must be considered. Pear asserts that with respect to the PearGab 6, the ordinary consumer would be aware of the unavoidable risk of a malicious data attack, not least of all in light of the consistent press coverage such attacks have received in recent years.

35. Finally, with respect to the Commissioner's allegation that the Privacy Representations are reviewable under paragraph 74.01(b), Pear submits that the Privacy Representations represent mere puffery

and do no constitute a statement or guarantee. Pear further contends that, in any event, the Privacy Representations do not pertain to the performance, efficacy or length of life of any product and, rather, as set out in its letter to the Bureau, represent an overarching design philosophy. Accordingly, Pear asserts that the Privacy Representations fall outside the scope of paragraph 74.01(1)(b) of the Act.

II. Serious Harm is Likely to Ensue Unless the Order is Issued

36. The Commissioner asserts that if the Tribunal is satisfied that Pear appears to be engaging in conduct contrary to Part VII.1 of the Act (as required under the first branch of the subsection 74.11(1) test), then, on the basis of that finding, the Tribunal can infer that serious harm is likely to ensue if Pear is permitted to continue to make the Privacy Representations.

37. In furtherance of this position, the Commissioner emphasises that Part VII.1 is intended to protect competition and the proper functioning of the market. The seriousness of the harm to competition that occurs as a result of reviewable conduct is demonstrated by the material penalties the Act prescribes for such conduct. Accordingly, the Commissioner submits, where reviewable conduct under subsection 74.01(1) is occurring and is likely to continue to occur, as the Commissioner alleges to be the case here, serious harm is necessarily likely to ensue.

38. Pear rejects the Commissioner's approach and contends that the second branch of subsection 74.11(1) must necessarily require the Commissioner to demonstrate harm separate from the mere occurrence of reviewable conduct. In Pear's submission, the Commissioner's assertion would render the second branch of subsection 74.11(1) superfluous, which cannot have been Parliament's intent.

39. Pear submits that the second branch of subsection 74.11(1) must have meaning of its own and, in the present case, no such harm has been put forward by the Commissioner. Moreover, Pear asserts, there is no harm to be found. In particular, Pear contends that the PearGab 6 Campaign has saturated the media for several months, with recent WWP survey data showing that 90% of Pear's target demographic was at least "moderately familiar" with the PearGab 6 Campaign and able to recall each of the five promoted features. As such, Pear submits that to the extent the Privacy Representations are material within the meaning of the Act (which Pear disputes) "there

is no putting the message back in the bottle." Similarly, Pear submits that should the Tribunal find that the Privacy Representations appear to be reviewable under paragraph 74.01(1)(b) of the Act, in order for the second branch of subsection 74.11(1) to have any meaning, the "mere making of a statement without adequate and proper testing must be treated as a simple foot fault"; in particular as even true claims can constitute reviewable conduct under paragraph 74.01(1)(b). Pear urges that the Tribunal must find "real and specific harm" as being likely to ensue as a result of the continued making of the Privacy Representations, of which it contends there is none in the present case.

III. The Balance of Convenience Favours Issuing the Order

40. The Commissioner submits that where an injunction is sought to protect the public interest or to enforce public rights, such as the Commissioner claims to do here, courts must be, and have been, very reluctant to conclude that the public interest in having the law obeyed is outweighed by the hardship the injunction would impose upon the person subject to the injunction. The Commissioner asserts that there is no basis here for the Tribunal to depart from this precedential practice.

41. Pear asserts that there is no harm occasioned by a refusal to grant the order sought by the Commissioner as, for the reasons set out above, Pear is not engaged in reviewable conduct under Part VII.1 of the Act and serious harm is not likely to ensue if the order is not issued.

42. However, Pear has not put before the Tribunal the harm (if any) that it would suffer if the order sought by the Commissioner is made and has not challenged that the balance of convenience favours issuing the order in the event that the Tribunal finds in favour of the Commissioner with respect to the first two branches of subsection 74.11(1).

43. Accordingly, in the present case, the Tribunal will consider the first two branches of subsection 74.11(1) to be dispositive and the balance of convenience will not be further considered in these reasons.

E. The Issues

44. As set out above, the parties bring into issue the first two branches of subsection 74.11(1) and raise a number of novel and important

considerations with respect to each. As detailed below, the Tribunal considers the outcome of the matter to turn on four principal issues:

a. What standard does subsection 74.11(1) of the Act establish for the granting of a temporary order? Stated differently, what burden does the Commissioner bear?

b. Under paragraph 74.01(1)(a), what is the appropriate test for materiality and how is the general impression test to be applied?

c. Under paragraph 74.01(1)(b), what is the test for determining whether a representation constitutes a statement or guarantee of performance?

d. What constitutes serious harm for purposes of paragraph 74.11(1)(a)? Is the continuation of reviewable conduct itself sufficient harm?

F. The Tribunal's Analysis

45. The Tribunal has carefully considered the parties' submissions, the relevant jurisprudence and the evidence available to it. For the reasons below, the Tribunal has concluded that:

46. While the language of subsection 74.11(1) establishes a relatively low standard in requiring only that it "appear to the court" that a party is engaging in reviewable conduct, in order for the Commissioner to discharge her burden, she must demonstrate at least on a balance of probabilities that there is evidence of such conduct.

a. In order for a representation to be false or misleading in a material respect, the representation must influence the purchasing decision of a credulous and inexperienced generic consumer. Materiality does not require that a representation be shown to be the *sine qua non* of a purchasing decision; it is sufficient that it be pertinent and influential to the decision-making process. The Tribunal finds that the Privacy Representations created the general impression that the PearGab 6 offered privacy protection, including from cyberattacks. It appears to the Tribunal that the Privacy Representations are false or misleading in a material respect, such that they appear to constitute reviewable conduct under paragraph 74.01(1)(a) of the Act.

b. The Privacy Representations were presented as a "promise"; the

literal meaning of this is clear and its general impression must be understood as statement or guarantee within the meaning of paragraph 74.01(1)(b). However, not all statements or guarantees must be substantiated by testing under paragraph 74.01(1)(b) of the Act. It does not appear to the Tribunal that the Privacy Representations relate to the performance, efficacy or length of life of a product, and as such, it does not appear to the Tribunal that Pear is engaged in reviewable conduct under paragraph 74.01(1)(b) of the Act.

c. Paragraph 74.11(1)(a) of the Act must have independent meaning; it cannot be merely redundant of the analysis required under subsection 74.11(1) as to whether a person is engaging in reviewable conduct under Part VII.1 of the Act. The Tribunal finds that the Commissioner has failed to demonstrate that serious harm is likely to ensue unless the order she seeks is issued.

I. The Applicable Standard for subsection 74.11(1)

a. Subsection 74.11(1) allows this Tribunal to order a person not to engage in conduct when it "appears to the court" that that person is engaging in reviewable conduct under Part VII.1 of the Act. The current version of subsection 74.11(1) has not yet been judicially applied and, as such, this Tribunal has not had opportunity to establish the nature of the threshold it invokes.

47. Upon the initial adoption of subsection 74.11(1) in 1999, the prior form of this provision stated that:

> Where, on application by the Commissioner, a court finds a strong prima facie case that a person is engaging in reviewable conduct under this Part, the court may order the person not to engage in that conduct or substantially similar reviewable conduct if the court is satisfied that
>
> […]

48. The current form of subsection 74.11(1) came into force on July 1, 2014. The Commissioner submits that Parliament's amendments "speak clearly" and that the displacement of a "strong prima facie case" with "it appears to the court" was intended to establish a low standard and to facilitate the ability of the Tribunal to enjoin

potentially reviewable conduct. The Commissioner contends that it follows that, subsection 74.11(1), in its current form, requires only that the allegation that a person is engaging in reviewable conduct be neither frivolous nor vexatious. Stated differently, in the present case, the Commissioner proposes that it is sufficient for the Tribunal to be satisfied that it is neither frivolous nor vexatious to allege that the Privacy Representations are reviewable under either paragraph 74.01(1)(a) or 74.01(1)(b).

49. The Tribunal agrees with the Commissioner that the history of subsection 74.11(1) is appropriately considered in interpreting its meaning. However, while the legislative history informs the assessment of Parliament's intent, this represents only one facet of statutory interpretation. As the Supreme Court of Canada explained in *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

50. In considering the provision's text, context and purpose, the Tribunal finds that whether it "appears to the court" that certain conduct is occurring is a meaningful threshold. An order requiring a respondent not to engage in certain conduct can be highly consequential to that respondent's business. For this Tribunal to order a person to cease particular conduct, the Commissioner must investigate the matter and present sufficient evidence to show that the conduct is indeed <u>likely</u> occurring on a balance of probabilities.

51. It would be unjust to allow this Tribunal to make an order enjoining conduct without first requiring the Commissioner to satisfy this burden. It is unlikely that the drafters of subsection 74.11(1) intended for this Tribunal to have the power to enjoin conduct that, on a balance of probabilities, does not appear to be occurring; particularly given that it is well established that the conduct in issue is speech.

52. The Commissioner need not meet the standard of a "strong prima facie case", nor must she necessarily present "clear and non-speculative" evidence. She must simply convince the Tribunal that, on balance, the respondent appears likely to be engaging in the conduct

alleged. The respondent similarly has the opportunity to convince the Tribunal that it does not appear to be engaged in reviewable conduct.

53. Accordingly, in considering below whether Pear is engaged in reviewable conduct under Part VII.1 of the Act, the Tribunal will consider whether on a balance of probabilities there is evidence that such conduct is likely occurring.

II. Paragraph 74.01(1)(a)—False or Misleading in a Material Respect

54. The first provision of Part VII.1 pursuant to which the Commissioner alleges Pear's conduct is reviewable is paragraph 74.01(1)(a). In order for Pear to be engaged in reviewable conduct under that paragraph, the Privacy Representations must (i) have been for the purpose or promoting, directly or indirectly, a product or other business interest, (ii) have been made to the public, and (iii) be false or misleading in a material respect. For the reasons that follow, it appears to the Tribunal that Pear's Privacy Representations satisfy each of the foregoing elements and are, accordingly, reviewable under paragraph 74.01(1)(a).

55. In the present case, it is not at issue whether Pear made the Privacy Representations for the purposes of promoting a business interest or that they were made to the public. The Privacy Representations were part of a multichannel advertisement campaign, which included TV commercials, digital advertisements, billboards and print campaigns, which was clearly directed at promoting sales of the PearGab 6. Both parties agree that it is indisputable that these representations were made to the public for purposes of promoting a business interest. As such, whether the Privacy Representations are reviewable under paragraph 74.01(1)(a) turns on whether they are false or misleading in a material respect.

a. The General Impression

56. First, the Tribunal will consider the general impression conveyed to consumers, in addition to the literal meaning of the representation, based only on the representations actually made to the public.

57. Pear contends that when considering the general impression of a representation, the general impression analysis must be made through the lens of a consumer with a perspective relevant to the product at

issue. In the present case, its assertion is that such a consumer would have contextual knowledge regarding data security that would act as a qualification for the representations in question. Such a consumer would know that cyberattacks are unavoidable, effectively an act of god, regardless of any privacy protections in place. This would of course inform their general impression of the Privacy Representations.

58. The Tribunal disagrees with Pear's contention. In evaluating the appropriate consumer lens, the Supreme Court in *Richard v. Time*, 2012 SCC 8, ("***Richard***") is instructive. It tells us that the relevant consumer is deemed to be "credulous and inexperienced"—a purposely low standard. Further, the "credulous and inexperienced consumer" is a generic consumer, not a consumer who is otherwise informed, prepared to consider the advert within an unspoken context. The Privacy Representations were made to the public at large, looking to attract persons wanting smartphones but also those who were not looking for smartphones but may be persuaded by the advertisements to purchase one. The consumers should be prepared to trust merchants, in this case Pear, on the basis of the general impression conveyed to them by the representation. It is therefore appropriate when evaluating the general impression to consider the perspective of the ordinary hurried purchaser—one who takes "no more than ordinary care to observe in that which is staring them in the face upon their first contact with an advertisement" (*Richard* at para 67), and not only that of a consumer with prior knowledge relevant to the purchase of smartphones.

59. In any event, the general impression must be based on the representations actually made to the public. Per *Richard* at para 57, it relates to "both the layout of the advertisement and the meaning of the words used." The Privacy Representations created the impression, both with respect to the literal words and the overall context, that the PearGab 6 would protect user privacy; moreover, the Privacy Representations suggested that users need not worry about their privacy when using the PearGab 6 because of its data protection features. The Privacy Representation did not explicitly exclude cyberattacks from the scope of their assurances or otherwise reference the frequency or unavoidable risk of cyberattacks; consumers' consideration of such factors cannot be assumed.

60. It follows that the general impression conveyed to the public was that the PearGab 6 offered privacy protection, including from cyberattacks.

61. The Tribunal accepts that cyberattacks have become a not uncommon occurrence and that it may be expected that a consumer with even a passing familiarity of such attacks would appreciate the unavoidable risk they represent. Further, the Tribunal does not rule out the possibility that the preponderance of purchasers of the PearGab 6, particularly during the initial months after its release, may be expected to have such familiarity. However, the Tribunal considers none of this to be germane to the question at hand; which, rather, requires consideration of the general impression created for a generic, credulous and inexperienced consumer.

62. As the general impression has been determined, the Tribunal will now determine whether, on that basis, the Privacy Representations are false or misleading.

63. The Commissioner argues that, upon viewing the Privacy Representations, the ordinary consumer would understand the PearGab 6 offered users privacy protection, including from cyberattacks. The ordinary consumer would infer from the advertisements that if they bought a PearGab 6, they could safely use the device without fear of their privacy being breached by bad actors.

64. Upon examination of the Privacy Representations and consideration of the evidence provided, the Tribunal agrees with the Commissioner. The ordinary consumer would understand from the Privacy Representations that the PearGab 6 offered errorless security, which proved incorrect within six short months of launching the device. The Privacy Representations included no indication that the PearGab 6's privacy protections could be breached and that user's data was—to a degree—vulnerable.

65. The fact that a consumer could have disabused him or herself of the false impression (for example, by reading news reports of cyberattacks) does not provide a defence for the falsehood (*Go Travel Direct Inc. v Maritime Travel Inc.*, 2009 NSCA 42). It is the representations that the Act is focused on, not the actions of potential consumers. It is not incumbent on consumers to conduct additional research regarding the validity of a merchant's claim. It is the merchant's responsibility to provide all material facts that impact a consumer's understanding

of the merchant's representation. If anything, Pear's failure to reference something as material as the unavoidable susceptibility of the PearGab 6 to cyberattacks when promoting the device's privacy protections constitutes a negative representation or omission, which is itself misleading (*R v Shell Canada Ltd*, O.J. No. 290).

66. The Tribunal therefore finds that the Privacy Representations appear to be false and misleading.

a. Materiality

67. Having determined that the Privacy Representations, on the basis of their general impression, appear to be false and misleading, the Tribunal must now assess the materiality of these misrepresentations. Courts have affirmed that the word "material" refers "to the degree to which the purchaser is affected by the words used in coming to a conclusion as to whether or not he should make a purchase" (*Commissioner of Competition v. Sears Canada Inc.*, 2005 CACT 2 at para 335). The Tribunal must determine whether the Privacy Representations could lead a consumer to a course of conduct that, on the basis of the representations, they believe to be advantageous. Put more simply, materiality is established if it is likely to influence an ordinary consumer's purchasing decision.

68. The Commissioner argues that the Privacy Representations were material as they may have induced consumers into purchasing the PearGab 6, a $1,000 device. Given the intended uses of the PearGab 6, including its storage of user's sensitive health and financial data, the Commissioner contends that the Privacy Representations would be a critical factor in purchasers' buying decisions.

69. Pear disagrees with the Commissioner's assertion, contending instead that privacy protection is at most an ancillary feature of the PearGab 6 and would not induce consumers to purchase the device. To support its claim, Pear produced an internal study which showed that privacy was not one of the smartphone's three most important features for users and demonstrated consumers' general ignorance to smartphone privacy settings.

70. The data provided by Pear does not evidence that privacy is immaterial to consumers' buying decisions. For one, Pear's question to consumers in its self-conducted study is distinct from the question at hand. When asked what a smartphone's "most important features"

are, most respondents would naturally consider applications that one actively uses and provide users with convenience or enjoyment, rather than passive features that the users unconsciously depend on in the day-to-day, like privacy protections. Further, users' lack of understanding of privacy settings only demonstrates general ignorance to the technical application of privacy functions. It does not demonstrate an apathy toward privacy protection in general. The ordinary and credulous consumer is often technologically unskilled.

71. The Tribunal does, however, accept Pear's assertion that privacy may not be the only—or most significant—consideration for consumers when buying a smartphone. But that is not the test. The Tribunal must consider the degree to which the representations may influence the consumers' purchasing decisions. Privacy protection was clearly persuasive enough to consumers for Pear to run dedicated advertisements on privacy across multiple channels, all of which highlighted its privacy protection as a key benefit to consumers. It is difficult to accept that Pear would expend resources, producing advertisements for television, print, digital channels, and more, had it not believed privacy protection to be a material consideration for consumers.

72. Accordingly, the Tribunal agrees with the Commissioner, it appears that the Privacy Representations were false and misleading in a material respect, such that Pear appears to be engaging in conduct that is reviewable under Part VII.1 of the Act.

III. Paragraph 74.01(b)—Statement or Guarantee of Performance

73. Having concluded that the Privacy Representations appear to constitute reviewable conduct under paragraph 74.01(1)(a), the Tribunal is satisfied that, for purposes of subsection 74.11(1), Pear appears to be engaging in conduct that is reviewable under Part VII.1 of the Act. Accordingly, consideration of whether or not the Privacy Representations also appear to constitute reviewable conduct under paragraph 74.01(1)(b) is not necessary to the disposition of the Commissioner's application. However, the parties each made detailed submissions on the issue, and the Tribunal has considered them carefully.

a. Reviewable Conduct under paragraph 74.01(1)(b)

74. Paragraph 74.01(1)(b) of the Act provides that:

> 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,
>
> […]
>
> makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation;

75. As such, in order for the Privacy Representations to constitute reviewable conduct under that paragraph, the Privacy Representations (i) must have been made for the purpose of promoting a product or business interest, (ii) must have been made to the public, (iii) must constitute a statement, warranty or guarantee of the performance, efficacy or length of life of a product and (iv) must not be based on adequate and proper testing.

76. As discussed in connection with paragraph 74.01(1)(a) of the Act, it has not been contested by Pear that the Privacy Representations were made for the purpose of promoting the PearGab 6 and that they were made to the public. Consistent with the discussion above, the Tribunal is satisfied that the first two elements of paragraph 74.01(1)(b) are satisfied here.

77. By Pear's own admission no testing was carried out in connection with the Privacy Representations prior to the PearGab 6 Campaign. No evidence was led by either party with respect to whether any such testing was conducted subsequent to Pear's September 15 letter. However, an adequate and proper test for purposes of paragraph 74.01(1)(b) must be undertaken prior to the related representation being made to the public (*Canada (Commissioner of Competition) v. Imperial Brush Co.*, 2008 Comp. Trib. 2 at para 125; *Canada (Competition Bureau) v. Chatr Wireless Inc.*, 2013 ONSC 5315 at para 293 ("***Chatr***")). While paragraph 74.01(1)(b) has been found to establish a flexible standard for assessing whether a claim has been adequately and properly tested, "there must be a test" (*Chatr* at para 344). As no testing was carried out, the Tribunal finds that the Privacy Representations satisfy the final element of paragraph 74.01(1)(b).

78. Accordingly, the question of whether or not the Privacy Representations constitute reviewable conduct under paragraph 74.01(1)(b) of the Act turns on whether or not the Privacy Representations constitute "a statement, warranty or guarantee of the performance, efficacy or length of life of a product" (a "**Performance Claim**"). While, as discussed above, it appears to the Tribunal that the Privacy Representations are false and misleading in a material respect, to the extent the Privacy Representations are a Performance Claim, they constitute reviewable conduct under Part VII.1 of the Act entirely independent of the Tribunal's earlier finding. A Performance Claim must be based on adequate and proper testing; the truth of the statement provides no defence under paragraph 74.01(1)(b).

a. Are the Privacy Representations a Performance Claim?

79. The Commissioner contends that the application of paragraph 74.01(1)(b) to the Privacy Representations is unambiguous: Pear has a made "promise"; a mere synonym for a "guarantee." However, the Commissioner's assertion addresses only one half of the Performance Claim requirement under paragraph 74.01(1)(b). The Act does not require proper and adequate testing for all claims, rather, only those that pertain to "performance, efficacy or length of life of a product."

80. As Marrocco J. observed in *Chatr*, in contrasting the application of the Act with the approach of the Federal Trade Commission ("**FTC**") in the United States:

> Section 74.01(1)(b) applies only to performance claims. In the United States, the FTC substantiation policy applies to "objective claims." The only claims exempted from the FTC substantiation requirement are subjective or immaterial claims.

81. Accordingly, two questions must be considered in order to determine whether the Privacy Representations constitute a Performance Claim. First, do the Privacy Representations constitute a "statement, warranty or guarantee"? Second, if so, do they pertain to "performance, efficacy or length of life of a product"?

82. With respect to the first question, the Tribunal agrees with the Commissioner that it is indisputable that the literal meaning of a "promise" is a "statement, warranty or guarantee". However, consistent with subsection 74.03(5), the Tribunal must also consider the general impression of the Privacy Representations.

83. The Tribunal agrees with Pear that, in assessing the general impression, the context of the Privacy Representations must be taken into account. However, with respect, the Tribunal cannot accept Pear's contention that the association of the "promise" with a fictional character, and one that is a fanciful anthropomorphic pear at that, establishes the Privacy Representation as "mere puff", rather than a serious "statement, warranty or guarantee." Pear, in its letter to the Bureau, explicitly affirmed the sincerity of Pyrus' Privacy Promise. Pear cannot at once assert both that the Privacy Representations are a genuine reflection of Pear's "ethos" and that they should not be understood as such by consumers. Advertisers cannot insulate themselves from Part VII.1 of the Act simply by having their mascots speak for them. The Tribunal is satisfied that the Privacy Representations appear to constitute a "guarantee".

84. However, even if a discount ought to be applied to a promise from a pear, the Tribunal considers the first branch of the Performance Claim test to establish a low threshold. While "warranty" and "guarantee" communicate a fairly strong form of assurance, paragraph 74.01(b) also applies to "statements". Even accepting Pear's position that the association with Pyrus renders the promise puff, the Tribunal would nonetheless consider that the Privacy Representations appear to constitute a "statement".

85. Having found that the Privacy Representations satisfy the first branch of the Performance Claim test, it is necessary to consider whether the substance of the Privacy Representations is of the kind covered by paragraph 74.01(1)(b).

86. Paragraph 74.01(1)(b) identifies three subject matters: (i) performance, (ii) efficacy and (iii) length of life. The Commissioner has not suggested that the Privacy Representations relate to length of life and the Tribunal considers it plainly to be the case that they do not. The Commissioner does assert that the Privacy Representations relate to both the "performance" and the "efficacy" of the PearGab 6, the meanings of which she contends are broad. In oral argument, the Commissioner acknowledged that there is a class of "objective statements" that would fall outside the ambit of paragraph 74.01(1)(b), but she submits that this class is narrow.

87. While the Commissioner suggested that it is not necessary for this case to define the outer limit of "performance" and "efficacy"

claims, she asserted that such terms must capture "anything that a product does, achieves or provides through some action"; with the class of "objective statements" that fall outside the ambit of paragraph 74.01(1)(b) being fairly limited and including "static, physical attributes." The Commissioner asserts that privacy is the result of the "continuous performance" of a large number of processes and functions and a promise of privacy (such as, the Commissioner contends, the Privacy Representations) is accordingly a performance guarantee within the meaning of paragraph 74.01(1)(b).

88. With respect, the Tribunal considers the Commissioner's proposed standard to be vague and uncertain. It is also inconsistent with the language of the Act: such a broad interpretation of performance and efficacy would render "length of life" redundant. Rather, the Tribunal accepts Pear's position that in order for a statement to pertain to "performance" or "efficacy" it must relate to a specific and measurable achievement.

89. Pear's assertion that its products were "designed" to protect a user's data privacy is an objective statement. Pear either did or did not specifically consider data privacy in its design process and, if it did, it should be able to produce evidence to this effect. However, because the Privacy Representations do not relate to a specific or measurable achievement, the Act does not require it do so.

90. It does not appear to the Tribunal that the Privacy Representations pertain to "performance, efficacy or length of life of a product" and accordingly it does not appear to the Tribunal that Pear is engaged in conduct reviewable under paragraph 74.01(1)(b) of the Act.

IV. Paragraph 74.11(1)(a)—Serious Harm is Likely to Ensue

91. The second element of the test under subsection 74.11(1) requires that the Commissioner satisfy the Court that serious harm is likely to ensue from the reviewable conduct unless the order sought is issued by the Tribunal.

92. For the reasons that follow, the Tribunal is not satisfied that the Commissioner met her burden under paragraph 74.11(1)(a).

a. The Threshold under paragraph 74.11(1)(a) of the Act

93. The Commissioner argues that section 74.11 sets out a lower standard than the one applicable for interlocutory injunctions at common law

for the Tribunal to conclude that harm will occur absent the order sought.

94. The Tribunal agrees with the Commissioner that the demonstration of a "serious" harm is different than the one applicable at common law where "irreparable" harm must be demonstrated. As explained by the Supreme Court in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110, "irreparable" refers to harm that is not susceptible or difficult to be compensated in damage. It refers to the nature of the harm rather than its "magnitude" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311). Under section 74.11 of the Act, the Commissioner need not demonstrate that the harm could not be compensated monetarily, but rather that the harm at issue is serious.

95. In addition, the Commissioner need only demonstrate that serious harm is likely to ensue absent the order sought, rather than that harm has occurred or will necessarily occur, as is the case to obtain interlocutory relief at common law. In this regard, the language at paragraph 74.11(1)(a) expressly differs from the test applicable for common law interlocutory relief, and in light of statutory interpretation rules, the Tribunal is satisfied that it was Parliament's intent to provide for a lower threshold to obtain interim relief under section 74.11 of the Act.

96. The Tribunal disagrees, however, with the Commissioner's submission that in the event the Tribunal finds that Pear appears to be engaged in reviewable conduct under paragraphs 74.01(1)(a) and/or 74.01(1)(b) of the Act, an inference can then be made that serious harm is likely to ensue from the conduct. The mere occurrence of reviewable conduct is not sufficient to satisfy the second branch of the test. On the contrary, the Commissioner must demonstrate (i) the seriousness of the harm that is likely to ensue from the conduct and (ii) that the harm alleged ensues from the reviewable conduct, here the Privacy Representations made as part of the PearGab 6 Campaign. Such demonstration can only be made by putting forward specific evidence of likely harm.

a. Application to the case at hand

97. The Tribunal finds that in the present case, the Commissioner has not directed the Tribunal to any real and specific serious harm to consumers or competition.

98. The Commissioner contends that she is presumed to bring this application in the public interest and that section 74.01 of the Act is intended to protect competition and the proper functioning of the market. In the Commissioner's view, the seriousness of the harm to competition and consumers that occurs as a result of deceptive marketing practices is demonstrated by the fact that the legislator made such conduct reviewable and that material penalties are prescribed by the Act for such conduct.

99. The Tribunal agrees with the Commissioner that the scheme of Part VII.1 of the Act is consistent with the conclusion that Parliament considered the conduct made reviewable thereunder sufficiently deleterious as to warrant material sanction. However, this is not sufficient to satisfy the second branch of the test under subsection 74.11(1) of the Act. The seriousness of the harm to competition or consumers must be made out with specificity on the evidence. Concluding otherwise would render the second branch of the test for interim relief superfluous, which would be to suggest that Parliament has spoken in vain.

100. The Commissioner asserted in oral argument that the continued dissemination of the Privacy Representations harms both consumers, who may purchase a PearGab 6 and unwittingly be exposed to cyberattacks through unjustified reliance on Pear's privacy protections, and the market, as the Privacy Representations will, in the Commissioner's view, distort competition and create a disincentive for genuine advancements in data protection. The Tribunal does not dispute that such harms could arise and support a finding in the Commissioner's favour under paragraph 74.11(1)(a). However, the Commissioner bears the burden of demonstrating, on the evidence, that such harms are likely and would be serious. The Commissioner has not discharged this burden.

101. While, pursuant to paragraph 74.03(4)(a), for purposes of paragraph 74.01(1)(a) it is not necessary to establish that any person was deceived or misled, the same cannot be said for establishing that serious harm is likely to ensue under subsection 74.11(1).

102. Considering the evidence presented by Pear with respect to the widespread and effective dissemination of the PearGab 6 Campaign, including the Privacy Representations, since its launch, there is nothing to indicate that the continuance of the PearGab 6 Campaign

will have any effect on the target consumers, as they have already been exposed to the Privacy Representations for months now. Further, data security has not been found to be an important smartphone feature for 82% of surveyed consumers; as such, it is unclear to what extent more PearGab 6 devices will be sold from the continuation of the Privacy Representations as compared to their cessation.

103. Against this factual backdrop, the Commissioner has adduced no evidence with respect to the magnitude of consumers, if any, that are likely to be misled or with respect to the extent, if any, to which the potential harms raised in oral argument are likely to ensue.

104. Since the burden falls on the Commissioner to demonstrate that a real and specific serious harm is likely to ensue from the reviewable conduct unless the order she seeks is issued, and she has not done so, the Tribunal finds that the Commissioner has not met her burden of proof under subsection 74.11(1) of the Act.

G. Order

105. For these reasons, the application brought by the Commissioner is dismissed.

DATED at Ottawa, this 18th day of October 2022.

SIGNED on behalf of the Tribunal by the Panel Members.

Team No. 10567

2023 ADAM F. FANAKI COMPETITION LAW MOOT/
CONCOURS DE PLAIDOIRIE ADAM F. FANAKI 2023

BEST FACTUM—APPELLANT—WESTERN UNIVERSITY FACULTY OF LAW

Mark Penner and Giovanni Perri

COMPETITION APPEAL TRIBUNAL

BETWEEN

CANADA (COMMISSIONER OF COMPETITION)

Appellant

AND

PEAR, INC

Respondent

FACTUM OF THE APPELLANT

Part I—Statement of Facts

1. This is an appeal from a decision of the Competition Tribunal ("the Tribunal") on the application of the Commissioner of Competition ("the Appellant") pursuant to subsection 74.11(1) of the *Competition Act*, RSC 1985, c C-43 ("the *Act*"). The Appellant seeks a temporary order requiring Pear, Inc ("the Respondent") not to engage in deceptive conduct that the Appellant alleged was reviewable under Part VII.1 of the *Act* ("the Order").

   Competition Act, RSC 1985, c C-43.

2. The Tribunal dismissed the Appellant's application on the basis that the Appellant failed to show that any real and specific serious harm was likely to ensue under paragraph 74.11(1)(a) from the Respondent's reviewable conduct (at para 104).

3. The Respondent is an industry-leading technology company whose portfolio includes both electronic devices and software products; its cutting-edge PearGab line of smartphones consistently ranks among the best-selling smartphones in Canada. The Respondent's products and software operate exclusively on its Rootz Deep Earth operating system. The Respondent collects and maintains a large volume of user data including financial data, through the Bag of Seeds application, and medical data, through the Pear a Day application (at para 10).

4. On March 15, 2022, the Respondent announced its latest smartphone, the PearGab 6, and an updated version of Rootz Deep Earth optimized specifically for the new smartphone. The launch was widely publicized through a multichannel marketing campaign (the "PearGab 6 Campaign") to generate interest ahead of its launch in Canada. The PearGab 6 has been a commercial success, both globally and within Canada.

5. The PearGab 6 Campaign made representations about five features of the device: 1) its ability to capture 3D pictures; 2) its "superfast" browsing speeds; 3) its available colours; 4) its lightweight large screen; and 5) the Pyrus Privacy Promise (the "Privacy Representations"). The latter is the subject of the present appeal.

6. Consistent with the PearGab 6 Campaign theme of "balance", each of the five features was marketed equally and prominently (at para 15). Some of the PearGab 6 Campaign's materials referred to multiple features while others highlighted only one.

7. All parties agree that the information communicated through the Privacy Representations can be accurately summarized as a "robust set of features and tools designed to protect your data" (at para 14). This promise has been communicated to consumers in three ways: 1) a print ad with an image of Pyrus, an anthropomorphic pear; 2) a short video featuring Pyrus; and 3) a digital ad that featured a PearGab 6 displaying pictures that represented each of the aforementioned five features, including one picture of Pyrus dressed as a security guard in front of a bank vault.

8. The Privacy Representations communicated to consumers that data security was at the core of the Respondent's corporate ethos and that the PearGab 6 was engineered to secure sensitive personal information, from financial data to medical records to family photos.

9. On August 6, 2022, the Respondent released a statement that it had detected unusual activity on PearGab 6 devices. On August 8, 2022, the Respondent confirmed that the activity was a malicious data breach affecting at least one million users globally, including some in Canada. Sensitive financial and health information stored on PearGab 6 smartphones through the Bag of Seeds and Pear a Day applications was accessed by an unauthorized third party.

10. In light of these events, the Competition Bureau ("the Bureau") opened an inquiry into the Respondent's ongoing promotion of the PearGab 6's data security credentials. On September 30, 2022, the Appellant commenced an action with the Tribunal that the Respondent had engaged in deceptive conduct with respect to the Privacy Representations.

Part II—Statement of Points In Issue

11. The Appellant will argue the following issues on appeal:

    a. Whether the Tribunal erred in interpreting the standard to be applied in subsection 74.11(1) of the *Act* for the granting of a temporary order.

    b. Whether the Tribunal erred in finding that the Respondent engaged in paragraph 74.01(1)(a) reviewable conduct.

    c. Whether the Tribunal erred in finding that the Respondent engaged in paragraph 74.01(1)(b) reviewable conduct.

    d. Whether the Tribunal erred in finding that the Appellant failed to demonstrate that serious harm was likely to ensue from any relevant reviewable conduct in which the Respondent may have engaged if the order sought was not granted.

Part III—Statement of Submissions

I. The Applicable Standard for Subsection 74.11(1)

12. Parliament's 2014 amendment to the *Act* reformed the applicable standard for subsection 74.11(1). The Appellant submits that Parliament's decision to replace the phrase "a strong *prima facie* case" in subsection 74.11(1) with "it appears to the court" was a clear and substantive change. Parliament intended to allow the Commissioner to assess potentially reviewable conduct by: 1) removing a need to

present evidence that reviewable conduct is or is likely occurring; and 2) to lower the standard by which allegations are assessed. This is supported by the *Act*'s legislative history, in conjunction with its text, context and purpose.

Competition Act, *supra* para 1, s 74.11(1).

13. In *Re Rizzo & Rizzo Shoes Ltd*, the Supreme Court of Canada ("SCC") introduced the proper approach to statutory interpretation, which requires a "textual, contextual and purposive analysis of the statute or [the] provision in question" (*Re Rizzo*).

Re Rizzo & Rizzo Shoes Ltd, [1998] 1 SCR 27 at 40, 48 [*Re Rizzo*].

a. Textual, Contextual, and Purposive Analysis of Subsection 74.11(1)

14. The ordinary meaning of the word 'appears' supports the Appellants' claim. The Canadian Oxford Dictionary defines 'appear' as "be evident" or "seem" (*Oxford*). Accordingly, when something seems to be occurring, other evidence supporting the statement is not required. A witness to a person displaying physical cues associated with sadness does not require additional evidence that the alleged emotional state is being experienced to infer that that person appears sad. Thus, the ordinary meaning of the word 'appears' supports the argument that reviewable conduct under subsection 74.11(1) does not require evidence, as reviewable conduct can appear on its face to be reviewable, without meeting the legal indicia required under paragraphs 74.01(1)(a) or (b).

Katherine Barber, ed, *The Canadian Oxford Dictionary*, (Don Mills, ON: Oxford University Press Canada, 1998) sub verbo "appear" [*Oxford*].

15. Contextual arguments further support the Appellant's position. Subsection 74.11(1) is contained within a distinct provision of the *Act*. Parliament's decision to separate orders under paragraph 74.1(1)(a) from temporary orders under subsection 74.11(1) supports the notion that Parliament intended the provisions to differ in their respective uses. If the Commissioner is required to present sufficient evidence that conduct is likely occurring on a balance of probabilities, a court or tribunal would be making a determination on whether a person is engaging in reviewable conduct, as is required under paragraph 74.1(1)(a). To accept this interpretation leads to an increase

in the standard, ultimately amalgamating paragraph 74.1(1)(a) with subsection 74.11(1), rendering subsection 74.11(1) redundant, illogical, and impracticable (*Pointe-Claire*). As previously held by the SCC in *R v Paul*, interpretations which lead to absurd outcomes, such as the one mentioned above, cannot be said to be the true intent of Parliament (*Paul*).

Pointe-Claire v Québec (Labour Court), [1997] 1 SCR 1015 at 1064 [*Pointe-Claire*].

R v Paul, [1982] 1 SCR 621 at 662 [*Paul*].

16. The context of subsection 74.11(1) is similar to a prohibitive interlocutory injunction because: 1) it is a temporary remedy; 2) which allows for the prohibition of a specific act; and 3) requires similar indicia of harm and convenience. Accordingly, the Appellant submits that Parliament intended subsection 74.11(1) to quasi-codify the three-part test in *RJR-MacDonald Inc v Canada (Attorney General)*, where the SCC held that a "prolonged examination of the merits is generally neither necessary nor desirable" (*RJR*). Therefore, the removal of 'a strong *prima facie* case' from the provision better reflects that the threshold question should be a preliminary assessment, considering only whether the allegations are frivolous or vexatious (*RJR*).

RJR-MacDonald Inc v Canada (Attorney General), [1994] 1 SCR 311 at 338, 335 [*RJR*].

17. Section 1.1 of the *Act* states that one of the *Act*'s intended purposes is to provide Canadians with competitive prices and product choices. False or misleading statements are a serious issue that can lead consumers to make purchasing decisions on false pretences. Consumers are thus unable to accurately compare information between competing products. Moreover, this conduct could distort the market price of goods by allowing firms who make false and misleading statements to charge a premium for their product, on the basis of their superior product claims. Once a false or misleading statement is made, the above harms are hard to unwind, especially considering the wide reach of modern marketing campaigns. Furthermore, the Bureau received more deceptive marketing complaints than complaints related to any other area within its jurisdiction annually over the past five years (Statistics Report).

Competition Act, *supra* para 1, s 1.1.

Competition Bureau Canada, "Competition Bureau Performance Measurement & Statistics Report 2021-2022" (last modified 22 January 2022), online: *Government of Canada* <ised- isde.canada.ca/site/competition-bureau-canada/en/competition-bureau-performance-measurement- statistics-report-2021-2022> [Statistics Report].

18. Subsection 74.11(1) should be interpreted as a proactive measure aimed at mitigating the potential damages of prevalent conduct. This interpretation is consistent with the purpose of Part VII.1 of the *Act*. Conversely, the Tribunal's interpretation would negate the responsiveness of subsection 74.11(1) by placing too high a burden for the Commissioner to discharge in a timely manner. Further, policy concerns regarding undue adverse business effects are safeguarded under the Appellant's interpretation. The Commissioner is still required to fulfill the tests laid out in paragraphs 74.11(1)(a) and (b), and any respondent still possesses the ability to counter allegations of reviewable conduct brought forth by the Commissioner.

II. Reviewable Conduct Under Part VII.1 of the Act

19. The Tribunal may grant an order under the first requirement in subsection 74.11(1) where a person is engaging in conduct reviewable under Part VII.1 of the *Act*.

Competition Act, *supra* para 1, s 74.11(1).

20. The Appellant maintains that the standard in subsection 74.11(1) described above as well as the standard set out by the Tribunal are both satisfied concerning the allegations against the Respondent under paragraphs 74.01(1)(a) and (b) of the *Act*.

a. Paragraph 74.01(1)(a)—False or Misleading in a Material Respect

21. The Appellant submits that the Tribunal did not err in finding that the Respondent engaged in reviewable conduct under paragraph 74.01(1)(a) of the *Act*.

22. For the Respondent's conduct to be reviewable under paragraph 74.01(1)(a), the Privacy Representations must: 1) have been for

the purpose or promoting, directly or indirectly, a product or other business interest; 2) have been made to the public; 3) be false or misleading; and 4) in a material respect. The Tribunal correctly concluded that the Privacy Representations were false and misleading in a material respect, such that the Respondent is engaging in conduct reviewable under Part VII.1 of the *Act* (at para 72).

Competition Act, *supra* para 1, s 74.01(1)(a).

i. Representations Made to the Public to Promote a Business Interest

23. Whether the Privacy Representations were made to the public for the purpose of promoting a business interest is not at issue in the present case (*Premier Career*).

Canada (Commissioner of Competition) v Premier Career Management Group Corp, 2009 FCA 295 at para 52 [*Premier Career*].

ii. The General Impression

24. Subsection 74.011(4) requires that to determine whether representations constitute reviewable conduct, the general impression conveyed by the representation as well as its literal meaning shall be taken into account. The Appellant submits that the Tribunal correctly held that the appropriate standard for considering the general impression is through the lens of the "relevant consumer," and relates to both the layout and words used in an ad (*Richard*).

Competition Act, *supra* para 1, s 74.011(4).

Richard v Time, 2012 SCC 8 at para 49 [*Richard*].

25. The relevant consumer is generic, "credulous and inexperienced," and otherwise uninformed (*Richard*). This is a purposely low standard, whereby the relevant perspective is that of the ordinary, hurried purchaser who takes no more than ordinary care when observing an advertisement (*Richard*). The Ontario Superior Court of Justice ("ONSC") adopted and contextualized the *Richard* standard in *Canada (Competition Bureau) v Chatr Wireless Inc*, adding that, in cases where the representations involved technologically complex products, the relevant consumer is credulous and "technically" inexperienced (*Chatr*).

Richard, *supra* para 24 at paras 72, 67, 57.

Canada (Competition Bureau) v Chatr Wireless Inc, 2013 ONSC 5315 at para 132 [*Chatr*].

26. The ONSC in *Chatr* considered the general impression of three advertising campaigns which made references respectively to "fewer dropped calls," "no worries about dropped calls" and a "no worries network" (*Chatr*). The taglines were accompanied by images of Chatr customers using their cellular devices unconcerned about communicating wirelessly (*Chatr*). Based on the taglines and associated imagery, the ONSC was satisfied that the ads gave the general impression to consumers that the Chatr network was more reliable than other wireless carriers and protected consumers against dropped calls (*Chatr*).

Chatr, *supra* para 25 at paras 142, 164, 207, 208.

27. The Privacy Representations are analogous to the impugned ads in *Chatr*. Thus, the *Chatr* ordinary person standard is the correct standard for the application of general impression. The video ad mentioned sensitive user data and stated that "security is at the core of the PearGab 6" (at para 14). Likewise, the digital display ad featured security-related imagery in the form of Pyrus dressed as a security guard. Thus, a credulous and technically inexperienced consumer would have the general impression that one of the PearGab 6's features is data security. When consumers saw Pyrus storing medical and financial data in a PearGab 6, they would have had the impression that their own PearGab 6s would be able to secure that same information. Similarly, in *Chatr*, the relevant consumer would have the general impression that their calls would not drop using the Chatr network when observing people talking in covered spaces or on a subway (*Chatr*).

Chatr, *supra* para 25 at paras 136–138.

28. Furthermore, the Privacy Representations did not exclude cyber-attacks from the scope of the PearGab 6's protection. According to the Respondent's own research, 82% of consumers either had no knowledge or only limited knowledge of their smartphone's privacy settings (at para 33). This is not to be interpreted as apathy towards data security, but simply ignorance regarding the technical

application of privacy functions (para 70). Absent an explicit reference to cyberattacks in the Privacy Representations, a credulous and technically inexperienced consumer would have the impression that the promise to secure sensitive personal information stored on the PearGab 6 through proprietary applications would include security from cyberattacks.

29. Accordingly, the Appellant submits that the Tribunal correctly found that the Privacy Representations, with respect to their literal words and overall meaning, created the general impression that the PearGab 6 could keep sensitive personal information secure from external threats, including cyberattacks (at paras 59, 60).

iii. False or Misleading

30. The Appellant submits that the Tribunal correctly concluded that the Privacy Representations were false and misleading.

31. The Tribunal found that the ordinary consumer would infer from the Privacy Representations that the PearGab 6 offered errorless security, such that consumers' privacy would be protected (at para 64). The Tribunal also found that the Privacy Representation did not indicate that there was a potential for the PearGab 6's privacy protection to be breached nor that user data was vulnerable (at para 64).

32. *Vidéotron, senc c Bell Canada* similarly found advertisements promoting Bell's new fibre optic system to be false as Bell advertised that its services were available throughout Québec (*Vidéotron*). In reality, however, the services were only available to a small portion of the overall target market (*Vidéotron*). The Superior Court of Québec concluded that the representations created the general impression that services were widely available and were thus false and misleading (*Vidéotron*). Similarly, the general impression in the present case, that user data was protected from cyberattacks, was proven to be false after the August 6, 2022 data breach.

Vidéotron, senc c Bell Canada, 2015 QCCS 1663 [*Vidéotron*].

33. The ability for a consumer to disabuse themselves of the false impressions in the Privacy Representations is not a defence for their falsehood (*Maritime Travel* NBCA). Having established that the PearGab 6 would secure sensitive personal information, the Respondent cannot argue that it was incumbent on users to conduct additional research.

Users are not expected to understand that errorless security excludes protection from cyberattacks nor are they required to take precautions accordingly. It is the Respondent's responsibility to provide all material facts that may impact a consumer's impression of the Privacy Representations (at para 65). Thus, the Respondent's failure to explain that the PearGab 6 does not provide errorless security against cyberattacks is not a defence but is rather an omission, which is itself misleading (at para 65).

Go Travel Direct Inc v Maritime Travel Inc, 2009 NSCA 42 at para 28 [*Maritime Travel* NSCA].

34. Therefore, the Appellant submits that the Tribunal was correct in finding that the Privacy Representations, on the basis of their general impression, appear to be false and misleading.

iv. Materiality

35. The Appellant maintains that the Tribunal did not err when it found that the Privacy Representations were false and misleading in a material respect, such that the Respondent is engaging in conduct reviewable under Part VII.1 of the *Act*.

36. The Tribunal in *Commissioner of Competition v Sears Canada Inc* defined materiality as "the degree to which the purchaser is affected by the words used in coming to a conclusion as to whether or not he should make a purchase" (*Sears*). Thus, the question at this stage is whether an "ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered" (*Sears*).

Commissioner of Competition v Sears Canada Inc, 2005 CACT 2 at paras 335, 333 [*Sears*].

37. In *Chatr*, the ONSC held that a credulous and technically inexperienced consumer of wireless services would be induced by promises of more reliable and cost-effective wireless services (*Chatr*). Likewise, consumers of devices that store sensitive information (including, but not limited to, medical and financial data) would be induced by promises of increased data security.

Chatr, *supra* para 25 at para 262.

38. At para 71, the Tribunal concluded that although data security may not be the most important consideration for a consumer when purchasing a smartphone, the consumer's purchasing decision is nevertheless influenced. The Respondent stated that consumers are generally ignorant of their smartphones' privacy settings (at para 69). Through this statement, the Respondent affirmed that consumers are vulnerable to misrepresentations about data protection. As the Tribunal noted, this does not mean that consumers are not affected by data privacy representations, only that they cannot adequately determine whether those representations are false or misleading.

39. Although the Respondent's internal study found that data security is not the most important feature to consumers, the Privacy Representations were nevertheless included and highlighted as a key benefit to consumers throughout the PearGab 6 Campaign. Each feature of the PearGab 6 was given equal prominence during the PearGab 6 Campaign (at para 15). Therefore, had the Respondent not believed data security to be a material consideration to consumers, it would not have made it one of the five 'balanced' pillars of the PearGab 6 Campaign.

40. Accordingly, the Appellant submits that the Tribunal was correct in finding that the representations were false and misleading in a material respect, such that the Respondent is engaging in reviewable conduct under Part VII.1 of the *Act*.

b. Paragraph 74.01(1)(b)—Statement or Guarantee of Performance

41. For the Respondent's conduct to be reviewable under paragraph 74.01(1)(b), the Privacy Representations must: 1) have been made to the public in the form of a statement, warranty or guarantee; and 2) be related to the performance, efficacy or length of life of a product. The Appellant submits that the Tribunal was correct in finding that the Privacy Representations were promises made to the public. However, the Tribunal erred in finding that those promises were not related to performance, such that proper and adequate testing was not required.

i. Representations Made to the Public

42. The Privacy Representations were promises made to the public for the purpose of promoting the PearGab 6 (at para 82).

43. The Privacy Representations are not mere puffery. Therefore, they fall within the scope of a "statement, warranty or guarantee." *Telus Communications Co v Bell Mobility, Inc* considered puffery to be statements that do not impress upon a consumer that a particular fact is true. The British Columbia Supreme Court held that consumers would not conclude that Bell was not operating on the same network as Telus from the impugned advertisement's claim that Bell had the "most powerful network" (*Bell Mobility*). Similarly, in *Maritime Travel Inc v Go Travel*, Justice Hood linked puffery to materiality, holding that statements which affect a consumer's buying decision are not puffery (*Maritime Travel* NSSC). *R v Stucky* also identified vagueness and exaggerated praise as factors relating to non-materiality and held that vague statements do not persuade consumers to purchase (*Stucky*).

Telus Communications Co v Bell Mobility, Inc, 2007 BCSC 518 at para 19 [*Bell Mobility*]. *Maritime Travel Inc v Go Travel*, 2008 NSSC 163 at para 39 [*Maritime Travel* NSSC].

R v Stucky, 2006 CanLII 41523 (Ont SC) at para 76, rev'd on other grounds 2009 ONCA 151 [*Stucky*].

44. In this case, the Privacy Representations are material and not vague. While none of the relevant ads contained any technical information about how the PearGab 6 actually protected privacy, the Respondent still told consumers that their sensitive personal information would be secure. The Privacy Representations in the video ad even provided examples of the types of sensitive personal information that the PearGab 6 was capable of protecting.

45. The Respondent also created two specific applications through which PearGab 6 users could secure sensitive personal information: Bag of Seeds, used to secure financial information; and Pear a Day, used to secure personal medical information. These applications were highlighted in the Privacy Representations. In so doing, the Respondent demonstrated that the Privacy Representations were intended to be material. The Respondent gave consumers a material reason to purchase the PearGab 6 and created the means by which consumers could, and did, act on that reason. Having done so, it would be unfair for the Respondent to be permitted to downplay the Privacy Representations as mere puff only after a cyberattack occurred.

ii. Performance, Efficacy or Length of Life

46. Reviewable conduct under paragraph 74.01(1)(b) is restricted to representations relating to the performance, efficacy or length of life of a product. Moreover, the provision requires that marketers conduct "proper and adequate" testing to substantiate any representation covered under one of the three above categories (*Chatr*). The Respondent has admitted that it did not test the data protection capabilities of the PearGab 6 (at para 77). Therefore, the issue at this stage is not whether testing occurred, but whether the Privacy Representations fall within the scope of this provision.

Competition Act, *supra* para 1, s 74.01(1)(b).

Chatr, *supra* para 25 at para 25.

47. The Appellant submits that the Tribunal was incorrect to find that the Privacy Representations did not fall within the scope of paragraph 74.01(1)(b). The Appellant accepts the Tribunal's interpretation of paragraph 74.01(1)(b), that performance claims must relate to specific and measurable achievements (at para 88). However, the Appellant contends that the Privacy Representations fall within that limitation. The Respondent specifically contemplated data security in the design process of the PearGab 6 and also developed an update for Rootz Deep Earth immediately following the cyberattack. In other words, the Respondent devoted time and resources to building and maintaining the data security features on the PearGab 6 because it considers data security to be part of the performance of its smartphones.

48. The Respondent directed the Tribunal to its own internal market research to show that privacy protection is not one of the primary reasons that consumers purchase its products (at para 33). While that may be true, in its submissions relating to materiality under paragraph 74.01(1)(a), the Respondent still characterized privacy protection as an ancillary reason for purchase – not central, but relevant (at para 69). Moreover, the Respondent made a conscious decision to advertise its privacy guarantee alongside four other representations which outlined the PearGab 6's various technical capacities (e.g., its browsing speed, its 3D picture capturing capacity, etc.).

49. Browsing speed and camera capacity are clearly related to the performance of the device. Accordingly, had the Respondent failed to conduct adequate and proper testing for either the representation that the PearGab 6 was capable of capturing 3D pictures or browsing the Internet at "superfast" speeds, the jurisprudence on this issue would support a finding that those were statements, warranties or guarantees within the meaning of paragraph 74.01(1)(b). *Canada (Commissioner of Competition) v Imperial Brush Co* explained that performance claims are "designed to convince the purchaser that there is some objective basis upon which the purchaser can rely" (*Imperial Brush Co*). Browsing speeds, data security, and camera quality were just that. They were promises that the device will provide the services for which it has been designed.

Canada (Commissioner of Competition) v Imperial Brush Co, 2008 Comp Trib 2 at para 76 [*Imperial Brush Co*].

50. Similarly, the ONSC in *Chatr* held that representations about dropped call rates made by wireless service providers were performance claims (*Chatr*). When consumers purchase wireless services, they do so with the intention of making successful mobile phone calls. Dropped calls are therefore directly related to the provider's performance of that service (*Chatr*). Likewise, it was perfectly clear to the Tribunal in *Imperial Brush Co* that representations that a chimney cleaning fire log helped to eliminate creosote (hazardous soot that can lead to chimney fires) were tied to the firelog's performance. The only reason to purchase such a product is to clean soot out of a chimney (*Imperial Brush Co*).

Chatr, *supra* para 25 at para 291.

Imperial Brush Co, *supra* para 49 at paras 17–18, 128, 143.

51. The Privacy Representations in this case are no different. The Respondent created the applications for the purpose of storing sensitive personal information and admitted that data privacy is at least an ancillary reason for purchasing the smartphones. Further, the Respondent asserted that the PearGab 6 was designed to protect that sensitive information (at para 89). In short, the Privacy Representations described one of the five functions of the PearGab 6, all five of which were engineered to give consumers reasons to purchase and use the device.

52. The Tribunal held that the general impression of the Privacy Representations was that the PearGab 6 would protect sensitive personal information from data breaches, including cyberattacks (at para 60). This is an intended function of the device. When the Respondent was reviewing its marketing strategy to ensure its compliance with the *Act*, it ought to have considered that a credulous and technically inexperienced consumer would have the impression that data security related to the performance of the PearGab 6.

53. The Respondent should not be permitted to argue that the Privacy Representations do not relate to performance in order to escape its obligation to substantiate its claims through testing. The Respondent cannot convey to an ordinary consumer that privacy is part of the functionality of the PearGab 6 by piggybacking the Privacy Representations onto other representations about that device's performance while simultaneously telling the Tribunal that it is not.

54. Consider the Bureau's investigation of Reebok-CCM. Reebok-CCM marketed its hockey helmets so as to create the impression that the helmets would protect players from head injuries, including concussions ("Reebok-CCM"). The testing conducted in support of those claims was inadequate even though it conformed to then-current industry standards, as it determined only whether a helmet was capable of preventing skull fractures, but not concussions ("Reebok-CCM"). Hockey helmets, just like smartphones, serve multiple functions. Reebok-CCM attempted to make representations on both areas of protection while only testing one ("Reebok-CCM"). The Respondent in this case did the same. The Respondent presumably tested the other performative aspects of the PearGab 6, and then paired that with untested Privacy Representations.

> Canadian Competition Bureau, "Agreement with Competition Bureau requires Reebok-CCM to donate $475,000 in equipment to charity" (21 December 2015), online: *Government of Canada* <ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/news-releases/reebok-ccm-ceases-certain-resistance-hockey-helmet-performance- claims> ["Reebok-CCM"].

55. The Privacy Representations do not constitute a vague, overarching design philosophy. A promise that the PearGab 6 could keep sensitive personal information secure from data breaches was a guarantee of performance in the same way that a promise that the PearGab 6

could capture 3D pictures or browse the Internet at superfast speeds were guarantees of performance.

56. In conclusion, the Privacy Representations are related to the performance of the PearGab 6, which ought to have placed the Respondent under an obligation to substantiate its claims through testing. Since the Respondent did not conduct any testing, the Tribunal erred in finding that the Privacy Representations did not constitute reviewable conduct under paragraph 74.01(1)(b).

III. Serious Harm is Likely to Ensue Unless the Order is Issued

57. Section 74.11 allows a court to issue a temporary order against an individual if the Bureau can prove that serious harm is likely to ensue unless the order is issued. In establishing that serious harm is likely to ensue, the Appellant agrees with the Tribunal that 'irreparable harm' refers to the nature of the harm, not its magnitude (*RJR*).

Competition Act, *supra* para 1, s 74.11(1)(a).

RJR, *supra* para 16 at 341.

58. The Tribunal erred in finding that the Appellant did not establish that serious harm is likely to ensue unless the requested Order was granted. The Appellant submits that serious harm to competition is likely to occur if the Privacy Representations are allowed to continue. User privacy, in particular, as a growing non-price dimension of competition, occupies a more salient place in competition law now than it did in decades past (Iacobucci). In *Karasik v Yahoo! Inc*, the ONSC held that data breaches carry with them unquantifiable risks of harm to classes of users (*Yahoo!*).

Edward M Iacobucci, "Examining the Canadian *Competition Act* in the Digital Era" (27 September 2021) at 13, 12, 7, online (pdf): *Senate of Canada* <https://sencanada.ca/media/3 68377/examining-the-canadian-competition-act-in-the-digital-era-en-pdf.pdf> [Iacobucci]. *Karasik v Yahoo! Inc*, 2021 ONSC 1063 at paras 35, 37 [*Yahoo!*].

59. Parliament is alive to this concern. Through the *Personal Information Protection and Electronic Documents Act* and the newly-introduced *Consumer Privacy Protection Act* (currently Bill C-27), Parliament is updating and strengthening its legislative regime to specifically address the protection of sensitive personal information in digital

markets. Parliament does not act frivolously. If data breaches of sensitive personal information are not likely to cause serious harm, Parliament would not have taken, and would not continue to take, steps to protect consumers.

Personal Information Protection and Electronic Documents Act, SC 2000, c 5.

C-27, *Digital Charter Implementation Act, 2022*, 1st Sess, 44th Parl, 2021, Part 1.

60. The European Parliament has moved towards an *ex ante* approach to regulation of large digital platforms, due in part to concerns that antitrust enforcement is too slow (*Digital Markets Act*). The British Government's Furman Report has identified similar issues (Furman Report). In concert with these reports, United Kingdom jurisprudence has trended towards only requiring plaintiff parties to prove that a data breach was "non-trivial" and beyond *de minimus* to obtain damages for harm ensuing from the breach. (*Lloyd*; *Rolfe*).

EC, *Regulation (EU) 2022/1925 of the European Parliament and the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act),* [2022] OJ, L 265/2 [*Digital Markets Act*].

Digital Competition Expert Panel, "Unlocking digital competition" (2019), online (pdf): *GOV.UK* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78 5547/unlocking_digital_competition_furman_review_web.pdf> [Furman Report].

Lloyd v Google LLC, 2021 UKSC 50 [*Lloyd*].

Rolfe v Veale Wasbrough Vizards LLP, 2021 EWHC 2809 (QB) [*Rolfe*].

61. In this case, the Privacy Representations create a disincentive for *bona fide* technological advancements in data security (at para 100). If one of the leading smartphone manufacturers is permitted to falsely promote an errorless data security function without any substantive testing, false and misleading promotion will become the industry standard. As a first mover in its industry, features developed by the Respondent are quickly emulated by other competitors (at para 11). Therefore, serious harm to competition is likely as the Respondent,

and its competitors, will be able to reap the marketing benefits of a secure smartphone without actually making one.

62. As submitted above at paras 17–18, Part VII.1 of the *Act* is intended to provide consumers with competitive product choices. The Privacy Representations magnify the potential for asymmetric information and reduce consumer choice by falsely promoting an errorless and secure operating system. Without information to the contrary, a credulous and technically inexperienced consumer would not appreciate the risks associated with storing sensitive personal information on a smartphone. By opting to use the PearGab 6, ordinary consumers unknowingly put their privacy at risk.

63. In *Thomson Newspapers Co v Canada*, the SCC majority agreed with Justice Gonthier in dissent that even though the influence of polls on voter choice was uncertain, its existence was still a legitimate harm (*Thomson*). The actual impact of the cyberattack is "unknowable" (*Yahoo!*). However, it is known that the Privacy Representations influenced consumers to store their sensitive information on the PearGab 6 despite the risk of harm resulting from data breaches. Ultimately, this eliminates consumer choice and erodes user privacy. In this way, serious harm ensued directly from the Respondent's reviewable conduct. The Privacy Representations encouraged users to store financial and health data in their respective PearGab 6 devices. While two of the Respondent's competitors were also subjected to the cyberattack, the Privacy Representations put, and continue to put, specific types of data in harm's way.

Thomson Newspapers Co v Canada (Attorney General), [1998] 1 SCR 877 at paras 58, 104–105 [*Thomson*].

Yahoo!, *supra* para 58 at para 37.

64. Therefore, the Respondent submits that serious harm exists and ensues from the Privacy Representations such that the requested Order should be granted under section 74.11.

IV. The Balance of Convenience Favors Issuing the Order

65. The Respondent did not lead any evidence before the Tribunal of any harm that it would suffer if the Order sought by the Appellant were granted. Therefore, the Appellant submits that the public interest in having the law obeyed and the harm that is likely to ensue unless the

Order is issued are not outweighed by the hardship the Order would impose upon the Respondent.

Part IV—Remedy Sought

66. The Appellant seeks a temporary prohibition under subsection 74.11(1) of the *Act* requiring the Respondent not to engage in making the Privacy Representations or substantially similar conduct. Granting the Order is consistent with other persuasive authorities. The Tribunal held in *Sears* that a prohibition order is consistent with the harm that subsection 74.01(3) was created to address (*Sears*). The Appellant submits that it is reasonable to extend the *Sears* holding to subsection 74.01(1). Reviewable price representations under subsection 74.01(3) are designed to mislead consumers in a material way. Representations under subsection 74.01(1) are the same. The requested Order will prevent misleading promotional information and representations not substantiated by testing from continuing to be received by consumers.

Sears, *supra* para 36 at para 375.

67. The Appellant submits Parliament lowered standard in subsection 74.11(1), such that the Commissioner is only required to show that the allegations are not frivolous or vexatious. However, if that standard is not accepted, the Appellant has shown that Respondent still committed reviewable conduct under both paragraphs 74.01(1)(a) and (b). The Appellant has also shown that serious harm is likely to ensue from that reviewable conduct if the requested Order is not granted. The balance of convenience favours granting the Order. Therefore, the appeal should be allowed.

APPENDIX A

A. Jurisprudence

B. Secondary Sources

C. Legislation

D. *Text of Statutes, Regulations & By-Laws* Competition Act, RSC 1985, C C-43

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

1.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation.

(3) 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, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market, has not sold a substantial volume of the

product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

> **(a)** has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

74.011 (4) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.

74.11 (1) On application by the Commissioner, a court may order a person who it appears to the court is engaging in conduct that is reviewable under this Part not to engage in that conduct or substantially similar reviewable conduct if it appears to the court that

> **(a)** serious harm is likely to ensue unless the order is issued; and
>
> **(b)** the balance of convenience favours issuing the order.

74.111 (1) If, on application by the Commissioner, a court finds a strong *prima facie* case that a person is engaging in or has engaged in conduct that is reviewable under paragraph 74.01(1)(a), and the court is satisfied that the person owns or has possession or control of articles within the jurisdiction of the court and is disposing of or is likely to dispose of them by any means, and that the disposal of the articles will substantially impair the enforceability of an order made under paragraph 74.1(1)(d), the court may issue an interim injunction for- bidding the person or any other person from disposing of or otherwise dealing with the articles, other than in the manner and on the terms specified in the injunction.

Team No. 10370

2023 ADAM F. FANAKI COMPETITION LAW MOOT/ CONCOURS DE PLAIDOIRIE ADAM F. FANAKI 2023

BEST FACTUM—RESPONDENT—UNIVERSITY OF TORONTO FACULTY OF LAW

Edmund Nilson and Max van der Weerd

IN THE COMPETITION APPEAL TRIBUNAL (ON APPEAL FROM THE COMPETITION TRIBUNAL)

BETWEEN

THE COMMISSIONER OF COMPETITION

Appellant

AND

PEAR INC

Respondent

FACTUM OF THE RESPONDENT

COUNSEL FOR THE RESPONDENT

[February 10, 2023]

OVERVIEW

1. Pear Inc. ("**Pear**") is a global, user-oriented technology company that offers a suite of innovative products and a cohesive ecosystem designed to improve customers' lives. Pear products are premium. Customers choose Pear because of the overall value proposition of both the products and the ecosystem.

2. This case arises out of a single data breach, which the Commissioner of Competition ("**Commissioner**") alleges impugns Pear's advertising. Specifically, in marketing Pear's latest phone—the PearGab 6—Pear has promoted a number of features, including a commitment to privacy. The privacy-focused statements (collectively the

"**Privacy Representations**") reflect Pear's overall ethos and principled approach to the protection of customer data. Pear takes seriously the trust given to it by its customers.

3. To promise fully errorless security is clearly beyond the capability of any technology company. This is obvious to the average consumer. Pear remains committed to protecting user data to the best of its ability and to the highest of industry standards. In the wake of the breach, Pear responded promptly to notify the public and patch vulnerabilities, reflecting the sincerity of Pear's commitment to its professed design principles. Therefore, the Privacy Representations do not mislead. In seeking to limit Pear's advertising, the Commissioner is asking for the power to limit Pear's ability to honestly communicate these values to potential customers.

4. The Competition Tribunal (the "**Tribunal**") refused to grant a temporary order under subsection 74.11(1) of the *Competition Act* (the "*Act*") in a decision dated 18 October 2022 (the "**Tribunal Decision**"). Pear asks the Competition Appeal Tribunal (the "**Appeal Tribunal**") to uphold the Tribunal Decision.

Competition Act, RSC 1985, c C-34, s 74.11(1) [*Competition Act*].

5. Pear submits that on a balance of probabilities the existing evidence does not demonstrate that Pear has made misleading representations under either 74.01(1)(a) or 74.01(1)(b) of the Act. Under 74.01(1)(a), the general impression created by the Privacy Representations was not misleading in a material respect. Under 74.01(1)(b), the Privacy Representations were not a statement or guarantee of performance. Finally, even if the Privacy Representations are misleading, serious harm is unlikely to ensue as required under subsection 74.11(1)(a) of the Act. Pear therefore requests the Appeal Tribunal uphold the Tribunal Decision and deny the Temporary Order.

Competition Act, *supra* para 4, at ss 74.01(1) and 74.11(1).

Part I—Statement of Facts

I. Pear is Committed to Data Security

6. The Privacy Representations reflect Pear's commitment to privacy and promoting its robust set of privacy features. Despite this

commitment and these features, in August 2022, hackers were able to breach Pear's mobile operating system, installed on the PearGab 6.

Canada (Commissioner of Competition) v Pear Inc (18 October 2022) at paras 16, 18 [*Tribunal Decision*]

7. Data security is an issue for all modern technology companies and it is a priority for Pear. A single instance of failure does not undermine Pear's years-long commitment to protecting customers. Pear was neither the first nor the only company to suffer a data breach—in fact Pear's two leading competitors announced a similar data breach only days later, likely perpetrated by the same hacker collective (*Tribunal Decision*). In response to the incursion, Pear has worked diligently to not only inform customers but also improve its protections in a continued attempt to provide best-in-class security.

Tribunal Decision, *supra* para 6, at para 19.

II. Consumers Are Informed of the Risks

8. Data breaches are widespread and well-publicized. Put differently, "cyberattacks have become a not uncommon occurrence" (*Tribunal Decision*). In this case, Pear was not the only victim—its leading competitors were hacked concurrently. The universal nature of these threats means the average consumer is aware that no data is truly and inviolably safe. Any consumers making a significant investment in a Pear device—approximately $1,000—must be understood to do so without being blind to inherent data risk. This is not to say consumers know and understand the technical realities of data security, but rather that the average consumer is aware that the use of any hardware or software product exposes them to risk.

Tribunal Decision, *supra* para 6, at para 61.

9. Pear does not promise perfection—no one can. Instead, Pear promises to worry about customer data and privacy. These phones are not flippant purchases. Smartphones are vital to modern life and consumers choose the phone that best fits their needs, aware that no option is perfect or without risk. Pear's consumers, who are a segment of the market with enough enthusiasm for personal electronics to purchase Pear's premium products, understand this.

10. To facilitate an informed choice, potential PearGab purchasers have a right to know about Pear's values. Customers are capable of evaluating the risks on the basis of publicly available information. Pear has been upfront about the data breach and the steps taken to address it. Consumers make an informed evaluation of Pear's Privacy Representations as one of a constellation of factors informing their ultimate purchase decision.

III. Privacy Is Not a Material Influence on Purchasing Decision

11. Pear's market research found that 82% of smartphone users have limited or no knowledge of the security settings on their phones, reflecting the relatively low priority of these features (*Tribunal Decision*). Instead, security and privacy are secondary factors that are rarely considered when deciding what smartphone to purchase. The Privacy Representations in question are but one of five main features highlighted in the PearGab 6 marketing campaign, and, on the evidence, a feature of low salience for consumer behaviour. Pear believes that data security and privacy should and do matter and thus has made the business decision to promote these aspects of its brand; however, specific customer behaviour should not be understood to be motivated by the Privacy Representations.

Tribunal Decision, *supra* para 6 at para 33.

IV. The Data Breach Has Been Addressed

12. Some Pear customer data became vulnerable because of the August 2022 security breach; however, that data breach has been addressed with subsequent patches. Current and future Pear customers' data is not vulnerable simply on the purchase of a new PearGab 6 smartphone. Vulnerability requires additional successful attacks, something Pear is committed to preventing and works diligently to stop. Encouraging the purchase of a PearGab 6 device is only risky to customer data if PearGab 6 users are uniquely vulnerable to a security breach relative to other smartphone users. This assertion has not been made and is wholly unsupported by the evidence.

Part II—Statement of Points in Issue

13. The central issue is whether there is sufficient cause to overturn the Tribunal's decision to deny the Commissioner's application under subsection 74.11(1) of the *Act*.

14. To decide this issue, the Court must determine:

i. Did the Tribunal correctly impose a balance of probabilities standard for obtaining a temporary order under subsection 74.11(1)?

ii. Did the Tribunal err in finding the Privacy Representations to be false and misleading in a material respect under subsection 74.01(1)(a)?

iii. Did the Tribunal appropriately hold that the Privacy Representations do not constitute a statement or guarantee of performance under subsection 74.01(1)(b)?

iv. Did the Tribunal avoid palpable and overriding error in concluding that serious harm was unlikely to ensue for consumers and competitors under subsection 74.11(1)(a)?

15. The answer to each of these questions is "yes." This court must likewise deny the Commissioner's request for a temporary order.

Part III—Statement of Submissions

I. Subsection 74.11(1) Requires Reviewable Conduct on the Balance of Probabilities

16. The standard required by subsection 74.11(1) is a question of law and should be reviewed on a standard of correctness (*Vavilov*). In 2014, the language of subsection 74.11(1) changed from requiring the court find "a strong *prima facie* case that a person is engaging in reviewable conduct" to requiring that it "appears to the court [that a person] is engaging in conduct that is reviewable" (*Competition Act*). This new wording has not yet been judicially interpreted (*Tribunal Decision*). Pear submits that the Tribunal correctly found that this linguistic change demands the evidence prove reviewable conduct on the balance of probabilities.

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at para 37 [*Vavilov*].

Competition Act, *supra* para 4, at s 74.11(1).

Tribunal Decision, *supra* para 6, at para 46.

a. The Legislative Context is Consistent with a Balance of Probabilities

17. Amending a law does not imply a change in that law (*Interpretation Act*). This stands for the principle of stability in the law (*R v DLW*). While this is not to say that amendments are meaningless, changes—and especially substantial changes—should be explicitly stated in the law. Parliament does not dramatically change the law by implication. In addition, statutory interpretation must be conducted with an eye towards the entire context of the relevant language, including plain meaning, legislative history and intent, and related jurisprudence that might shed light on appropriate understanding (*Canada Trustco*).

Interpretation Act, RSC 1985, c. I-21, s 45(2) [*Interpretation Act*]. *R v DLW*, 2016 SCC 22 at para 21 [*DLW*].

Canada Trustco Mortgage Co v Canada, 2005 SCC 54 at para 10 [*Canada Trustco*].

18. Understanding the amendment requires first understanding the standard a strong *prima facie* case would have imposed. The best guide to the standard comes from *R v Canadian Broadcasting Corp*, where the Supreme Court of Canada required a strong *prima facie* case for mandatory interlocutory injunctions. In defining a strong *prima facie* case, the court held that there "is a burden on the applicant to show a case of such merit that it is *very* likely to succeed at trial" (*Canadian Broadcasting*, emphasis added). "Very likely" means more than just likely and implies something more than a balance of probabilities. In that case, the Crown had to demonstrate that it was very likely to prove the CBC was in contempt of court. In this case, the Commissioner would have had to demonstrate that she was very likely to prove that Pear is engaged in reviewable conduct on the merits.

R v Canadian Broadcasting Corp, 2018 SCC 5 at para 17 [*Canadian Broadcasting*].

19. In reading "appears to the court" as a balance of probabilities standard, the Tribunal lowered the standard from "a strong *prima facie* case." The Tribunal acknowledged the possibility that the standard was changed in its decision (*Tribunal Decision*). According to Pear and the Tribunal's reading of "appears to the court," the Commissioner no longer has to demonstrate that she is *very likely* to prove

that Pear is engaged in reviewable conduct. Instead, she must merely demonstrate that she is *likely* to prove that Pear is engaged in reviewable conduct.

Tribunal Decision, *supra* para 6, at para 52.

20. Furthermore, Pear submits that a lower standard is not the same as an insignificantly low standard. The *Interpretation Act* and the fundamental principle of stability in the law (*DLW*) make clear that as a matter of statutory interpretation the magnitude of the change should be read minimally. Lowering the standard from "strong *prima facie* case" to "not vexatious or frivolous" (*Tribunal Decision*) as the Commissioner argues is too significant a change to impose by implication alone.

Interpretation Act, *supra* para 17.

DLW, *supra* para 17.

Tribunal Decision, *supra* para 6, at para 48 describing the Commissioner's position.

21. To read "appears to the court" as "not vexatious or frivolous" is also to deny the meaning and effect of the language. As an agent charged with acting in the public interest, the Commissioner should be presumed not to bring vexatious or frivolous litigation. To impose so low a standard here is redundant with our basic expectations of public officials. It would, in effect, give the Commissioner determinative power—power that has been explicitly reserved for the Tribunal. Giving subsection 74.11(1) meaning therefore requires a more substantive evaluation of the Commissioner's preliminary case. Parliament should be presumed to be aware of the not vexatious or frivolous standard as it exists in *RJR-MacDonald* and yet deliberately chose a different standard that must necessarily be interpreted to be more stringent. The court was correct to interpret the legislative intent and broader legislative context as imposing a balance of probabilities standard.

RJR-Macdonald Inc v Canada (Attorney General), [1994] 1 SCR 311 at p 335, 111 DLR (4th) 385 [*RJR- Macdonald*].

b. Plain Reading and Jurisprudence Support a Balance of Probabilities Standard

22. This legislative context is further reinforced by a plain language and jurisprudential understanding of the entire phrase; in other words, the critical phrase is not that it "appears to the court" but rather that "it appears to the court [that a person] is engaging in conduct that is reviewable." The *Oxford English Dictionary* offers many possible definitions of "appears;" however, in this context the most sensible definitions are either "to be clear or evident to the understanding" or "to be taken as, to seem." In plain language then, "appears to" can be understood as synonymous with "seems". If it seems to the court that reviewable conduct is occurring, that is understood as the court believing that reviewable conduct is more likely than not occurring.

Competition Act, *supra* para 4, at s 74.11(1).

John Simpson et al, eds, *OED Online* (Oxford: Oxford University Press, 2023) sub verbo "appear, v".

23. In other examinations of "it appears to the Court," courts have appropriately considered the entirety of the phrase. In *Maheu*, the relevant phrase is "it appears to the Court that … there is reason to believe" and the Court emphasizes that subordinate clause in developing its ultimate standard. Similarly, in *Eastern Platinum*, the legislation in question reads, "it appears to the court that it is in the best interests of the company" (*BCA*). Viewed holistically, the courts in *Maheu* and *Eastern Platinum* can be understood to read the relevant clauses as "it is likely that there is reason to believe" and "it is likely in the best interests of the company" as they develop the overall standard to be applied. A similar approach here would read subsection 74.11(1) as "it is likely [a person] is engaging in conduct that is reviewable." In other words, both plain language and jurisprudence support a balance of probability standard.

Maheu v IMS Health Canada, 2003 FCT 1 at paras 53-56[*Maheu*] (aff'd 2003 FCA 462). *2 5 3 8 5 2 0 Ontario Ltd v Eastern Platinum Limited*, 2020 BCCA 313 at para 26 [*Eastern Platinum*]. *Business Corporations Act*, SBC 2002, c 57, s 233(1)(d) [*BCA*].

c. Broader Social Context Likewise Demands a Balance of Probabilities Standard

24. Determining the appropriate burden of proof in this case also requires consideration of the broader consequences of granting temporary orders, specifically economic and *Charter* consequences. Economically, deceptive marketing practices distort the market by inappropriately influencing consumer purchases; however, overly zealous regulation of marketing likewise distorts the market. If it is too easy for the Commissioner to stifle marketing that is, in fact, not misleading, that absence of advertisement likewise deprives consumers crucial knowledge and inappropriately influences purchases. Walking the fine line of too-much versus too-little regulation requires the additional consideration demanded by a balance of probabilities standard.

25. Temporary orders under subsection 74.11(1) are issued in cases relating to allegedly deceptive marketing practices; in other words, temporary orders under subsection 74.11(1) almost invariably regulate and limit speech. *Charter* values make it clear that the government should be reticent and circumspect when contemplating the regulation of speech (*Keegstra*). Parliament cannot be understood to allow the Commissioner and the Tribunal to limit speech on the basis of litigation that is merely not vexatious or frivolous. The Commissioner must demonstrate something more and show that on the balance of probabilities a person is engaged in reviewable conduct.

Constitution Act 1982, RSC 1985, App II, No 44, Sched B, Pt 1, s 2 [*Constitution Act*]. *R v Keegstra*, [1990] 3 SCR 697, [1990] SCJ No 131 [*Keegstra*].

d. Giving "Appears to the Court" Consistent Meaning Requires a Balance of Probabilities Standard

26. The phrase "appears to the court" is used twice in subsection 74.11(1) and five times across the whole of section 74.11. The first instance has been the focus of Pear's submissions and the arguments before the Tribunal; however, "appears to the court" must be given consistent meaning across the entirety of section 74.11.

Competition Act, *supra* para 4 at s 74.11.

27. Looking at the other uses of "appears to the court," a balance of probabilities standard is clearly intended. In both 74.11(1)(a) and 74.11(1.1), "appears to the court" is explicitly linked to "likely." Moreover, to apply a "not vexatious or frivolous" standard across the entirety of the section is to trivialize the burden on the Commissioner and allow the Commissioner to regulate speech far too easily. The foregoing policy arguments become all the more forceful on the understanding that trivializing "appears to the court" at the beginning of subsection 74.11(1) would by extension trivialize the substance of the entire section. The Tribunal must be empowered to meaningfully review the Commissioner's determinations of reviewable conduct and ensuing harm.

e. A Balance of Probabilities Standard Is Not a Decision on the Merits

28. A balance of probabilities standard is likely to be the same standard applied in the context of a final merits decision. Imposing a balance of probabilities here, however, does not duplicate the final merits decision. A temporary order under subsection 74.11(1) is based on preliminary information. As the Commissioner's investigation progresses, more information and evidence will emerge until the case is complete and a full hearing—with a full range of remedies—is appropriate. A balance of probabilities standard preserves the independent meaning of subsection 74.11(1) while still giving it substance.

II. Pear Did Not Make a False and Misleading Statement in a Material Respect

29. The Tribunal wrongly held that the PearGab 6 campaign violated subsection 74.01(1)(a) by making a "representation to the public that is false or misleading in a material respect" to promote a product (*Competition Act*). The PearGab 6 campaign is not misleading or material. The correct legal test is a question of law and should be determined on a standard of correctness (*Vavilov*), while the test's application is a mixed question of fact and law and will be determined according to either a standard of correctness or palpable and overriding error depending on the degree to which it is factually suffused (*Housen*).

Competition Act, *supra* para 4 at s 74.01(1)(a).

Vavilov, *supra* para 16 at para 37.

Housen v Nikolaisen, 2002 SCC 33 at para 36 [*Housen*].

a. The Test for False or Misleading Statements is the General Impression Test

30. The test for whether a statement is false or misleading is the "general impression" test, which assesses whether the average consumer forms a general impression of an advertisement that is misleading. The general impression is that formed "after an initial contact with the entire advertisement, and it relates to both the layout of the advertisement and the meaning of the words used" (*Richard*). The test also draws from section 52(4) of the *Competition Act*, which states that "the general impression conveyed by a representation as well as its literal meaning shall be taken into account" in criminal misleading advertising cases (*Competition Act*).

Richard v Time Inc., 2012 SCC 8 at para 57 [*Richard*].

Competition Act, *supra* para 4 at s 52(4).

31. The average consumer protected by the general impression test is similar to the "ordinary hurried purchaser" of trademark law (*Richard*). This consumer is not a "moron in a hurry," and is owed a "certain amount of credit" (*Mattel*). The average consumer's level of care also varies depending on the product. In misleading advertising cases, this means that more expensive products, like vacations and expensive electronics, will be approached with more care by consumers (*Maritime Travel*).

Richard, supra para 30 at paras 64-65.

Maritime Travel Inc v Go Travel, 2009 NSCA 42 at para 68 [*Maritime Travel*]. *Mattel U.S.A. Inc. v 3894207 Canada Inc.*, 2006 SCC 22 at paras 56-58 [*Mattel*].

32. The correct test is not that of a "credulous and inexperienced" consumer, as that formulation of the test is only for the "purposes of the [*Consumer Protection Act*]," and arises from Quebec law (*Richard*). The average consumer for the purposes of the *Competition Act* is that of the "credulous and technically inexperienced consumer," as used in *Chatr*. The Tribunal's misapplication of the standard taints their entire analysis.

Richard, supra para 30 at para 72.

Canada (Commissioner of Competition) v Chatr Wireless Inc., 2013 ONSC 5315 at para 132 [*Chatr*].

b. The General Impression is Not "Errorless Security"

33. The Tribunal mistakenly held that the general impression created by Pear's Privacy Representations was "errorless security" (*Tribunal Decision*). Instead, the general impression is that privacy is an important value to Pear. None of the Privacy Representations claim that the PearGab 6 offers errorless security. Pear promotes a robust set of privacy features, as well as a company culture that values privacy. Pear's tag line "we're up worrying about your privacy so you don't have to be" clearly states that Pear still worries about consumer privacy and by implication still worries about a breach (*Tribunal Decision*). Even if Pear had claimed that PearGab 6 users would be worry free, this claim should be interpreted contextually, with reference to what Pear's competitors offered and with the understanding that advertising contains some puffery (*Rushak*). In *Chatr*, a promise of "no worries about dropped calls" was interpreted relative to the performance of Chatr's competitors, not as a promise of errorless performance. A similar interpretation where Pear's claims are viewed relatively rather than absolutely should be applied here.

Tribunal Decision, *supra* para 6 at paras 14 and 61.

Rushak v Henneken, 1991 CarswellBC 223 at para 23, [1991] 6 WWR 596.

Chatr, supra 32 at paras 141-142.

34. The average PearGab 6 consumer understands the risk of cyberattacks. A PearGab 6 is not an incidental purchase, it is a premium smartphone that typically retails for over $1000, and purchasers would have a commensurate level of knowledge. The average consumer will also be aware of the risk of cyberattacks. The concept of privacy necessarily implies interested third parties who would like access to data. Understanding the risk of cyberattacks also requires no technical knowledge. Consumers do not need to understand how cyberattacks are performed to understand the risk. Nor do they need to conduct additional research, given the well-publicized nature of many cyberattacks. A preponderance of PearGab 6 purchasers

have enough familiarity with cyberattacks to recognize the threat they pose (*Tribunal Decision*). It may be that some consumers are unaware of the risk of cyberattacks, but the average consumer is not the lowest common denominator. The average PearGab 6 consumer understands the risk of cyberattacks and would interpret the Privacy Representations as a comment on Pear's commitment to privacy relative to its competitors.

Tribunal Decision, *supra* para 6 at para 61.

35. There is no evidence that the PearGab 6's privacy protections are inferior; if anything Pear's commitment to privacy meets or exceeds its competitors. Although the PearGab 6 was compromised, the operating systems of Pear's principal competitors were also impacted. The only thing that distinguishes the PearGab 6 attack from the attacks on its competitors is that Pear was the first company to report a breach, upon which it immediately notified its users and issued an emergency patch. Pending the ongoing investigations into these data breaches, any definitive declarations on relative security are premature, but Pear's early reporting of the breach indicate a company that is better able to detect breaches or more willing to report them. All the evidence suggests is that hacker collectives like JesterRoast, which has performed at least seven high profile cyberattacks in two years, remain a threat against which Pear remains vigilant.

Tribunal Decision, *supra* para 6 at paras 17-20.

c. The Test for Materiality is the Likely Effect Test

36. The Tribunal correctly identified the test for material misrepresentations, whether consumers will "likely be influenced" by a misleading representation in making a purchase (*Kenitex*). This impression must be created by the misleading element of the advertisement, not by some other factor (*Sears*). This test also does not consider by what the average consumer *should* be influenced, but by what they *are* influenced. It is distinct from normative concerns. The Tribunal's emphasis on the importance of privacy overlooked this.

R v Kenitex Canada Ltd., 1980 CarswellOnt 1459 at para 10, 51 CPR (2d) 103 [*Kenitex*].

Canada (Commissioner of Competition) v Sears Canada Inc., 2005 Comp. Trib. 2 at para 336, 2005 CarswellNat 8137 [*Sears*].

Tribunal Decision, *supra* para 6 at para 70.

d. Privacy is not Material to the Ordinary Consumer

37. Privacy is not material to consumers because there is no evidence that consumers' purchasing decisions are influenced by privacy. Instead, there is evidence that Pear's consumers are indifferent to privacy. When Pear surveyed consumers about their purchasing priorities, not one consumer prioritized data security. Similarly, 82% of surveyed consumers have not familiarized themselves with their phone's privacy settings. Consumers who do not care about privacy are unlikely to make decisions based on privacy-related advertising, regardless of whether they should care about privacy. The PearGab 6 campaign included the Privacy Representations because privacy is part of the design philosophy underpinning the PearGab 6, and because privacy is an important part of Pear's brand, promoted alongside its mascots to increase recognition.

Tribunal Decision, supra para 6 at para 33.

III. The Privacy Representations Do Not Constitute a "Statement, Warranty or Guarantee of Performance"

38. The PearGab 6 campaign did not violate subsection 74.01(1)(b) by making "a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof" (*Competition Act*). The Tribunal correctly held that the Privacy Representations were not representations about the PearGab 6's performance or efficacy. The Tribunal erred in holding that the comments were statements under the subsection, placing undue weight on the literal meaning of the word "promise" and setting too low a standard for the word "statement" for the purposes the subsection. The formulation of the applicable test is a question of law, subject to correctness review (*Vavilov*). The test's application is a question of mixed fact and law (*Housen*).

Competition Act, *supra* para 4 at s. 74.01(1)(b).

Vavilov, *supra* para 16 at para 37.

Housen, *supra* para 29.

a. The Privacy Representations Are Not a "Statement, Warranty or Guarantee"

39. The Tribunal erred in its interpretation of subsection 74.01(1)(b) by setting the threshold for a "statement" within the meaning of the *Act* too low, failing to recognize that the correct test requires a representation with greater than usual authority. Modern principles of statutory interpretation require that "the words of an Act must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Vavilov*). The Tribunal's reading of "statement" disregarded the role of "warranty or guarantee" within the Act, making both words redundant. Similarly, the Tribunal did not consider the definition of statement, which is "a formal written or oral account of facts, theories, opinions, events, etc., (now) esp. as requested by authority, or issued to the media" (*OED Online*). In place of the Tribunal's all-encompassing understanding of statement, "statement" as it exists in 74.01(1)(b) should be read as requiring a level of authority and gravitas. This would also be consistent with the purpose of the subsection, which is to preserve the reliability of advertising that represents itself having above-average reliability.

Vavilov, *supra* para 16 at para 117.

John Simpson et al, eds, *OED Online* (Oxford: Oxford University Press, 2023) sub verbo "statement, n".

40. As the Tribunal held, the general impression test applies to subsection 74.01(1)(b). This means that the "general impression conveyed by a representation as well as its literal meaning" should be considered, and that the literal meaning of a representation is not solely determinative of whether a representation falls within the scope of the *Act* (*Richard*). The Tribunal placed excessive weight on the literal meaning of the word "promise" that was used in the Privacy Representation and neglected the importance of the advertisement's general impression.

Richard, supra para 30 at para 45.

Tribunal Decision, *supra* para 6 at para 82.

41. Applying the correct interpretation of the Act to the case at bar, Pear's comments are not authoritative enough to fall within the Act. "Pyrus' Privacy Promise," the representation most likely to be argued to be a warranty or guarantee, is clearly puff (*Carbolic Smoke Ball Company*). In this context, "promise" was chosen for its alliterative quality, not for its specific meaning. Similarly, the promise is delivered by an anthropomorphic pear. The average consumer would not impart the word "promise" with the authority necessary to bring it within the meaning of subsection 74.01(1)(b). The Privacy Representations made during the campaign as a whole also lack the authority necessary to qualify as statements within the meaning of the *Act*.

Tribunal Decision, *supra* para 6 at para 14.

Carlill v Carbolic Smoke Ball Company, [1893] 1 QB 256, 57 JP 325.

b. Pear's Privacy Representations Do Not Pertain to Performance or Efficacy

42. The Tribunal held that the Privacy Representations do not pertain to performance, efficacy, or length of life. The Tribunal required that performance and efficacy claims relate to a "specific and measurable achievement." For a representation to fall under subsection 74.01(1)(b) it must be testable, otherwise the Act would risk excluding truthful but untestable claims and would be overly broad (*Tribunal Decision*).

Tribunal Decision, *supra* para 6 at para 88.

43. Alternatively, if the Tribunal's test is wrong, privacy would still not be a claim of performance or efficacy. Performance refers to "the accomplishment or carrying out of something undertaken," while efficacy refers to the "power or capacity to produce effects" (*OED Online*). As *Imperial Brush* stated, the terms refer to the "manner in which the [product] will perform." The test for if an attribute qualifies as a measure of performance or efficiency is therefore whether it is a means of accomplishing an objective. This excludes objectives themselves and their underpinning values.

John Simpson et al, eds, *OED Online* (Oxford: Oxford University Press, 2022) sub verbo "performance". John Simpson et al, eds, *OED Online* (Oxford: Oxford University Press, 2022) sub verbo "efficacy".

Canada (Commissioner of Competition) v Imperial Brush, 2008 Trib. Conc. 2 at para 201, 2008 CarswellNat 216 [*Imperial Brush*].

44. Under the Tribunal's test, the Privacy Representations were broad and amorphous value statements. They do not contain indicators of "achievement" that would be conducive to testing. Although there are means of testing issues that are related to privacy, privacy itself is a vague, value-based category that is not testable.

Tribunal Decision, *supra* para 6 at para 89.

45. Even if the Tribunal's standard is wrong, the Privacy Representations still represent broad value statements, not a means of achieving objectives. The PearGab 6 campaign did not make any representations about the manner in which a task would be undertaken, but rather about the underlying values of the company. In other words, privacy is not the manner, but a subjective, protean goal. In *Imperial Brush*, the defendants were not required to test what a "clean chimney" constituted. However, this granular exercise is exactly what the appellants are asking Pear to do.

Imperial Brush, *supra* para 43.

IV. Consumers and Competitors are Unlikely to Suffer Serious Harm

a. Subsection 74.11(1)(a) Requires Serious Harm

46. Subsection 74.11(1)(a) requires that "serious harm is likely to ensue unless the order is issued" (*Competition Act*). The test for serious harm is a question of law. The Tribunal correctly noted that serious harm is a different standard compared to the irreparable harm standard at common law (*Tribunal Decision*). Specifically, irreparable harm "refers to the nature of the harm suffered rather than its magnitude" (*RJR-MacDonald*). By using serious harm, Parliament has allowed considerations of economic harm otherwise prohibited at common law; however, Parliament has also specifically imported notions of magnitude into the evaluation. To give meaning to this section, the Tribunal correctly required the Commissioner to demonstrate both the serious magnitude of the alleged harm and its connection to the reviewable conduct; it cannot simply be presumed on a finding of reviewable conduct.

Competition Act, *supra* para 4 at s 74.11(1)(a).

Tribunal Decision, *supra* para 6 at para 94.

RJR-MacDonald, *supra* para 21 at p 341.

47. An overall comparison of the Temporary Order requirements relative to *RJR-MacDonald's* interlocutory injunctions requirement further supports this position. The test for granting an injunction requires only that "the claim is not frivolous or vexatious" (*RJR-MacDonald*)—a low bar. Pear has argued that subsection 74.11(1) requires an evaluation of claims on the more stringent balance of probabilities standard. Parliament has therefore made the requirements more stringent relative to common law injunctions. While "serious" compared to "irreparable" admits more types of harm, the importation of magnitude should similarly be read as more stringent.

RJR-MacDonald, *supra* para 21 at p 335.

48. Understanding serious harm also requires a full contextual analysis (*Canada TrustCo*). As the foregoing analysis of "appears to the court" suggests, Parliament has already lowered the threshold for issuing a temporary order by changing the requirement from a "strong *prima facie* case." Parliament cannot be understood to have imposed a meaningless or trivial bar when the regulated conduct will inevitably be speech. To allow a prohibition on speech without a meaningful demonstration of harm is inimical to our constitutional ideals. The Commissioner bears the burden of demonstrating serious harm and must meet that burden.

Canada Trustco, *supra* para 17.

Constitution Act, *supra* para 25.

b. There is No Palpable and Overriding Error in How the Tribunal Applied the Serious Harm Standard

49. As a question of mixed law and fact, how the Tribunal evaluated serious harm is subject to review on a standard of palpable and overriding error (*Vavilov*). The Federal Court of Appeals has clarified this standard, saying "to interfere on factually suffused questions of mixed fact and law, we must find palpable and overriding error or

an 'obvious error' going to the 'very core of the outcome of the case'. This is a high threshold" (*Rogers*). Whether the Privacy Representations will likely give rise to serious harm is clearly factually suffused and therefore merits review on a standard of palpable and overriding error.

Vavilov, *supra* para 16 at para 37.

Canada (Commissioner of Competition) v Rogers Communications Inc et al, 2023 FCA 16 at para 7 [*Rogers*].

50. Pear submits that there was no such error in how the Tribunal applied the standard. It is reasonable in evaluating the likelihood of serious harm to require specific relevant evidence. It is not enough for the Commissioner to say that harm *could* occur; the Commissioner must show that *serious* harm is *likely*.

51. Pear, in contrast, led evidence on this point. Specifically, Pear has highlighted that most target consumers have already been exposed to the PearGab 6 Campaign, limiting the possibility that additional consumers will change their behaviour because of additional exposure. Further, with its survey data, Pear has demonstrated that data security is not a primary motivator for smartphone purchasers, weakening and making suspect the necessary inference that sales of the PearGab 6 would be significantly different absent the Privacy Representations.

Tribunal Decision, *supra* para 6 at para 102.

52. The Tribunal can only rely on the evidence presented at trial. To rely on Pear's evidence on this point when the Commissioner has "adduced no evidence with respect to the magnitude of consumers … likely to be misled or with respect to the extent … to which the potential harms … are likely to ensue" cannot be considered a palpable and overriding error.

Tribunal, *supra* para 6 at para 103.

c. Serious Harm is Unlikely to Ensue

53. The Tribunal rightly found that serious harm is unlikely to ensue. There are two possible relevant harms to consider. The first is economic harm. This theory of harm requires customers to buy PearGab

6 phones they otherwise would not have on a mistaken belief about the relative security of Pear's phones. Such misguided customer decisions are unlikely to occur at the scale required to meet this high standard.

54. The economic theory of harm assumes that purchasers of the PearGab 6 rely on the Privacy Representations. Pear's evidence, accepted by the Tribunal, establishes that this is not the case. Data security was not the most important smartphone feature for any surveyed consumers and most are unfamiliar with their privacy settings (*Tribunal Decision*). Moreover, because of the effective dissemination of the PearGab 6 campaign, consumers are making purchase decisions with an awareness of the Privacy Representations whether the temporary order is issued or not. Finally, consumers are making their decision aware of the data breach and its implications on both privacy and data security. Consequently, it is unlikely that any consumers will buy a PearGab 6 device because of the allegedly misleading Privacy Representations, let alone a sufficient number to give rise to sufficiently serious economic harm under 74.11(1)(a).

Tribunal Decision, *supra* para 6 at para 33.

55. The second theory of harm—personal harm—is even less likely than economic harm. This theory posits that not only will individuals buy the PearGab 6 device that they would not have absent the Privacy Representations, but those individuals will then also unwittingly have data stolen in the event of a future breach. In other words, personal harm relies not only on the tenuous logic of altered consumer behaviour, but also requires a subsequent data breach to occur.

56. Undoubtedly data security is a pressing issue, and a data breach can be damaging to those affected. However, a temporary order preventing the dissemination of the Privacy Representations does not in effect protect vulnerable consumer data. That task is better accomplished by data protection legislation like *PIPEDA* and the proposed *Digital Charter Implementation Act*. This is a misleading advertising case, not a data security case. Censoring the Privacy Representations does not magically make data more secure.

Personal Information Protection and Electronic Documents Act, SC 2000, c 5 [*PIPEDA*].

Bill C-27, *An Act to enact the Consumer Privacy Protection Act, the*

Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts, 1st Sess, 44th Parl, 2022 (second reading 28 November 2022). [*Digital Charter Implementation*].

Part IV—Remedy Sought

57. Pear requests the Appeal Tribunal uphold the lower Tribunal's refusal to issue a temporary order under section 74.11(1) of the *Competition Act* and permit Pear to continue to advertise its Privacy Representations while the Commissioner continues her investigation.

APPENDIX A—TABLE OF AUTHORITIES

A. Legislation

Bill C-27, *An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts*, 1st Sess, 44th Parl, 2022 (second reading 28 November 2022).

Business Corporations Act, SBC 2002, c 57.

Competition Act, RSC 1985, c C-34.

Interpretation Act, RSC 1985, c. I-21.

Personal Information Protection and Electronic Documents Act, SC 2000, c 5.

B. Jurisprudence

2538520 Ontario Ltd v Eastern Platinum Limited, 2020 BCCA 313.

Canada (Commissioner of Competition) v Chatr Wireless Inc., 2013 ONSC 5315.

Canada (Commissioner of Competition) v Imperial Brush, 2008 Trib. Conc. 2, 2008 CarswellNat 216.

Canada (Commissioner of Competition) v Pear Inc (18 October 2022).

Canada (Commissioner of Competition) v Rogers Communications Inc et al, 2023 FCA 16.

Canada (Commissioner of Competition) v Sears Canada Inc., 2005 Comp. Trib. 2, 2005 CarswellNat 8137

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65.

Canada Trustco Mortgage Co v Canada, 2005 SCC 54.

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Constitution Act 1982, RSC 1985, App II, No 44, Sched B, Pt 1.

Housen v Nikolaisen, 2002 SCC 33.

Maheu v IMS Health Canada, 2003 FCT 1.

Maritime Travel Inc v Go Travel, 2009 NSCA 42.

Mattel U.S.A. Inc. v 3894207 Canada Inc., 2006 SCC 22.

R v Canadian Broadcasting Corp, 2018 SCC 5.

R v DLW, 2016 SCC 22.

R v Keegstra, [1990] 3 SCR 697, [1990] SCJ No 131.

R v Kenitex Canada Ltd., 1980 CarswellOnt1459, 51 CPR (2d) 103.

Richard v Time Inc., 2012 SCC 8.

RJR-Macdonald Inc v Canada (Attorney General), [1994] 1 SCR 311, 111 DLR (4th) 385.

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C. Secondary Sources

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Simpson, John et al, eds, *OED Online* (Oxford: Oxford University Press, 2023) sub verbo "statement, n".

Simpson, John et al, eds, *OED Online* (Oxford: Oxford University Press, 2023) sub verbo "performance".

Simpson, John et al, eds, *OED Online* (Oxford: Oxford University Press, 2023) sub verbo "efficacy".