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Reforming the Competition Act to Address Deceptive Green Marketing and Integrate Sustainability

A submission by Ecojustice and the Canadian Association of Physicians for the Environment (CAPE) to the Minister of Innovation Science and Economic Development Canada with regard to the consultation on the *Future of Competition Policy in Canada.*

Contents

1. Introduction

> *"In what is the most significant economic transformation since the Industrial Revolution, our friends and partners around the world — chief among them the United States — are investing heavily to build clean economies and the net-zero industries of tomorrow. Today, and in the years to come, Canada must either meet this historic moment — this remarkable opportunity before us — or we will be left behind as the world's democracies build the clean economy of the 21st century."*
>
> - Finance Minister Chrystia Freeland.[1]

The conventional wisdom in competition circles over the past 20 years was that competition should be insulated from environmental concerns. In the last decade, however, there has been a sea-change as competition agencies around the world have realized that competition law has an important role to play in the transition to a clean, low-carbon economy.

As currently drafted, the *Competition Act* ("*Act*") does not effectively support Canada's participation in this transition. Our competition regime does not incorporate sustainability goals. It does not encourage green innovation or green consumption, and it fails to address market failures related to pollution. This reform offers a timely and important opportunity to ensure that our competition regime contributes towards a Canadian economy that is resource-efficient, low pollution, and net-zero, while also remaining competitive and fair.

While Canada needs to act to improve a number of areas of competition policy, including merger control and cooperative agreements, as described below, addressing deceptive green claims is ground zero. Greenwashing – deceptive claims about environmental benefits and impacts – represents a particularly significant barrier to the transition to a sustainable economy.[2]

Indeed, greenwashing is rife and systemic. Recent studies from Europe and Australia find that a majority of claims (53.3% and 57%, respectively) about products provide vague, misleading, or unfounded information on their environmental characteristics.[3] These numbers appear no better in North America. In a poll of 1,491 top-level executives, 58% of global respondents admitted that their organization is guilty of greenwashing, with this number rising to 72% for North American respondents.[4]

When environmental claims are fair and accurate, consumers can make informed decisions and choose products that are genuinely better for the environment. An Ipsos study in 2021 found that, over the past few years, 56% of Canadians have made changes to the products and services they buy or use out of concern about climate change.[5] Given increasing consumer preference for sustainable products, this

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[1] Wherry, A. (2023) *Trudeau and Freeland up the ante on a clean economy,* CBC News, accessed online.
[2] An overview of the fossil fuel industry's history of deceptive advertising can be found: Environmental Law Centre (2023) *Reforming the Competition Act to Defend Climate: The Need to Regulate Deceptive Ads*, accessed online.
[3] European Commission (2020) *Environmental claims in the EU – inventory and reliability assessment*, accessed online; Australian Competition and Consumer Commission (2023) *Greenwashing by Businesses in Australia*, accessed online.
[4] Freeman, A. (2022) *Global executives suspect their own companies of "greenwashing*, Axios, accessed online.
[5] Ipsos Global Advisor (2021) *Climate Change and Consumer Behaviour*, accessed online. See also a 2020 study by Deloitte that spanned six countries (including Canada) that found that, due to their values on climate change: 35% of consumers changed

results in investment and innovation towards environmentally sustainable products with better outcomes for the environment, the climate, and our health.

Conversely, if greenwashing is allowed to proliferate, consumers will not be able to distinguish the good from the bad, thereby reducing the competitiveness of genuinely sustainable businesses and disincentivizing green innovation. Already, a majority of Canadians are suspicious of sustainability claims made by companies[6] and it is important to establish consumer confidence in such claims so that genuinely sustainable businesses can benefit from their efforts. Unchecked greenwashing can also undermine environmental action by our governments, by making them believe the private sector is tackling the problem effectively.

If systemic greenwashing is not addressed, investments in strengthening Canada's competitiveness in the clean economy will not lead to the desired results and we will be throwing good money after bad. The *Competition Act* must be made fit for purpose so it helps improve social welfare by delivering sustainable outcomes and reducing environmental market failures. Such market failures include cost externalities, where the negative externalities on the environment of production and distribution are not integrated into the product price. They also include consumer biases, where revealed market preferences do not reflect actual consumer welfare, and other linked supply-side market failures, such as coordination issues, which discourage green innovation.[7]

Environmental regulations and the internalization of externalities through mechanisms like carbon taxes are not, and have not been, able to move the needle sufficiently to achieve environmental and climate goals on their own, and are often slow and expensive to implement.[8] The state-market dichotomy is increasingly outdated; there is a broad realization that private actors have a key role to play in addressing environmental and climate goals. And, further, that competition policy can meaningfully address the market failures and coordination challenges of the transition, complementing the more traditionally envisioned state environmental regulation.[9] If there are not adequate market incentives for innovation, businesses may fail to meet the future needs of consumers and simply meet the current regulatory demands.[10]

In the following sections, we make a number of recommendations based on best practices from around the world to better enable the *Competition Act,* and the competition regime generally, to support Canada's transition to a low-carbon economy.

We start with the purpose clause (recommendations 1.1 and 1.2) before discussing our key recommendations on how the *Act* must be expanded to address green deceptive marketing as an

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their consumption habits and 22% of consumers switched to a company whose values aligned with theirs. Deloitte (2020) *Get Out in Front: Global Research Report* at p 31, accessed online.

[6] Labbé, S. (2023) *Do you trust a company's 'green claims'? If yes, you're a Canadian minority,* The Coast Reporter, online.

[7] Organisation for Economic Co-operation and Development ("OECD") (2021) *Environmental considerations in competition enforcement, OECD Competition Committee Discussion Paper* at p 47, accessed online.

[8] Kingston, S. (2021) *Introduction to Competition Law, Climate Change and Environmental Sustainability*, Forthcoming, Competition Law, Climate Change & Environmental Sustainability, accessed online.

[9] Volpin, C. (2020) *Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves)*, Social Science Research Network, accessed online. ("*Volpin - Sustainability as a Quality Dimension of Competition*")

[10] Zachmann, G. (2022) *The role of competition in the transition to climate neutrality*", *Working Paper,* 11/2022, Bruegel at p.13, accessed online; Kingston, S. (2019) *Editorial: Competition Law in an Environmental Crisis,* Journal of European Competition Law & Practice, Vol 10, No. 9, accessed online.

expansion of the current general prohibitions already in the *Act*. The deceptive marketing recommendations include:

- Amending the *Act* to designate certain representations as false and misleading in a material respect (Recommendation 2.1);
- Prescribing certain representations as misleading in all circumstances (Recommendation 2.2);
- Publishing guidance for environmental and climate claims (Recommendation 3.1);
- Defining business interests (Recommendation 4.1);
- Requiring environmental, climate, health and social impacts of a product to be based on adequate and proper testing (Recommendation 5.1);
- Making representations about the environment presumptively material (Recommendation 6.1); and,
- Expanding access to the Tribunal to any person for environmental deceptive marketing and expanding remedies available (Recommendations 7.1 to 7.7).

We then recommend establishing a sustainability taskforce at the Competition Bureau (the "Bureau") and formal market study powers (Recommendations 8.1 and 8.2). Finally we make recommendations to increase transparency related to deceptive marketing enforcement and to introduce sustainability considerations into cooperation agreements and mergers (Recommendations 9.1 to 11.4).

The time to act is now. We must pull every available lever to avoid the worst impacts of anthropogenic climate change[11] - competition reform is one of those levers. The impacts of climate change on the environment and on our health are already being experienced through higher temperatures, shifting rainfall patterns, and extreme weather events which we have seen lead to devastating heat domes, wildfires, flooding, landslides, and hurricanes.[12] Canada has committed, under both international law and domestic legislation, to climate action.[13] Other regulators and government bodies responsible for market and financial oversight are moving to address the risk of climate change in their respective areas.[14] Competition must do the same. We can no longer wait.

2. Amend the Purpose Clause to Recognize Sustainability and Important Environmental and Social Objectives

The purpose of competition law is not to promote competition for the sake of competition, but to promote a functional and fair marketplace that advances important social and economic objectives for

[11] Some future changes are unavoidable or irreversible, but can be limited by deep, rapid and sustained emissions reductions. Intergovernmental Panel on Climate Change (2023) *Synthesis Report: Summary for Policymakers,* at B.1, B.3, C1.2, accessed online.

[12] Government of Canada (2022) *Climate change adaptation in Canada,* accessed online.

[13] United Nations Framework Convention on Climate Change (2016) *The Paris Agreement*, art 2, accessed online; *Canadian Net-Zero Emissions Accountability Act,* SC 2021, c 22, accessed online.

[14] These steps are not sufficient alone to address climate change; however, see for example: Office of the Superintendent of Financial Institutions("OSFI") (2023) *Climate Risk Management: Guideline B-15,* accessed online; Bank of Canada and OSFI (2022) *Using Scenario Analysis to Assess Climate Transition Risk*, accessed online; Canadian Securities Administrators (2021), *Canadian securities regulators seek comment on climate-related disclosure requirements*, accessed online; Sustainable Finance Action Council (2022), *Taxonomy Roadmap Report*, accessed online.

the benefit of Canadians. The purpose clause of the *Competition Act* should be revised to reflect this reality.[15]

The protection of the environment, addressing climate change, as well as protecting and advancing human rights are objectives that the *Competition Act* is able to advance. As acknowledged by EU National Competition Authorities, a narrow price-centric view of consumer welfare[16] is no longer justified in the approach to competition. Rather, out-of-market costs and benefits (including environmental impacts) can be meaningfully integrated into competition analysis.[17] For example, Greece has recommended that competition authorities take a broader perspective of their aims and objectives embracing externalities and intergenerational effects, in addition to monetarily assessments.[18] Austrian antitrust law allows out-of-market efficiencies; environmental benefits do not need to be for relevant market consumers, but can benefit the broader society.[19]

Economic and non-economic environmental effects can be integrated into competitive assessments, including within the consumer welfare perspective.[20] While this balancing of (potentially conflicting) interests is not easy, our courts and competition authorities already do this and are well equipped to handle this balancing act and assess qualitative and quantitative evidence to this end.

The *Act* should advance environmental, climate, and social objectives because they are important in their own right, but also because consumers care about them and because they help companies participate in and benefit from the transition to a sustainable economy. Companies of all sizes around the world are taking action to advance such objectives, which means that Canadian companies must also integrate sustainability to remain competitive in domestic and global economies. These may be considered new objectives for competition law, however, as noted by the legal scholar Giorgio Monti:

> "*to-date no competition authority has deployed competition law in accordance with one unchanging set of aims – the goals of antitrust vary over time; even at the same time, the law can be pursuing different, even mutually contradictory, goals."*[21]

Therefore, the purpose clause should be amended to ensure the *Act* promotes sustainability and advances environmental, health, climate, and social objectives. These objectives can be effectively captured by reference to Canada's commitments in respect of the environment, health, climate change,

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[15] The Net-Zero Advisory Body has recommended that all federal agencies, departments and Crown corporations should play a more ambitious role in net zero objectives and mandates be changed if needed. Net-Zero Advisory Body (2023) First annual report to the Minister of Environment and Climate Change - Compete and succeed in a net-zero future at p 4, accessed online.
[16] The consumer welfare standard requires a narrow economic efficiency assessment entailing proof of quantified economic benefits for consumers within the relevant market.
[17] Malinauskaite, J. (2022) "Competition Law and Sustainability: EU and National Perspectives" in *Journal of European Competition Law & Practice*, *13*(5), pp 336-348, accessed online.
[18] OECD (2020) *Sustainability and Competition - Note by Greece,* DAF/COMP/WD(2020)64 at p 6, online.
[19] The translated provision states 'consumers shall also be considered to be allowed a fair share of the resulting benefit if the improvement of the production or distribution of goods or the promotion of technical or economic progress significantly contributes to an ecologically sustainable or climate-neutral economy. Dreher, M. (2021) "Amendment of Austrian competition law strengthens role of sustainability", *Freshfields Bruckhaus Deringer,* accessed online.
[20] OECD (2021) *Environmental considerations in competition enforcement, OECD Competition Committee Discussion Paper*, accessed online.
[21] Monti, G (2007) *Competition law: Policy perspectives*, EC Competition Law (Law in Context, pp. 1-19), Cambridge University Press, Cambridge.

and human rights (including Indigenous rights). These commitments include both those made domestically (in legislation or policy), as well as internationally (by treaty or other form of agreement).

Recommendations

1.1 Amend s. 1.1 of the *Competition Act* to state: The purpose of this *Act* is to maintain and encourage competition in Canada in order to promote the efficiency, sustainability, and adaptability of the Canadian economy…in order to achieve Canada's commitments in respect of the environment, health, climate change and human rights.

1.2 Amend s. 2(1) to define the 'environment' and 'sustainability' as those terms are defined in the *Impact Assessment Act:*[22]

environment means the components of the Earth, and includes:

(a) land, water and air, including all layers of the atmosphere;

(b) all organic and inorganic matter and living organisms; and

(c) the interacting natural systems that include components referred to in paragraphs (a) and (b).[23]

sustainability means the ability to protect the environment, contribute to the social and economic well-being of the people of Canada, and preserve their health in a manner that benefits present and future generations.

3. Strengthen the Deceptive Marketing Regime to Address Systemic Greenwashing

Greenwashing is a market distortion that is not sufficiently addressed in Canadian competition law. It can seriously distort the effective expression of consumer and social concerns about environmental issues. While consumers can drive change through their purchasing and spending power, they can only do so if clear and accurate environmental information is made freely available to them. Businesses need standards and guidance on environmental deceptive marketing so they are not left in murky waters about what types of claims they can make, face legal challenges or regulatory enforcement, or lose out to competitors whose greenwashing claims pervert the market.

Jurisdictions worldwide are clamping down on greenwashing, because deceptive environmental claims are both more damaging and insidious than other forms of deceptive marketing for many reasons including those related to economic and competition policy and those related to environmental and social policy.

Economic and competition policy reasons to address greenwashing include:

1. **Unfair competition.** Unchecked greenwashing forces legitimate green businesses to compete on an unfair basis with firms that have not borne the upfront cost of becoming more sustainable. This penalizes green businesses and can drive them out of business.

2. **Information asymmetry**. Unlike claims about product characteristics that consumers experience from interacting with the product, consumers have no ability to independently validate claims

[22] *Impact Assessment Act,* SC 2019, c 28, s 2 (definitions of "environment" and "sustainability").

[23] See similar definitions in the *Criminal Code,* RSC 1985, c C-46, s 2 (definition of "environment"); *Migratory Birds Convention Act, 1994,* SC 1994, c 22, s 2 (definition of "environment").

about the environmental and social impacts of a product because these are not experienced directly by the consumer. Impacts to health may be experienced directly but may be difficult to identify or may manifest over a long period. These are credence claims — consumers have to rely on the information provided by businesses, who are better placed to identify the impacts of their own products.

3. **Support consumer decision-making**. Consumers will not pay more for greener products unless they feel they can trust the claims and meaningfully compare the environmental quality with other products.[24] Greenwashing confuses and ultimately discourages consumers from buying green products and services, which seriously undermines and threatens consumer confidence in green claims, greener production practices and a net-zero economy.
4. **Stifles green innovation**. If companies can get away with greenwashing, there is no incentive to innovate and invest in truly green products and services. Developing new green products already faces disadvantages in trying to establish new markets or displace existing products.
5. **Exploits and magnifies consumer biases.** The shift towards more sustainable production and consumption practices is already hindered by consumer biases which lead to a mismatch between what consumers want and what they buy. These biases are magnified by greenwashing which discourages informed decisions.[25]
6. **Economic welfare impact.** False environmental claims cause increased pollution and environmental degradation with consequent welfare losses beyond the consumer of the product. These costs are distributed amongst potential consumers in the relevant market, those outside, as well as future generations.
7. **Global competition.** Other countries, including Canada's key trading partners in the UK, EU, and USA, are adapting their competition law to incorporate sustainability considerations and support the transition to a low-carbon economy. If Canada fails to act, we will lose competitive advantage in the global market.

Environmental and social policy reasons to address greenwashing include:

1. **Undermines government regulation.** If our governments are falsely led to believe that the market is effectively addressing climate change, then they will be less inclined to undertake climate action (via legislation, regulation, or policy) as necessary and may direct public resources towards supporting ineffective climate initiatives.
2. **Impacts on consumers' health.** False environmental claims lead to undisclosed health impacts on consumers, for example cosmetic products often contain harmful chemicals that consumers are unknowingly exposed through greenwash.[26] Consumer awareness would contribute to

[24] *Volpin - Sustainability as a Quality Dimension of Competition.*
[25] Biases include: Status quo bias, availability bias, anchoring bias, hyperbolic discounting, etc. other choice errors are associated with decisions related to long-time horizon planning, divergent futures, and complexities such as the carbon tax, future fuel prices etc, See OECD (2021) *Environmental considerations in competition enforcement, OECD Competition Committee Discussion Paper* at p.13, accessed online.
[26] Riccolo, A. (2021) T*he lack of regulation in preventing greenwashing of cosmetics in the US*. J. Legis., 47, p 133, accessed online.

phasing out such toxic ingredients altogether.

3. **Impacts workers' health.** Workers in green industries have reduced environmental exposures leading to increased health.
4. **Promotes environmental disinformation.** Greenwashing has other non-market effects, such as promoting disinformation regarding the causes and solutions to environmental crises such as climate change, which stifles public support for necessary action.
5. **Environmental, social, and cultural impacts.** False environmental claims cause increased pollution and environmental degradation, biodiversity loss, and profound cultural and social impacts. Not all of the impacts can be meaningfully calculated in economic terms, even when using best practices for social and environmental accounting. Everyone is impacted, but these costs are unevenly distributed and disproportionately impact Indigenous communities, as well as racialized and poor communities.

Following the best practices from jurisdictions around the world, the *Competition Act* should be amended to strengthen the deceptive marketing regime to better address greenwashing. This includes prohibiting specific types of greenwashing, making environmental claims presumptively material, ensuring environmental and social impacts are included as attributes of product quality, and enhancing the ability of individuals to advance legal challenges. Alongside these amendments, the Competition Bureau should issue new and modernized guidance on environmental claims for industry and advertisers.

3.1 Clear prohibitions against specific forms of greenwashing

Businesses and advertisers need clear direction about what types of environmental and climate related claims they can and cannot make without running afoul of the law. The most effective way of providing this direction - and signaling its importance - is to legislate the specific types of claims that can be made and to clearly lay out prohibited deceptive practices.

Legal prohibitions on specific types of greenwashing are necessary as:

1. The extent of greenwashing in the marketplace demonstrates that the current prohibitions in the *Act* against deceptive marketing are not effectively addressing greenwashing. The severity of the climate and environmental crises are significant enough to warrant strengthening the *Act* by providing a specific focus on greenwashing.
2. Statutory investigations into alleged misrepresentations are based on consumer applications and tax the limited capacity of the Bureau. This results in an enforcement regime that is reactive and slow - a piecemeal response to a systemic problem.
3. Complainants face the hurdle of making the case that a certain representation meets the legal test required by s. 52 and s. 74.01, and the Bureau must also undertake this analysis itself. Removing this step could make it easier for both complainants and the Bureau to address misrepresentations.

4. Guidance serves a complementary function to prohibitions by educating companies and consumers but, by itself, it is not sufficient to address this issue because it is not legally binding and does not convey the same degree of seriousness as a legal prohibition.[27]
5. Greater certainty about what types of greenwashing are prohibited serves both as an enabler of legitimate claims (encourages genuinely green production and marketing) and a deterrent for false claims and makes enforcement more effective.

The European Union ("EU") provides a useful example of how the *Act* might incorporate prohibitions against greenwashing. The EU's *Unfair Commercial Practices Directive* ("UCPD") includes general prohibitions against certain types of "unfair commercial practices" that materially distort the economic behaviour of a consumer. These practices include: misleading actions, misleading omissions, aggressive commercial practices, or the use of harassment, coercion and undue influence.[28]

However, the UCPD goes beyond providing a general prohibition and provides greater certainty by listing 31 specific practices that it regards as unfair in all circumstances.[29] In 2022, due to the extent of greenwashing in the marketplace, the EU decided to strengthen the rules to facilitate enforcement in this area[30] and proposes to add 10 more commercial practices that specifically relate to sustainability.[31]

Below, the EU's proposed 10 sustainability-related practices (with a few suggested modifications in italics) are set out, as we believe that they provide a good model for addressing greenwashing here in Canada and should be adopted here. We have also proposed additional practices that address issues that the EU's proposals do not address. A rationale is included for each.

These prohibitions seek to address anti-competitive behaviour and explicitly articulate practices that - if brought to the attention of the Bureau via a complaint under s. 9 of the *Act* - would be captured by the existing prohibition against misrepresentations. As such, they fall within federal jurisdiction and do not impair provincial constitutional authority; the only difference is that our recommendations offer a more targeted and effective approach than the *Act* currently offers.

Such specificity is not new to the *Act*. A previous amendment introduced provisions under s.52(1.3) to better tackle another deceptive practice - drip pricing - in which the government recognized that additional specificity was required to address a systemic problem. Further, s.78(1) provides a list of "anti-competitive acts", while the *Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service* provide additional examples of prohibited "anti-competitive acts" in the specific

[27] The need for legal prohibition as well as guidance is demonstrated by the fact that, while the Bureau´s (now archived) *Environmental Claims: A Guide for Industry and Advertisers* included some of the described deceptive practices below, they remain widespread.
[28] EU *Unfair Commercial Practices Directive,* 2005/29/EC, accessed online, ("*EU Unfair Commercial Practices Directive"*), articles 5-9.
[29] *EU Unfair Commercial Practices Directive,* Annex I.
[30] European Commission (2022) *Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU - Explanatory Memorandum,* accessed online.
[31] European Commission (2023) *Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information*, accessed online ("*EU UCPD Amendment Proposal*").

context of domestic services. The specificity provided by these provisions make it much easier to identify and address the impugned behaviour.[32]

To avoid excessive detail within the *Act* itself and to allow the Minister greater flexibility in keeping the *Act* up-to-date and responsive to new forms of greenwashing, the prohibitions should be included in regulation.

Recommendations

2.1 Insert a provision in s. 52 of the Act that states: "For greater certainty, in this section and in sections 52.01, 52.1, 74.01 and 74.011, representations that are considered to be false and misleading in a material respect in all circumstances may be prescribed by regulations."

2.2 Establish a regulation under s. 128(1) of the *Act* and include the following representations that are misleading in all circumstances:

Proposed prohibition	**Rationale & Additional Notes**
1. Displaying a sustainability label *in relation to a product, service, or company* which is not based on a certification scheme or not established by public authorities.	Sustainability labels are effective ways for companies to represent their sustainability-related attributes and distinguish themselves from competitors. However, consumers are often faced with labels that are not always transparent or credible, including "self-certification" schemes. The EU has proposed a "Green Claims Directive" to ensure the quality of environmental labels (a type of sustainability labels).[33] The Minister should review the Green Claims Directive, particularly the requirements for environmental labels in Articles 7 and 8, and include similar requirements in a new regulation under the amended Act.
2. Making a generic environmental claim *in relation to a product, service, or company* for which the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim.	Consumers are often faced with unclear or poorly substantiated environmental claims. The term "generic

[32] See for example the following piece which posits that US Federal Trade Commission guidance needs to become binding regulation. Rotman, R. et al (2020) *Greenwashing No More: The Case for Stronger Regulation of Environmental Marketing,* Administrative Law Review, Vol 72, No 3, pp 417-443, accessed online.

[33] European Commission (2023) *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on substantiation and communication of explicit environmental claims (Green Claims Directive),* accessed online.

	environmental claim" should be defined in the regulation.[34] Examples of such claims can be provided in the regulation and explained further in accompanying guidance.[35] The regulation should specify that "excellent environmental performance" can be demonstrated by compliance with regulation, recognized eco-labelling schemes, or applicable laws.[36]
3. Making an environmental claim about the entire product*, service, or company* when it actually concerns only a certain aspect of the product*, service, or company*.	A product may have a variety of environmental impacts, some positive and some negative. Companies often produce several types of goods and services, some of which are better for the environment than others. However, it is misleading to cherry-pick a positive environmental claim and use it to represent the entire impact of a product, service, or business while not disclosing significant negative environmental impacts.
4. Presenting requirements imposed by law on all products*, services or businesses* in the relevant ~~product~~ category on the ~~Union~~ market as a distinctive feature of the trader's offer. 4.1 A commercial practice shall also be regarded as misleading if…it involves: advertising benefits for consumers that are considered as a common practice in the relevant market.	A requirement that is imposed by law (or is a common practice) and, therefore, applies to all similar products, services, or businesses, is not a feature that companies should be able to use to distinguish themselves or their products or services. Stopping this practice will encourage companies to innovate and go beyond the requirements of the law, distinguish themselves by this extra effort, and be rewarded by consumers as appropriate.
5. Omitting to inform the consumer that a software update will negatively impact the use of goods with digital elements or certain features of those goods even if the	Practices that cause the early obsolescence of goods negatively impacts the consumer (e.g. replacement costs) and the environment (e.g. increased material waste).

[34] *EU UCPD Amendment Proposal: "generic environmental claim"* means any explicit environmental claim, not contained in a sustainability label, where the specification of the claim is not provided in clear and prominent terms on the same medium.
[35] For example: 'environmentally friendly', 'eco-friendly', 'eco', 'green', 'nature's friend', 'ecological', 'climate friendly', 'gentle on the environment', 'carbon friendly', 'carbon neutral', 'carbon positive', 'climate neutral', 'energy efficient', 'biodegradable', 'biobased', 'conscious' or 'responsible'.
[36] *EU UCPD Amendment Proposal*.

software update improves the function of other features.	
6. Omitting to inform the consumer about the existence of a feature of a good introduced to limit its durability.	Practices that cause the early obsolescence of goods negatively impacts the consumer (e.g. replacement costs) and the environment (e.g. increased material waste).
7. Claiming that a good has a certain durability in terms of usage time or intensity when it does not.	Providing better information on products' durability or lifespan has been identified as an important option to empower consumers in the green transition.
8. Presenting products as allowing repair when they do not or omitting to inform the consumer that goods do not allow repair in accordance with legal requirements.	The repairability of a product is an attractive feature to consumers and helps promote the circular economy. It is important, therefore, that consumers receive reliable information about the repairability of a good.
9. Inducing the consumer into replacing the consumables of a good earlier than for technical reasons is necessary.	Such practices mislead the consumer into believing that the goods will no longer function unless their consumables are replaced, thus leading them to purchase more consumables than necessary. (An example of a "consumable" is an ink cartridge for a printer.)
10. Omitting to inform that a good is designed to limit its functionality when using consumables, spare parts or accessories that are not provided by the original producer.	This could lead to unnecessary repair costs, waste streams or additional costs due to the obligation to use the original producer's consumables which the consumer could not foresee at the time of purchase.
11. Making an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and an independent monitoring system.	Pledges to achieve targets in the future are greenwashing unless they are accompanied by credible, independently verified implementation plans. For a claim like "net-zero by 2050" this means a fully-costed plan that covers all Scope 1, 2, and 3 emissions, is based on existing and viable technology, and is accompanied by accountability mechanisms (e.g. interim targets and annual reporting). Several reputable assurance standards exist for net-zero

	claims[37] and a United Nations expert group has released recommendations for net-zero claims by businesses and financial institutions.[38]
To this list, we would add the following deceptive practices:	
12. Environmental claims about fossil fuel products and fossil fuel transport and environmental claims about the businesses which produce them.	It is impossible to claim anything environmentally positive about fossil fuel products (e.g. coal, oil, and gas) or fossil fuel transport (e.g. internal combustion vehicles, boats, and planes) without misleading people. For example, this would prohibit a car company from making green adverts about gasoline cars and their business while they make gasoline cars, but it could still make a green advert about their electric cars (which are not fossil fuel transport).
13. Claiming that buying carbon credits will offset emissions associated with a product, service, or company.	A carbon credit is a payment to the costs of a carbon credit project that stores carbon dioxide or reduces emissions from deforestation/land use change (e.g. planting trees or protecting forests). This carbon credit is then used by the payor to say it has 'offset' or compensated a certain quantity of its GHG emissions (usually 1 tonne per credit). Carbon credits cannot compensate for GHG emissions for two reasons: 1) Drastic emissions reductions are required to address climate change and there are far more emissions than natural sinks (e.g. forests) and artificial means (carbon capture and storage). Achieving our climate goals requires both urgently reducing emissions and enhancing natural sinks, so relying on one in place of the other does not work; and

[37] For example: Science Based Targets Initiative, the Partnership for Carbon Accounting Financials, The Paris Agreement Capital Transition Assessment, The Transition Pathway Initiative, the International Organization for Standardization.

[38] United Nations' High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities (2022) *Integrity Matters: Net-Zero Commitments by Businesses, Financial Institutions, Cities, and Regions*, accessed 22 March 2023 online. ("*UN Expert Group - Report on Net-Zero Commitments*")

	2) One tonne of carbon offset is not equivalent to one tonne of emissions because offsets suffer from issues with "additionality" (which is whether the emissions savings would have happened without the credit) and "permanence" (which is whether the storage of carbon will last as long as is necessary to help address climate change). Further, carbon credits offer a means to "green" a high-carbon product/activity, which promotes their continued use and associated emissions. It also acts as a barrier to green innovation and societal transformation.[39]

3.2 Guidance on the use of green terms for industry and advertisers

To support compliance with the prohibitions against greenwashing in the Act, the Bureau should provide consumers, advertisers, and businesses with guidance on environmental claims. This would serve as a practical, user-friendly resource that outlines the Bureau's interpretation of the Act with examples of the types of claims that can - and cannot - be made. This is particularly important for consumers and small and medium-sized businesses who may lack the legal expertise to interpret and apply the legislation themselves.

The Bureau last published environmental claims guidance for industry and advertisers in 2008 and archived the guidance in November 2021.[40] Since 2008, the science and understanding around environmental claims has evolved and new terms (e.g. "net-zero") have emerged that are very popular, hard to understand, and are being frequently misused in advertising. Updated guidance is required.

Several jurisdictions provide guidance on the use of sustainability-related claims that outline key principles or rules to follow and examples of claims that are (and are not) allowed. There are a number of similarities between the examples.

The UK Competition and Markets Authority ("CMA") has published a Green Claims Code that sets out six principles to give businesses greater clarity about how the CMA thinks the law translates into practice and what this means for businesses making environmental claims.[41] Claims must:

1) Be truthful and accurate
2) Clear and unambiguous
3) Not omit or hide important relevant information
4) Be fair and meaningful
5) Consider the full lifecycle of the product or service; and
6) Must be substantiated.

[39] ClientEarth (2022) *Briefing: Legal risks of carbon offsets*, accessed 22 March 2023 online.
[40] Competition Bureau Canada & Canadian Standards Association (2008) *Environmental Claims: A Guide for Industry and Advertisers*, accessed online.
[41] UK Competition & Markets Authority (2021) *Making environmental claims on goods and services,* accessed online.

The Dutch Autoriteit Consument & Markt[42] and the New Zealand Commerce Commission[43] have both published guidelines for businesses making sustainability and environmental claims and include similar principles as the UK.

The US Federal Trade Commission ("FTC") is currently seeking public comment on potential updates to its Green Guides, which were last updated in 2012.[44] These guides help marketers ensure that the claims they make about the environmental attributes of their products are truthful and non-deceptive under the *Federal Trade Commission Act*. The FTC is seeking input on issues that we believe are also relevant to Canadian consumers, including carbon offsets and climate change.

Given the existential nature of the climate crisis, net-zero claims deserve particular scrutiny and guidance. The United Nations High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities ("UN Expert Group") has recently released clear and robust guidance on net-zero commitments by non-state entities (i.e. businesses, financial institutions, cities, and regions).[45] Chaired by Catherine McKenna, former federal Minister of the Environment, the UN Expert Group noted the important role of non-state entities in addressing climate change, stating that:

> "*Non-state actors - industry, financial institutions, cities and regions - play a critical role in getting the world to net zero no later than 2050. They will either help scale the ambition and action we need to ensure a sustainable planet or else they strongly increase the likelihood of failure. The planet cannot afford delays, excuses, or more greenwashing.*"[46]

The UN Expert Group's guidance is based on credible existing initiatives like the Science Based Targets initiative[47] and the UN's Race to Zero[48] and makes 10 practical recommendations to bring integrity, transparency and accountability to net zero by establishing clear standards and criteria. These recommendations should inform the Bureau's updated guidance.

A recent report by Ecojustice, Shift:Action, and Environmental Defence also notes the importance of financial institutions and large corporations in Canada developing "credible climate plans" and describes the essential elements of such plans:

1) Target: set targets that align the financial institution's activities with limiting [global] warming to 1.5°C;
2) Plan: implement programs and policies to deliver on targets; and

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[42] Dutch Autoriteit Consument & Markt (2021) *Guidelines regarding sustainability claims*, accessed online. The guidelines outline five "rules of thumb": 1) Make clear what sustainability benefit the product offers; 2) Substantiate your sustainability claims with facts, and keep them up-to-date; 3) Comparisons with other products, services, or companies must be fair; 4) Be honest and specific about your company's efforts with regard to sustainability; and 5) Make sure that visual claims and labels are useful to consumers, not confusing.

[43] New Zealand Commerce Commission (2020) *Environmental Claims Guidelines: a guide for traders,* accessed online. The guidance outlines the following: 1) Be truthful and accurate; 2) Be specific; 3) Substantiate your claims; 4) Use plain language; 5) Do not exaggerate; 6) Take care when relying on tests and surveys; and 7) Consider the overall impression. It also discusses "lifecycle claims" about the composition, production, and disposal of products, as well other common environmental claims (comparative, branding, certification stamps.

[44] US Federal Trade Commission (2022) *FTC Seeks Public Comment on Potential Updates to its 'Green Guides' for the Use of Environmental Marketing Claims*, accessed online.

[45] *UN Expert Group - Report on Net-Zero Commitments.*

[46] *UN Expert Group - Report on Net-Zero Commitments,* p 7.

[47] Science Based Targets Initiative (2023) *The Net-Zero Standard*, accessed online.

[48] United Nations (2023) *Race To Zero Campaign*, accessed online.

3) Report: report to regulators annually on progress against targets.[49]

Recommendation
3.1 The Competition Bureau should draft and publish new guidance for environmental and climate claims.

3.3 Scope of prohibitions against misrepresentations

Sections 52 and 74.01(1)(a) of the *Competition Act* address false or misleading representations and deceptive marketing practices in the promotion of the supply or use of a product or any business interest. These prohibitions form the central measures that the Act uses to address misrepresentations, and are relied on by the Bureau and complainants to address greenwashing.

As currently drafted, these provisions fail to adequately address greenwashing because they employ a narrow interpretation of key terms and omit environmental, social, and health impacts as relevant product qualities. Further, enforcement of these provisions relies largely on an application process to an under-resourced Bureau that takes several years to complete and lacks transparency.

3.3.1 Ensure that the prohibition against false and misleading representations captures all relevant business interests

To be prohibited under s. 52 and s. 74.01(1)(a), representations must be false and misleading "in a material respect" and for the purpose of promoting "the supply or use of a product or service" or "any business interest."

Whether a representation is misleading in a "material respect" has been interpreted by the courts to focus on the extent of influence of the representation on purchasing decisions of consumers.[50] The problem is that this is just one type of business interest that a company may seek to promote, therefore, enforcement that focuses solely on consumer transactions could make it difficult to address environmental representations that unfairly promote other business interests that also lead to market distortions.

For example, a company might make a representation about its environmental reputation or company-wide impact on the climate in order to obtain social license to operate, influence political and regulator decisions that affect its operations, or attract potential financing and other business support to enable its operations. These are all business interests, the advancement of which could improve the position of a company within the marketplace.

Fortunately, the plain language meaning of the term "material respect" may not be the problem as it does not tie the term to consumer transactions or any particular type of business interest. Further, the courts have stated that the term "business interest" be given wide meaning.[51] It may be the case that all cases to-date about representations have dealt with consumer transactions and, as a result, the term "material respect" has only been defined to-date in connection with purchasing decisions.

[49] Ecojustice et al. (2022) *Roadmap to a Sustainable Financial System in Canada*, accessed online.
[50] *Commissioner of Competition v Sears Canada Inc*, 2005 CACT 2 ("*Sears Canada*"), paras 333-335.
[51] *Apotex Inc v Hoffmann La-Roche Ltd*, 2000 OJ No 4732 ("*Apotex*"), paras 13-14 (ONCA).

Nevertheless, we believe that it is necessary to resolve this ambiguity by defining "business interest" in the Act to make it clear to companies and consumers that the prohibitions in s. 52 and s. 74.01(1)(a) apply to all types of business interests.

Recommendation

4.1 Amend the definitions in s. 2 to include:

"business interests" means, but is not limited to, consumer transactions, corporate reputation, financial and other support, and political and regulatory decisions.

3.3.2 Require adequate and proper tests for environmental, climate, health and social impact claims

The prohibition in s. 74.01(1)(b) against representations that are not based on adequate and proper tests are focused on specific characteristics that the consumer will experience themselves: performance, efficacy, or length of life of a product. The prohibition omits key product characteristics that consumers care about but have to rely on the company for information: environmental, climate, health, and social impacts.

The characteristics currently listed in the s. 74.01(1)(b) are those that consumers will experience themselves as they use the product. It will be relatively apparent to them whether the product performs as advertised, creates the advertised result, or lasts as long as advertised. However, the environmental, climate, health and social impacts of a product are not impacts that consumers will necessarily experience themselves or be able to establish a direct link to their use of the product.

For example, consumers will - most likely - be unable to determine the regional environmental issues or impacts where the product is manufactured. They will not be able to measure the carbon emissions from the manufacture, transport, use, or disposal of the product. They will not be able to assess the health and safety conditions of labourers. And it can be hard to identify link health effects experienced by the consumer directly to the use of a product.

To understand these impacts, the consumer has to rely on the representations of the company and the tests that the company has undertaken to measure these impacts. There is a significant information asymmetry that exists between the company and the consumer with respect to an understanding of environmental, climate, health and social impacts and this gap is larger than with other types of product characteristics.

It is important, therefore, that companies are required to ensure that any representations they make about environmental, climate, health and social impacts of the products and services are based on adequate and proper tests. And further, that they can be penalized under the *Act* for failing to do so.

The EU is considering taking similar steps to ensure that companies do not deceive consumers about the environmental and social impacts of products. The EU's UCPD currently lists a number of product characteristics about which a trader should not deceive a consumer. The EU proposes to amend this list by adding "environmental and social impact", "durability", and "repairability".[52]

Recommendation

[52] *EU UCPD Amendment Proposal*, article 6(1).

5.1 Amend s.74.01 to read:

(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,

…

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy**,** ~~or~~ length of life, **or environmental, climate, health, or social impact** 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; …

3.3.3 Specify that representations about the environment, climate, and health are material

Given the serious and widespread nature of greenwashing and the broad societal costs associated with its practice, it is important to signal as clearly as possible that greenwashing is prohibited. The more clear that this is stated in the *Competition Act*, the more likely that companies will avoid running afoul of the legislation and the more straightforward it will be for complaints to file greenwashing complaints and/or the Bureau to respond to complaints or prosecute greenwashing itself. Confirming in the *Act* that representations about health, the environment, and climate change are always "material" is an effective way to signal that greenwashing is prohibited.

As currently understood, a misrepresentation is material if it is so important, pertinent, germane, or essential that it could affect the decision of a consumer to purchase the product.[53] In *Canada (Commissioner of Competition) v Sears Canada Inc*, the court considered three factors to determine the materiality of misrepresentations:

1. the evidence that consumers consider the subject of the representations when making purchasing decisions;
2. the magnitude of the misrepresentations; and
3. the limited ability of the consumer to assess the accuracy of the representations.[54]

As we note above, consumers do care about the environment and climate change when making decisions. Regarding magnitude, the serious nature of the climate crisis and other environmental issues (such as biodiversity loss) means that any misrepresentation that even slightly exacerbates these crises is de facto of high magnitude. Finally, the information asymmetry between companies and consumers about the environmental and social impacts of products and services mean that it is very difficult for consumers to assess the accuracy of environmental claims.

The US FTC considers some types of representations presumptively material and thus unlawful. For example, claims that "significantly involve health, safety, or other areas with which the reasonable consumer would be concerned" are presumptively material.[55] A presumption of materiality also applies to express claims for which the seller knew (or should have known) that an ordinary consumer would need omitted information to adequately evaluate the product or service, and that the omission would

[53] *R v Tege Investment Ltd* (1978), 51 CPR (2d) 216 at para 7; cited and adopted by *Canada (Sears Canada* at para 334); *Apotex* at para 16.
[54] Factors adapted from considerations applied in *Sears Canada* at paras 338-41.
[55] US Federal Trade Commission (1984) *FTC Policy Statement on Deception*, accessed online.

mislead a consumer.[56] Similarly, under certain conditions the Commission can infer materiality from implied claims.[57]

Therefore, it would be beneficial to clarify in the *Act* that representations about the environment, climate, and health should automatically be considered "material".

Recommendation
6.1 Insert a provision in s.74.01(1) that states: "For greater certainty, representations about the environment, including the climate or greenhouse gas emissions, and health are material".

3.4 Expand the public's ability to challenge greenwashing

There must be meaningful ways for consumers to challenge greenwashing, but currently the civil recourse and investigatory processes are cumbersome and present barriers. The *Act* should expand access to private redress to increase mechanisms for enforcement by expanding the avenues to challenge greenwashing of products and businesses.

Section 36 of the *Competition Act* provides access to civil litigation for false or misleading claims under s. 52. To be successful, the consumer must prove that the representations were made knowingly or recklessly, which is a higher standard in law. The consumer must also prove they suffered damages by obtaining less value than expected based on the representations, and as such suffered damage causally connected to the misrepresentation.[58] The requirement to prove damages for false and misleading statements related to alleged environmental benefits can be challenging,[59] which presents a barrier for many greenwashing claims. It is difficult for a consumer to demonstrate that they acquired less value than expected, particularly for general or vague greenwash claims about a product (i.e., 'eco-friendly') or corporate greenwash claims (i.e., 'Paris-aligned'), as these statements are not tied to the performance of a product.

Private greenwashing litigation is important as not only does the Bureau have limited capacity to investigate complaints and undertake court actions itself, but also as its investigatory and complaint process is opaque and largely excludes the complainant. For an issue as globally important and market impactful as greenwashing, there must be transparent and viable mechanisms for individuals to challenge false and misleading environmental practices in a public forum. Similar to the legal principle applicable to courts, justice must be done and must also be seen to be done.[60] Therefore, not only must there be laws against deceptive marketing, but there must be credible and public avenues of enforcement to uphold these laws.

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[56] *FTC Policy Statement on Deception*
[57] *FTC Policy Statement on Deception. See also* Removatron Int'l Corp., 111 F.T.C. 206, 306-07 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); Am. Home Prods. Corp., 98 F.T.C. 136, 368 (1981), *aff'd*.
[58] *Drynan v Bausch Health Companies Inc*, 2021 ONSC 6423 at paras 179, 180, leave to appeal dismissed, 2022 ONSC 1586 (Div Ct).
[59] See for example *MacKinnon v Volkswagen Group Canada, Inc.,* [2021] OJ No 4879 (SCJ), rev'd, [2022] OJ No 4353 (Div Ct).
[60] *Named Person v Vancouver Sun,* [2007] 3 SCR 253 at para 32.

The *Competition Act* should allow individuals to advance litigation for deceptive environmental marketing to a court, including the Tribunal,[61] without needing to prove causation and damages and without having to prove knowing or reckless behaviour. Allowing individuals to bring deceptive environmental marketing claims before the Tribunal is an extension of current provisions that already allow individuals access to the Tribunal for other competition matters, and that already allow the Tribunal to make determinations on deceptive marketing claims.[62] The provisions of the *Act* should be expanded to allow any person to apply to the Tribunal for leave to bring claims for environmental deceptive marketing practices, as long as the matter is not already the subject of an inquiry or has been settled.

An example of legislation that grants a broad private right of action is the British Columbia *Business Practices and Consumer Protection Act,* which allows any person, whether or not they have purchased a company's product or services or suffered harm from those products or service, to advance a proceeding against that company.[63] The *Competition Act* needs a similar mechanism, and one that allows the court to grant the same remedies as it would in a proceeding by the Commissioner.

The available relief should also be expanded to ensure the enforcement is able to provide, to the fullest extent possible, an adequate remedy and deter future deceptive marketing. The *Act* should allow courts to order a payment of redress in the collective interest when there is wider environmental harm from the deceptive marketing practice, like when products are sold using misleading environmental claims. This remedy was a mechanism recommended by the UK CMA.[64]

If deceptive marketing causes harms to particularly sensitive components of the environment, such as protected species at risk, higher awards should be granted. We would recommend considering giving the court discretion to award the person advancing the claim to recover damages. The Tribunal should also be permitted to order contracts annulled and restitution to be available for deceptive practices.[65]

[61] Section 74.09 of the *Act* defines "court" broadly to encompass the Tribunal, Federal Court, or the superior court of a province.
[62] *Competition Act*, RSC 1985, c C-34, ss.74.09, 74.1, 103.1.
[63] *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s.172.
[64] Competition & Markets Authority (March 14, 2022), *Environmental sustainability and the UK competition and consumer regimes: CMA advice to the Government*, online. This recommendation is not yet law.
[65] The Competition Bureau also recommends an expansion of these remedies. Competition Bureau (2023) *The Future of Competition Policy in Canada* at s 4.4, accessed online.

Recommendations

7.1 Add s. 103.1.1 that "Any person may apply to the Tribunal for leave to make an application under section 74.1(1) for matters related to environmental, including climate, deceptive marketing practices."

7.2 Add s. 103.1(7.2) on granting leave such that "The Tribunal may grant leave to make an application under section 74.1 if the matter

(a) is not subject to an inquiry by the Commissioner, and

(b) was not the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order is sought.."

7.3 Amend s. 74.1(1) and s. 74.1(9) to add "...on application by the Commissioner or a person granted leave under section 103.1.1…".

7.4 Remove the limitation in s. 74.1(1)(d) that restitution is only available for conduct reviewable under s. 74.01(1)(a), so that it is available for all deceptive marketing practices, such as making unsubstantiated performance claims about a product.

7.5 Add s. 74.1(1)(e) to allow a court, having determined that there has been reviewable conduct, to order a payment of redress in the collective interests when there is broader environmental harm associated with the reviewable conduct.

7.6 Add s.74.1(1)(f) to allow a court, having determined that there has been reviewable conduct, to order damages payable.

7.7 Add s.74.1(1)(g) to allow a court, having determined that there has been reviewable conduct, to cancel contracts.

4. Administration and Enforcement

4.1 Increase Powers and Capacity

To be effective, businesses and consumers must have confidence that competition law, policies and standards are supported by strong regulatory action. To increase the strength of, and confidence in, the enforcement and administration of green competition issues, the Bureau's powers and capacity must be enhanced. The six-applicant inquiry process is a key tool in the public interest that appears to instigate the vast majority, if not all of the Bureau's green deceptive marketing inquiries. This process should not be removed or weakened.

The Bureau should establish a sustainability taskforce to ensure Canada is a leader and not a laggard on green competition issues and help combat the skepticism and confusion related to unregulated sustainability claims.[66] The creation of branches with expertise in emerging issues is not new to the Bureau.[67] In the UK, the CMA established a cross-organizational sustainability taskforce to be a focal

[66] Brouwer, A. (2016) *Revealing Greenwashing: A Consumers' Perspective*, International Conferences on Internet Technologies & Society, Educational Technologies, and Sustainability Technology, and Education, p.245, accessed online.

[67] For example, the Digital Enforcement and Intelligence Branch was created as a center of expertise to help the Bureau.

point for policy issues relating to sustainability. Their taskforce leads engagement, develops internal thinking and maintains a network of experts, as well as providing advice to its government and drafting guidance.[68] We recommend doing the same.

Canada's competition regime would also benefit from the Bureau having market studies powers and increased capacity enjoyed by competition authorities in other jurisdictions, allowing proactive investigation and assessment of green issues.[69] Although the Bureau says it takes environmental claims seriously and will take action on the laws under its purview,[70] its approach to enforcement appears merely reactive to consumer complaints and its guidance for industry environmental claims is outdated and archived. In our experience, it takes 2-3 years for an application for inquiry to be resolved, all while the greenwash continues.[71] In contrast, the Australian competition regulator announced in March 2023 it would be investigating firms after a sweep of the internet showed that over half of businesses were making concerning environmental or sustainability claims.[72]

Recommendations

8.1 Establish a sustainability taskforce in the Competition Bureau.

8.2 Empower the Commissioner of Competition to formally carry out market studies.

4.2 Increase Transparency

There is a lack of transparency related to Bureau applications and the outcomes of inquiries. It is unclear how many applications for inquiry under s.9 of the *Act* are filed, how many applications trigger an investigation and the outcomes of all of those inquiries. For 2022, only one deceptive marketing inquiry case outcome is listed on the Bureau's website.[73] Similarly, there is no information on the number or results of complaints the Bureau receives on deceptive marketing.

Due to the public interest nature of environmental claims[74] the Bureau should publish the outcomes - with reasons - of all deceptive marketing environmental applications received under s.9 as well as other complaints, regardless of the result. Repealing the requirement under s.10(3) of the *Act* that inquiries must be conducted in private would also increase transparency as the Bureau could provide information

[68] UK Competition and Markets Authority (Feb 2023) *Press Release: New guidance to help businesses co-operate on environment*, accessed online.

[69] OECD (2016) *OECD Economic Surveys: Canada* at p 109, online; The Bureau's submission also recommends that it should have the formal power to undertake information-gathering for market studies. See Competition Bureau (2023), *The Future of Competition Policy in Canada* at s 5.2, accessed online.

[70] Competition Bureau Canada (2021) *Environmental claims and greenwashing*, accessed online.

[71] For example the application for inquiry into the advertising of wipes as "flushable" was submitted in May 2019, and discontinued in February 2022, the Keurig coffee pods recyclability misleading advertising application was submitted in May 2019 and the decision made in January 2022, the RBC misleading climate action advertising application was submitted in April 2022 and is unresolved as of March 2023,and the CSA forest certification standard application was submitted in July 2021 and is also unresolved as of March 2023.

[72] Australian Competition & Consumer Commission (2023) *ACCC 'greenwashing' internet sweep unearths widespread concerning claims,* accessed online.

[73] Government of Canada, *Deceptive marketing practices - cases and outcomes*, accessed online.

[74] *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41 at para 84. The Supreme Court of Canada noted that "by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection").

to the public related to the nature and progress of investigations, while maintaining confidentiality under s.29 of the *Act*.

Recommendations

9.1 On the Bureau's website, publish all s.9 applications received by the Bureau, provide notice of whether an inquiry has commenced, and publish the outcomes and related reasons.

9.2 On the Bureau's website, publish summaries of complaints made outside of the s.9 process and make public the outcomes of such complaints.

9.3 Repeal s.10(3) of the *Act*.

5. Competitor Collaborations

Exemptions to allow sustainability agreements

The private sector has a crucial role in accelerating and enabling shifts towards sustainability and climate resilient development.[75] Cooperation agreements can help reach sustainability goals faster, in a more cost-efficient way and in a manner that overcomes demand-side market failures.[76] In some cases, it may be advantageous for competitors to collaborate in undertaking environmental action, such as phasing out environmentally damaging products, services, and processes. Development of new innovation can be costly and time consuming particularly for emerging or small businesses. Absent cooperation, the first mover disadvantages may stifle green innovation, particularly when unchecked greenwashing distorts the market. The *Act* should be amended, and the Bureau should issue guidance, to ensure that competition law does not impede collaboration between private actors that is necessary to further environmental protection and sustainability.

Currently, the *Act* chills sustainable collaboration by:

1. making it an offence under s.45(1) to conspire, agree or make arrangements with respect to price and the production or supply of products, and
2. empowering the Tribunal under s.90.1(1) to constrain agreements that substantially lessen competition.

These provisions, particularly without guidance, can impede cooperation to phase out environmentally damaging products or processes. It discourages agreements aimed at establishing environmental standards, coordination to reduce environmentally harmful substances, and sharing the costs of environmental protection measures. For example, it has been reported that concerns about such antitrust rules hindered the Net Zero Insurance Alliance from adopting commitments to exit coal insurance.[77] The Bureau has not provided guidance to businesses on sustainability agreements, and its Competitor Collaboration Guidelines are silent on sustainability and the environment.

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[75] Intergovernmental Panel on Climate Change (2023) *Synthesis Report: Summary for Policymakers* at C1.2, accessed online; Kingston, S. (2019) *Editorial: Competition Law in an Environmental Crisis,* Journal of European Competition Law & Practice*,* Vol 10, No. 9 at p.517, accessed online.

[76] Dolmans, M, et al (2022) *New EU Guidelines for Horizontal Agreements: A Changing Climate for Sustainability Cooperation?*, *Oxford Business Law Blog,* accessed online.

[77] Marsh, A. (2022), "Antitrust laws could fracture insurers' net-zero pledges" in *PropertyCasualty360,* accessed online.

Canada should reintroduce the environmental defence to conspiracy claims. It should also follow the lead of other jurisdictions and amend the *Act* to allow agreements that are in the public benefit for environmental and sustainability progress, even if there is a lessening of competition.[78]

For example, UK competition law allows agreements that lessen competition when there is a benefit related to production, distribution, and technical or economic progress.[79] The UK CMA recently published draft guidance on sustainability agreements for consultation. The draft guidance states that the benefits of sustainability agreements can include:

- eliminating or reducing harmful effects from production or consumption that the market has not addressed (like reducing greenhouse gas emissions),
- creating new products with reduced environmental impact, and
- creating economies of scale for environmentally sustainable products.

The draft guidance also includes specific direction on climate change agreements "where a more permissive approach is adopted" that would take account of the benefits to all UK consumers (instead of only the consumers of the product or service in question) when balancing the harm to competition against the benefits that result from the agreement.[80]

The UK CMA's draft guidance also flags that the CMA will help provide clarity to businesses, provide informal advice (which, if followed, militate against fines), and that it "will not take enforcement action against environmental sustainability agreements, including climate change agreements, that clearly correspond" to the examples and principles in the sustainability agreements guidance.[81] Businesses are expected to evaluate the environmental benefits/negative effects as well as effects on competition to demonstrate the benefits are substantial enough to offset any harm caused.[82] By operating from a view that it is important not to impede legitimate collaboration between businesses to promote or protect environmental sustainability, the UK competition regulator is supporting a resilient economy that can grow sustainably.[83]

The Bureau should also issue guidelines to businesses to provide clear guidance on the application and scope of cooperation. The European Commission has published guidelines on the application of existing

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[78] E.g. Austria, New Zealand, and Australia include consideration of the public benefit of agreements in competition law:
The *Austrian Cartel Act* bans agreements that impair competition but has an exemption for agreements that improve the production or distribution of goods or to promote technical or economic progress while allowing consumers a fair share of the resulting benefit. "Benefits" include those that contribute to an ecologically sustainable or climate-neutral economy. *Federal Act against Cartels and other Restrictions of Competition (Federal Law Gazette I No. 61/2005)* at § 2. (1), 2(2), accessed online.
In New Zealand, the environment and health are both recognized as public benefits (or detriments) that the competition authority may consider in assessing competitor agreements.
Australian law allows the regulator to consider whether gains in efficiency constitute a public benefit that outweighs the public detriment from substantial lessening of competition. Australian Competition and Consumer Commission (2017), *Merger Guidelines* at s 7.66, accessed online.

[79] *Competition Act, 1998 (UK)*, 1998, c 41 at s 9.

[80] According to Dr Michael Grenfell, Executive Director of Enforcement at the UK Competition and Markets Authority, this reflects the fact that climate change represents a special category of threat. Greenfell, M. (2023), *Can we protect the environment and keep the benefits of competition?*, Economist Impact, accessed online.

[81] UK Competition and Markets Authority (Feb 2023) *Draft guidance on the application of the Chapter I prohibition in the Competition Act 1998 to environmental sustainability agreements,* accessed online*, ("UK CMA - Draft Guidance on Sustainability Agreements")* at paras 1.4, 1.13, 1.14, 1.15, 7.1-7.14.

[82] *UK CMA - Draft Guidance on Sustainability Agreements,* at paras 5.4, 5.23, 5.24.

[83] *UK CMA - Draft Guidance on Sustainability Agreements,* at paras 1.3 and 1.4.

rules on horizontal agreements and includes a chapter on agreements that "genuinely pursues one or more sustainability objectives."[84] There is a specific exemption in the EU applicable to the agricultural sector which allows competitors to collaborate in ways they might not otherwise be allowed when certain sustainability objectives are being pursued.[85] Other horizontal sustainability agreements are not exempt, however; the EU guidance describes situations when such sustainability agreements would not raise competition concerns. It details how typically sustainable standardization agreements are unlikely to produce appreciable negative effects on competition.[86] Under the legal framework sustainability agreements that have anti-competitive impacts can still be justified under the general rules applicable to all horizontal agreements.

Recommendations

The Act should remove the barriers to legitimate sustainable cooperation, which could be accomplished through the following.

10.1 Amend the *Competition Act* to insert an environmental defence to conspiracy claims under s. 45. The defence that existed in earlier versions of the *Act* could be used, i.e., "Subject to subsection (4), in a prosecution under subsection (1), the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to measures to protect the environment."

10.2 Add s. 90.1(2)(i) to the *Act* to allow the Tribunal to have regard to "any effect of the agreement or arrangement on the environment, including whether the agreement supports Canada's goals on the environment, including climate, and sustainability".

10.3 Add s. 90.1(4.1) to the *Act* to include public benefit considerations, particularly as it relates to the environment and sustainability. For example: "The Tribunal shall not make an order under subsection (1) if it finds that the agreement or arrangement has brought about or is likely to bring about public benefit through positive environmental, including climate, or sustainability progress, that outweighs the potential harm."

10.4 The Bureau should issue guidance on environmental sustainability agreements, including climate change agreements, providing further information to businesses, including on their approach to enforcement.

[84] European Commission (2022) *Annex: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* ("*EU Horizontal Agreements Guideline*") at para 547, p 132, accessed online.

[85] EU Monitor (2021), *Legal provisions of COM(2018)394 - Amendment of Regulation 1308/2013 establishing a common organisation of the markets in agricultural products and of four other regulations on agriculture* at article 210a, accessed online. Corresponding draft guidelines have also been published. European Commission (2023), *Sustainability agreements in agriculture - consultation on draft guidelines on antitrust exclusion*, accessed online.

[86] The EU Guideline also describes that if sustainable standardization agreements do raise appreciable negative effects on competition, that the parties may still be able to proceed if they prove matters related to efficiency gains, indispensability, pass on of a fair share of benefits to consumers (including individual use value benefits, individual non-use value benefits and collective benefits) and a non-elimination of competition. *EU Horizontal Agreements Guideline* at pp 138-144.

6. Mergers

The environment as a public benefit or detriment should be considered in mergers

To ensure mergers in our marketplace align, and do not hinder, our national environmental, climate, and human rights goals, the *Act* should be amended to empower the Tribunal to consider and impose conditions on mergers for the broader public benefit.

A recent example of a merger that raised public benefit concerns related to climate change is the bid by the Royal Bank of Canada ("RBC") to purchase HSBC's Canadian unit. Both RBC and HSBC have been found or accused of misleading consumers by making false promises about their climate action while financing the primary driver of climate change, fossil fuels.[87] Allowing this acquisition without consideration of, and imposition of conditions to address, the greenwashing impact of the merger undermines efforts to stamp out greenwashing and address climate change. As these are financial entities, the *Act* allows the Minister of Finance to consider the public interest in assessing the merger; however, the *Act* currently provides no such public benefit consideration to the Tribunal or Commissioner.[88]

Canada's competition law should follow the lead of other countries and incorporate the public benefit into its assessment of notifiable transactions and mergers.[89] This can further innovation, such as in Germany where the public interest in the energy transition and the environment justified overriding concerns around a merger's anti-competitive impacts on the supply of bearings as there was a potential to develop key technologies for wind energy generation.[90] In New Zealand, the competition authority may permit restrictive trade practices and can grant mergers and agreements that substantially lessen competition if it finds sufficient public benefit outweighing the harm. The "public benefit" includes anything of value to the community generally and any contribution to the aims pursued by the society, including benefits or detriments related to the environment, health, and social welfare.[91] Canada's

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[87] Ecojustice represented Stand.earth in submitting a letter to the Minister of Finance opposing the RBC purchase of HSBC unless there were conditions to restrict greenwashing and manage climate change risks. See Letter, *Re Proposed Acquisition of HSBC Canada by the Royal Bank of Canada,* dated December 7, 2022. In October 2022 The Bureau opened an inquiry into a complaint under the *Competition Act* that RBC had made false and misleading statements about its action on climate change. Also in October 2022, the UK Advertising Standards Authority concluded that HSBC had made misleading climate related advertisements.

[88] *Competition Act,* s. 94(b). Note that the Minister of Transport may also consider public interest grounds for matters within its sector (see s. 94(c)).

[89] Examples of countries that include public benefit in assessment of mergers:
Poland: the competition authority applies the public interest test as a usual part of merger proceedings on a regular basis.Competition & Markets Authority (2016) *Public Interest Regimes in the European Union - differences and similarities in approach* at p 3, accessed online.
South Africa: the competition legislation considers the impact of a merger on the public interest (Norton Rose Fulbright (2021) *Merger Control 2022: South Africa,* 18th Edition, accessed online).
Germany, UK, Spain, and France: ministers have the ability to intervene in exceptional merger cases on issues of public interest that are not connected with competition enforcement. Fabien Zivy (2013) *Making merger control simpler and more consistent in Europe: a "win-win" agenda in support of competitiveness* at p 44-45, accessed online; Competition & Markets Authority (2016) *Public Interest Regimes in the European Union - differences and similarities in approach* at pp 3-4, accessed online.
See also OECD (2021) *Environmental Considerations in Competition Enforcement: Background Paper by the Secretariat* at p 43/63, available online; OECD (2020) *Sustainability and Competition - Note by Australia and New Zealand*, accessed online.

[90] OECD (2021) *Environmental Considerations in Competition Enforcement: Background Paper by the Secretariat* at p.44/63, accessed online.

[91] *Commerce Act 1986* (New Zealand) No 5, at s. 61(6); New Zealand Commerce Commission (2022) *Mergers and Acquisition Guidelines*, at p.5, accessed online; New Zealand Commerce Commission (2020) *Authorisation Guidelines*, at pp.3, 10, 13, accessed online. Similarly, in Spain the protection of the environment is explicitly outlined as a ground of general interest that

competition law should incorporate similar public interest matters on environmental protection, and the consideration of human rights, health impacts, and Indigenous reconciliation must also form part of this assessment.

When making competition decisions regarding mergers, the Tribunal should systematically assess the environmental and social impact as part of its consumer welfare analysis, and whether a reduction or increase of competition will likely increase or reduce the environmental burden on consumers.[92] To aid in this, businesses should be required to provide information on public benefit of notifiable transactions to the Commission, which should include data such as the emissions impact of the merger, as well as known issues or concerns related to environmental harm, allegations of deceptive marketing, and potential impact on Indigenous rights.

Recommendations

Incorporate public benefit considerations into the merger analysis and provide the Tribunal the ability to impose conditions to remedy concerns for the public benefit. This could be accomplished as follows:

11.1 Add a provision to the *Act* that includes public benefit considerations as a supplement to the efficiency defence. For example, a new s. 96.1 might state:

"The Tribunal shall not make an order under s. 92(1) if it finds that the agreement or arrangement has brought about or is likely to bring about a net public benefit that outweighs the potential harm."

11.2 Require the Tribunal to consider and make orders for the public benefit in assessing mergers by adding s. 92(1)(g), which may read:

"The Tribunal

(i) shall consider whether it is necessary to make orders requiring any party to the proposed or completed merger or any other person to take or restrain from taking certain action to ameliorate any negative impacts to, or protect, the public benefit arising from the proposed or completed merger; and,

(ii) may order any party to the merger or proposed merger or any other person to take or restrain from taking action to ameliorate negative impacts to, or protect, the public benefit from the proposed or completed merger.")

11.3 Add s. 91.1 to the *Act* to define "public benefit" as including "environmental protection, including progress towards, and not hindrance of, Canada's environmental and climate commitments and the furtherance of human rights, including Indigenous rights and reconciliation."

11.4 Amend the *Notifiable Transaction Regulation*, SOR/87-348, s.16(1) to include a new provision as subsection (e) to require each party and affiliates to provide information on matters that positively or negatively impact the public benefit, including impact of the merger on greenhouse

may be considered by Ministers in assessing mergers. *Ley 15/2007,* de 3 de julio, de Defensa de la Competencia at Chapter II (of the economic concentrations), articles 10(4)(d), 60, accessed online; Guerra, A. et al. (2022) *Merger Control in Spain: Overview*, Thomson Reuters, accessed online.

[92] Dolmans, M. (2020) *Sustainable Competition Policy,* Competition Law and Policy Debate CLPD, *5*(4), accessed online.

gas emissions, as well as complaints, legal and regulatory proceedings, and known issues or concerns related to environmental harm, allegations of deceptive marketing, and any foreseen impact on human rights, including Indigenous rights.