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FOSTERING SUSTAINABILITY USING THE EXISTING TOOLBOX: ENVIRONMENTAL EFFECTS IN CANADIAN COMPETITION LAW*

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Over the last few decades, a debate has formed surrounding whether competition law should take into account sustainability considerations. This paper is not intended to answer this normative debate. Instead, it focuses on the precursor question: can the current iteration of the Competition Act successfully consider environmental goals in its competitive analysis? Although not expressly contemplated in section 1.1 of the Competition Act, this paper argues that, in light of recent amendments to the Competition Act and enforcement actions around the globe, environmental effects can be considered in the competitive analysis framework through the efficiencies defence, green "killer acquisitions," competitor collaborations focusing on sustainability, standard setting in abuse of dominance allegations, and "greenwashing." Nonetheless, if environmental objectives are pursued through the Competition Act, less emphasis should be placed on the enforcement of abuse of dominance and competitive collaboration provisions until further guidance from the Competition Bureau can be issued due to a lack of clarity in these areas. Conversely, the Competition Bureau should instead focus its efforts on deceptive marketing claims and mergers, as these two areas for review create less tension between environmental objectives and competition goals, and are the most likely to have a lasting, positive effect on competition and sustainability.

Voilà quelques dizaines d'années que s'est amorcé en droit de la concurrence un débat normatif quant à savoir s'il faudrait tenir compte de questions de durabilité, débat que cet article ne prétend pas venir clore. Nous nous intéresserons plutôt ici à une question qui aurait dû se poser avant même la présente discussion : la Loi sur la concurrence, dans sa version actuelle, intègre-t-elle bien les objectifs environnementaux dans son cadre d'analyse de la concurrence? Cet aspect n'est pas explicitement mentionné à l'article 1.1, mais nous présenterons l'argument voulant qu'à la lumière des récentes modifications à la Loi et des mesures prises par les autorités autour du globe, la question environnementale ait sa place dans l'analyse de la concurrence par la défense fondée sur les gains en efficience, l'acquisition prédatrice de concurrents, les collaborations entre concurrents dans une visée de développement durable, l'établissement de normes dans les dossiers de potentiel abus de position dominante et les tentatives de « verdissement » d'image.

Quoi qu'il en soit, si l'on admet la défense d'objectifs environnementaux dans l'application de la Loi sur la concurrence, il ne faudra pas prioritiser l'abus de position dominante et la collaboration entre concurrents jusqu'à ce que l'on reçoive des éclaircissements du Bureau de la concurrence à leur sujet. Par ailleurs, le Bureau devrait concentrer ses énergies sur le problème des fusions et des allégations commerciales trompeuses : en effet, ces deux domaines présentent peu de risques de conflit entre les objectifs en matière d'écologie et ceux en matière de concurrence, les interventions ayant alors le plus de chances d'être nettement bénéfiques à long terme pour l'environnement comme pour la concurrence.

I. Introduction

In the last decade, the consequences of global warming and climate change have become well-recognized by the international community. This has resulted in a prominent position for sustainability concerns on the agenda of international organizations, states, and private businesses.[1] This increasing focus on global warming and climate change has shifted consumer preferences towards environmentally friendly goods and services.[2] Accordingly, the green quality of products is gradually becoming a parameter of competition and increasingly driving consumer demand. Where previously climate change and sustainability concerns were primarily confined to politics and environmental law, in recent years they have traversed into other legal spheres that were traditionally unrelated to the environment.[3] This has led to increased calls for competition policy to assist in promoting pro-competitive and sustainable business conduct.[4]

The Canadian *Competition Act*[5] (the "***Act***") does not currently include a provision specifically pertaining to the promotion of sustainability or environmental considerations.[6] This has resulted in a lively debate as some scholars have argued that the purpose of the *Act* in section 1.1 should be revised to allow competition law to be applied for the purpose of environmental protection.[7] Others, however, reject this premise and contend that the Competition Bureau (the "**Bureau**") is not the appropriate body to consider environmental goals.[8] Instead, these scholars argue that it would be more effective to use targeted legislation and other government agencies to address specific environmental objectives.[9]

This paper, however, is not intended to address this larger, normative question of whether competition law is the most appropriate vehicle through which to consider environmental effects and therefore, whether section 1.1 of the *Act*[10] should be amended explicitly to consider this potential new goal.

To answer this question properly, an assessment of the *Act* is necessary first, to determine whether and to what extent environmental effects can be considered within the existing competitive analysis framework. Therefore, to provide sufficient background for those looking to engage in this normative discussion, this paper will provide an overview of where sustainability may be considered within the current iteration of the *Act* and the tensions that develop when analyzing environmental goals alongside existing competition objectives.

This paper will argue that the *Act* is capable of considering environmental effects in its competitive analysis framework. However, the tension between the goals of the *Act* and sustainability may, in some situations, result in the consideration of environmental effects compromising the purpose of the *Act*. Therefore, it will be argued that although the *Act* may consider sustainability in its analysis, there are certain provisions that are better suited for considering these effects, such as those devoted to deceptive marketing and mergers. Due to the potential for alignment between competition and sustainability goals, these two provisions are the most likely to have a positive effect on both competition and the environment. Thus, sustainability goals should be primarily pursued in the competition law context, if at all, through the deceptive marketing and merger provisions of the *Act*. Conversely, the consideration of sustainability goals in the abuse of dominance and competitive collaboration provisions is more likely to require forbearance on the part of the Bureau in situations where they might otherwise take enforcement action but may refrain from doing so if sustainability goals are the primary or a significant purpose of the impugned actions. A lack of clarity regarding enforcement in these areas may lead industries to avoid entering into agreements designed to promote sustainability if they might also lessen competition. Similarly, arguably dominant firms may also refrain from setting environmentally friendly standards, for example, for fear of being accused of abusing their dominant position. Therefore, greater guidance from the Bureau in these areas is necessary before they can be used effectively as a vehicle through which to combat concerns regarding environmental degradation.

In developing this argument, Section II will begin by discussing the sometimes—irreconcilable nature of competition and sustainability goals as well as the tension that this creates when considering environmental effects. Section III will then argue that the current competition law framework in Canada is flexible enough to consider environmental effects specifically when analyzing the efficiencies defence, green "killer acquisitions,"[11] sustainable competitor collaborations, standard setting in abuse of dominance

allegations, and "greenwashing."[12] Finally, for completeness, Section IV will briefly engage with the normative debate discussed above to argue that competition law enforcement authorities should be cautious when analyzing environmental effects, especially when an extension of the *Act* beyond its current bounds is required. Furthermore, to the extent that the current competitive framework is suitable for contemplating environmental effects, greater guidance is necessary from the Bureau to ensure that firms feel confident in taking steps to address sustainability in their business and will continue to pursue green competition.

II. The Tension: Competition Law and Sustainability

At present, the *Act* does not include any provisions pertaining directly to the promotion of sustainability or environmental considerations.[13] More specifically, the stated objectives of Canadian competition policy, outlined in section 1.1 of the *Act*, do not explicitly mention the role of competition law in combatting harmful actions towards the environment. Section 1.1 states,

> "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."[14]

When considering the ambit of section 1.1, the Federal Court of Appeal ("**FCA**") in *Tervita Corporation v Commissioner of Competition* held that an environmental purpose cannot be read into the *Act*.[15] To attribute an environmental purpose to the *Act*, the Court wrote, would contradict the legislator's original intent and would be inconsistent with the expertise of the Competition Tribunal.[16] However, this is not to say that environmental effects connected to economic effects cannot be considered. The FCA only considered those environmental concerns having no immediate economic impact as falling outside of the scope of the *Act*'s purpose.[17]

In light of the FCA's ruling in *Tervita*, a debate has emerged as to whether the *Act* is an appropriate vehicle to promote sustainability and thereby, to combat climate change. Some scholars argue that section 1.1 of the *Act* should be amended to allow the Bureau to act for the purpose of advancing environmental protection.[18] Others dismiss this argument, contending instead that the Bureau is not the appropriate body to consider

environmental goals[19] and it would be more effective to use targeted legislation and other government agencies to specifically address objectives related to the environment.[20] However, these opposing scholars do not argue that environmental effects should never be considered when assessing anti-competitive and pro-competitive effects, such as in the case of mergers.[21] Instead, their main argument against the explicit discussion of sustainability goals in section 1.1 is that the current goals of the *Act* and environmental objectives are often in tension and therefore, the consideration of environmental effects may harm the achievement of the current objectives outlined in section 1.1, thus undermining the efficacy of the "purpose" clause as a guide to the interpretation and enforcement of the *Act*.

Nonetheless, there are indications that the objectives of competition law and Canada's environmental goals may not always be irreconcilable.[22] Competition law can produce outcomes that have significant sustainability benefits, such as ensuring that natural resources are efficiently allocated and used.[23] For example, competition policies, such as the 2022 amendments to section 93 of the *Act* (which specifically instructed the Competition Tribunal to consider the impact of a merger on non-price aspects of competition),[24] that aim at improving quality, including the sustainable quality of products, increasing choice, and stimulating green innovation, may advance environmental goals as well as create more competitive markets.[25] Thus, as will be discussed further below, there are areas of competition law where environmental goals and sustainability may complement and even promote the stated objectives of the *Act*.

A) The Interdependence of Competition and Environmental Goals

In its 2021 Report, "Environmental Considerations in Competition Enforcement," the OECD highlighted two situations where competition law can play an important role in fighting climate change.[26] First, competition law may advance the goals of environmental protection when conduct that is found to be anti-competitive also results in environmental damage.[27] For example, enforcement measures against a standard-setting cartel due to its potential to reduce competition through the promotion of standards may, in some circumstances, also have the inherent benefit of ensuring that more sustainable and innovative firms are not pushed out of the market and are able to continue to promote environmental goals. These types of cases allow competition law to act interdependently with sustainability without any conscious decision on the part of the Commissioner of Competition (the "**Commissioner**") to advance environmental objectives.

Second, where consumer preferences favour more environmentally-friendly products and services, increased competition may assist in advancing environmental goals as companies are likely to increase their supply and adjust their investments to capture a larger share of this greener demand.[28] The amplified preference of consumers towards environmentally-friendly products will also increase their willingness to pay, thereby incentivizing companies to invest in greener products, increasing market differentiation in this space.[29] Therefore, through maintaining competitive markets, the *Act* indirectly promotes environmental objectives when consumer preferences align with more sustainable products. Accordingly, to the extent that investing in greener initiatives can provide companies with a competitive advantage, the creation of a more competitive market will also combat climate change.[30]

B) The Misalignment Between Competition and Environmental Goals

Nonetheless, the common sense inference for some is that competition policies are intrinsically at odds with environmental protection because increased competition is usually associated with higher output and lower prices, which supports overconsumption of limited environmental resources.[31] There are generally three conditions, all or some of which may be present at the same time, where a more competitive market may not provide the incentives necessary for companies to invest in sustainability, placing competition law at odds with environmental protection goals.

First, companies may face a first mover disadvantage and will not invest in greener production or processes if they fear they will be undercut by their rivals. They will instead choose to free ride on the advantage gained by other firms being the first movers in this area.[32] Although this market failure can be overcome through coordination between businesses, there is a fine line between pro-competitive and anti-competitive collaboration, as will be discussed further below. This uncertainty is further exacerbated by the limited guidance from the Bureau in this area which may well result in firms shying away from cooperation despite the potential environmental benefits due to fear of inadvertently entering into an anti-competitive collaboration.

Second, environmental objectives will not be advanced through competitive markets where demand for a sustainable alternative may exist, but it is not high enough to cover the fixed costs of production required to create the product or to allow the company to achieve sufficient scale.[33] As a result, it

is likely that these sustainable alternatives will not be produced due to high costs and the inability to reach necessary scaling.

Finally, competitive markets will not promote environmental goals in situations where consumers, though potentially motivated by sustainable choices, still opt for less environmentally friendly alternatives. This often results from free-riding by some consumers on the behaviour of others as they rely on them to make more sustainable choices instead of making the choice themselves.[34] This decreases demand for sustainable alternatives and in the long-run decreases the supply of these products, thereby harming the environment and decreasing product differentiation as well as consumer choice.

C) The Challenges with Considering Environmental Effects

Aside from the potential market failures resulting from inconsistencies between competition and environmental goals, one of the main criticisms levelled at the contemplation of sustainability objectives within competitive assessments is that the analysis of non-economic effects would fall outside the mandate of competition authorities, thereby harming their legitimacy.[35] Accordingly, many associate the idea of incorporating non-economic environmental effects into competitive analysis as being more in line with populist or neo-Brandeisian views of antitrust.[36] As long as Canadian competition law does not adhere directly to these views, authorities may face some challenges in applying environmental considerations in the traditional competitive assessment framework.[37] This section will provide an overview of some of these challenges.

The first challenge that competition authorities may face in analyzing the environmental impact of conduct within the existing competition law framework is determining how environmental effects should be considered and to what extent.[38] Although environmental considerations are often seen as being difficult to analyze due to their qualitative nature, in practice there are relatively limited difficulties when the environmental effects being evaluated are captured by looking to non-price dimensions of competition.[39] In cases where sustainability effects are easily categorized as economic, while the effects may be more complex to quantify due to their potentially non-pecuniary and more subjective nature, there are still well-accepted methods of quantification that can be used to assess the environmental effects.[40] The difficulty is in analyzing environmental effects that do not have easily cognizable economic dimensions, especially when these must be compared to economic effects.[41] For example, the Tribunal may have difficulty

comparing the effects of a merger that is likely to result in a decrease in the quality of environmental performance of a given product but may also decrease shipping costs through vertical integration by 15%. This inherent difficulty is primarily why the FCA in *Tervita* considered those environmental concerns having no economic impact as falling outside of the scope of the *Act*'s purpose.[42]

The second challenge for competition authorities is determining the correct timeframe for the assessment of environmental effects.[43] This is important because the timeframe for analysis can significantly affect the outcome of the assessment.[44] For example, in the United States car emissions case, the Department of Justice opened an investigation against four vehicle producers who had signed a voluntary agreement in California to impose environmental standards above the federal legal requirements. [45] In this case, if the competition authorities considered a shorter time frame for their analysis of the environmental effects, the focus of the analysis might have been on the increase in prices and elimination of choice for consumers wanting to buy cheaper, more environmentally-friendly cars as a result of the cooperation. If, instead, a longer timeframe had been used, the competition authorities may have also considered the reduction in harmful emissions from the use of less polluting cars as well as cost savings for individuals from reduced fuel consumption and the positive impact on green innovation.[46] Therefore, depending on whether the test is "harm to consumers", "harm to competition" or "public interest", authorities have to make a judgement call and adopt the timeframe that is most appropriate. However, the timeframes used by agencies may not always be able to accurately capture the reality when it comes to environmental effects, which may well prove difficult for authorities to navigate.[47]

III. Evaluating Sustainability in the Existing Framework

As outlined above, the sustainability-competition debate puts competition agencies in a difficult position, especially when the objectives of the two areas are in tension. Nonetheless, where these goals align, it is possible for competition agencies to consider environmental effects within the current competitive analysis framework. In this section, the interplays between competition policy and environmental objectives will be further fleshed out by analyzing the efficiencies defence, green "killer acquisitions," competitor collaborations, abuse of dominance, and greenwashing conduct through the deceptive marketing provisions, to determine where and how environmental effects can be considered within the current iteration of the *Act*.

A) Mergers

At the 2022 Green Growth Summit, the Commissioner noted that one important area of intersection between competition law and environmental objectives is the merger review process.[48] Under the *Act*, the Bureau has jurisdiction to review transactions that fall within the definition of a "merger" in section 91[49] and to challenge such transactions on the basis that they prevent or lessen, or are likely to prevent or lessen, competition substantially, under section 92.[50] In order to determine whether a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially, a variety of factors, outlined in section 93 of the *Act*, may be considered.[51]

Although environmental effects are not expressly discussed in section 93, there are two potential situations within merger analysis that may illustrate how and where sustainability may be considered. The first is where the merging parties' raise the efficiencies defence under section 96 of the *Act*. This defence is an affirmative claim by the merging parties that although their merger is anti-competitive and will prevent or lessen competition under section 92, the efficiencies that will result from the merger outweigh and offset those anti-competitive effects.[52] The second is a "green killer acquisition". This specific type of merger occurs when an incumbent firm acquires an innovative target that has a focus on sustainability with the intention of terminating the development of the target's innovations to prevent future competition.[53] Each of these cases will be discussed in turn below.

i) The Efficiencies Defence

Even if a merger is found to be likely to prevent or lessen competition substantially under section 92,[54] it may still be saved if the efficiencies defence in section 96 of the *Act* can be proven on a balance of probabilities.[55] As such, "the onus of alleging and proving that efficiency gains from the merger will be greater and will offset the effects of any prevention or lessening of competition resulting from the merger falls upon the merging parties."[56] The analysis under section 96 therefore requires determining "whether the efficiency gains of the merger, which result from the integration of resources, outweigh the anti-competitive effects, which result from the decrease in or absence of competition in the relevant geographic and product market."[57]

The efficiencies defence is Parliament's recognition that the integration of the activity between two firms following a merger may result in productive efficiencies due to real cost savings in resources, allowing firms to increase

output or produce better quality products from the same amount of input.[58] Such efficiencies can, for example, take the form of reduced production costs enabled by less resource-intensive production methods or lower transportation costs.[59] However, the efficiencies defence also captures more than just productive efficiencies, including allocative efficiency (i.e., the degree to which resources available to society are allocated to their most valuable use) and dynamic efficiencies (i.e., the optimal introduction of new products and production processes over time).[60] The efficiencies defence further acknowledges Canada's large geography, comparatively small population, and the need for Canadian businesses to effectively compete in the global marketplace.[61] Accordingly, "[i]n the context of the relatively small Canadian economy, to which international trade is important, the efficiencies defence is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition."[62]

a) The Consideration of Environmental Effects in Tervita

Although the *Act* does not expressly indicate whether a merger's environmental effects should be considered as part of the efficiencies defence, the Supreme Court of Canada ("**SCC**") in *Tervita* clarified the scope of section 96 when analyzing qualitative effects, such as environmental objectives.[63]

In overturning the FCA's decision, the SCC in *Tervita* established that the Commissioner has the burden of quantifying (or at least estimating[64]) any quantifiable anti-competitive effects of a proposed merger when an efficiencies defence has been raised.[65] That quantification or estimate must be grounded in evidence that can be challenged and weighed.[66] Failure to do so, the Court held, will result in a zero weight on all quantifiable effects that the Commissioner failed to quantify.[67]

The quantification burden that this decision effectively created has been heavily criticized by many as it has been argued that this preference for quantifiable effects has created a hierarchy of evidence that has the potential to place even low-quality quantitative evidence above convincing qualitative evidence in evaluating any anti-competitive effects.[68] Some scholars also argue that, even though the change seems to have been driven by procedural fairness,[69] the current adversarial system does enough to ensure the credibility of evidence such that the requirement for quantification is unnecessary.[70] Moreover, the distinction between qualitative and quantitative evidence is not as simple in practice as, in theory, all competitive effects are in some way quantifiable.[71] Finally, it has been questioned why the Commissioner, rather than the parties, is required to set the target to be met in developing

evidence of efficiencies.[72] Although this may minimize subjectivity, it is not clear whether the Commissioner is in the best position to provide the evidence. However, there is also nothing to suggest that the merging parties would be any better at producing this evidence.[73] As a result of these concerns, there has been fear following the SCC's decision in *Tervita* that the requirement for quantitative evidence will be detrimental to the recognition of both competitive and anti-competitive environmental effects in the analysis of the efficiencies defence in the future.[74]

Some scholars have also raised trepidations that the emphasis on quantifying effects could have consequences beyond the efficiencies defence, limiting the agreements that businesses might decide to enter into for purposes of promoting sustainability.[75] Although not explicitly discussed in the SCC's decision in *Tervita*, there are questions regarding whether the consideration of environmental effects in the context of the efficiencies defence can be expanded into the greater merger analysis when determining whether there is a substantial lessening or prevention of competition. While environmental effects on their face may not have a place within this part of the analysis, it remains open as to whether pro-competitive effects of a merger that are protective of the environment as well as anti-competitive effects that result in environmental harm, might also be considered, especially with the newly added consideration of non-price effects in subsection 93(g.3). The addition of this new factor in section 93 will allow the Tribunal to consider non-price environmental effects which may include, for example, increases in the quality of environmentally friendly cleaning products or the addition of a new environmentally conscious waste disposal business line, which could increase consumer choice and therefore increase competition. Despite the addition of the non-price factor in section 93, it is clear that the effect of the merger on competition would need to be the primary consideration in the Commissioner's analysis. Accordingly, it is unlikely that environmental effects alone could be incorporated as a significant piece of the general merger analysis framework.

b) The Elimination of the Efficiencies Defence

The potential frustrations with the analysis of the efficiencies defence are not only at issue when environmental effects are at play. The Bureau has often voiced its distaste with the defence more generally due to its difficult and expensive analysis process, which has not landed on deaf ears within Parliament.[76] Therefore, although the efficiencies defence is the only provision in the *Act* where environmental effects have been explicitly considered, the future of the efficiencies defence is grim. In early March 2023, the Bureau

released "The Future of Competition Policy in Canada", its submission to the Innovation, Science and Economic Development Canada's consultation on the future of competition policy in Canada (the "**Consultation**").[77] In its submission, the Bureau contended that the efficiencies defence is no longer supportable and is inconsistent with international practices. Accordingly, the Bureau recommended that the efficiencies defence be eliminated and a new section 93 factor be added to allow for the consideration by the Tribunal of efficiency gains in determining whether a merger substantially lessens or prevents competition.[78] Despite the Bureau's submission and similar calls from the Canadian Bar Association to add a factor in section 93 if the efficiencies defence were to be eliminated, Bill C-56, which was introduced into Parliament on September 21, 2023, did not include a new section 93 factor for efficiency gains along with the elimination of the efficiencies defence in section 96.[79] Although at the time of writing the Bill has not yet been passed, it is anticipated to do so and the opposition bills tabled by both the NDP[80] and the Conservatives[81] would also do away with it (although the NDP bill does add it as a factor to consider when assessing the likely competitive impact of the merger). Thus, recent events provide a clear signal that the efficiencies defence and the potential for considering efficiency gains as a section 93 factor may prove little to no help in furthering environmental goals in the future.

ii) Green Killer Acquisitions

Innovation drives economic growth and firm profitability. This often makes innovative firms the target of acquisitions by incumbents, typically in the early stages of product development.[82] These types of acquisitions are commonly referred to by scholars as "killer acquisitions".[83] Traditionally, killer acquisitions have been viewed by economists as positive because firms that are better at exploiting technologies acquire innovative targets to realize synergies, effectively enabling specialization and subsequently increasing innovation and overall welfare.[84] However, relatively recently a different motive for acquiring innovative firms has been suggested. This theory of harm argues that an incumbent firm may acquire an innovative target with the intention of terminating the development of the target's innovations to pre-empt future competition.[85] The acquiring firm might find it more profitable to buy and shut down a nascent firm's product rather than suffer the loss in revenue it expects to incur when the nascent firm's product matures (even if it would "cannibalize" its own sales after the acquisition).[86] These start-up or nascent firms play a vital role in competitive markets and therefore, if subject to killer acquisitions, there is a loss of not only a competitive constraint, but also increased product choice in the market.[87]

The risk that a loss of potential competition can harm consumers is well established.[88] Therefore, with the increasing demand for greener products from consumers, it is no surprise that an increasing number of mergers have been driven by an environmental rationale and impact, including so-called "green killer acquisitions".[89] This theory of harm sees incumbents acquiring more sustainable competitors with the aim to alleviate competitive pressure to produce greener or less polluting products or services.[90] Beyond the resulting effects on competition, these kinds of mergers may also drive up prices and lead to less use of these greener products thereby damaging the environment.[91] The harm associated with this practice is heightened when green innovation is carried out by smaller players as the merger may not be notifiable to competition authorities, allowing the action to potentially go unchecked.[92]

a) The Difficulty with Challenging Green Killer Acquisitions

Although green killer acquisitions do not necessarily raise novel competition law issues, panelists at the Bureau's Green Growth Summit in September 2022 suggested that they may warrant increased scrutiny in merger review.[93] Despite the potential harm associated with these types of mergers, it is quite difficult for the Bureau to monitor the marketplace and discover them in the first place. As the concept of green killer acquisitions is the acquisition of a nascent firm, these mergers often do not trigger the notification threshold in the *Act*. In its submission to the Consultation, the Bureau noted that "only five acquisitions made by the largest tech firms – Google, Apple, Amazon, Facebook and Microsoft – were notified under the *Act* in the past decade".[94] Accordingly, even though the Commissioner can challenge mergers that are non-notifiable, these types of transactions often fly under the radar and are not caught by the Bureau for review in the first place.

Moreover, the challenging of killer acquisitions is often difficult.[95] In Canada, the Commissioner must identify, on a balance of probabilities, "concrete market opportunities" that an emerging competitor is likely to exploit before remedies will be available due to the anti-competitive nature of the transaction.[96] Additionally, the SCC in *Tervita* held that the correct approach to section 92 requires a consideration of more than 'mere possibilities' of events in the future with due weight given to business judgment.[97] The Bureau has expressed that proving this can be difficult, if not impossible, when a business is still developing the products that would challenge other competitors, as is the case with these types of acquisitions.[98] Emerging green competitors may pose a potential threat to dominant firms and may

become a threat over only a short period of time due to their exponential growth.[99] However, discerning and proving that an acquisition of a very new firm with small or non-existent sales is a threat to competition may be challenging.[100]

It has been argued that serial acquisitions of this type (i.e., a series of small acquisitions over time) may actually be better tackled through the recently expanded abuse of dominance provision in section 79, which will be discussed in more detail below.[101] This approach would examine a series of killer acquisitions to establish that the firm adopted a strategy of acquiring emerging green competitors to prove that it abused its dominant position.[102] However, despite some discussion of killer acquisitions in the Bureau's recently released guidance on the amendments to the abuse of dominance provisions,[103] uncertainty and a lack of transparency as to how a review of serial acquisitions would unfold under section 79 makes it unlikely that this will be a significant area of enforcement by the Bureau in the near future.

b) Global Amendments to Tackle Killer Acquisitions

Canada is not the only jurisdiction being challenged by killer acquisitions. In September 2023, the European Commission (the "**Commission**") published a "Merger Brief" setting out the agency's views on how its current legal framework supports the incorporation of sustainability considerations into EU merger control.[104] In its report, the Commission stated that it aims to be vigilant against green killer acquisitions.[105] Where the green killer acquisitions originate from smaller companies with lower turnover, the Commission affirmed its intention to rely on Article 22 of the *EU Merger Regulation*, which allows the Commission to review cases which do not qualify for review under the merger control laws of the requesting member state.[106] Under this approach, the Commission accepts referrals of mergers from Member States if it becomes aware of a transaction that can affect trade between Member States that threatens to significantly impede competition in at least one Member State, even if the transaction is not legally notifiable under any merger control thresholds at the Commission or national level.[107]

The United States has also stated its intention to utilize current tools to combat killer acquisitions. Although the US pre-merger notification system subjects most mergers of significant size to pre-merger review for competition concerns, a transaction does not have to be subject to such review for the Federal Trade Commission or the Department of Justice to be able to challenge it under antitrust laws.[108] Under section 7 of the *Clayton Act*, these agencies can challenge acquisitions of stocks or assets, without regard

to whether the acquisition requires pre-merger notification, thereby allowing the US to review killer acquisitions using its existing framework.[109] As in Canada, however, non-notifiable transactions may fly below the radar and escape detection.

In contrast, the United Kingdom's Competition & Markets Authority (**CMA**) has voiced scepticism regarding its ability to handle killer acquisitions without amending UK competition law. On April 25, 2023, the UK government published the *Digital Markets, Competition and Consumers* bill, which introduced significant changes to the jurisdictional thresholds used in UK merger review aimed at killer acquisitions.[110] These new filing thresholds for killer acquisitions of nascent businesses will eliminate the need for an overlap between merging parties' activities in the UK where one party has a high share of supply (at least 33%) and substantial UK presence (turnover exceeding £350 million).[111] This new threshold is intended to complement the government's proposal to regulate acquisitions by businesses with "strategic market status" that are included in the proposed new digital markets regime. Under those proposed rules, all transactions involving a designated company will require notification if (a) that company acquires a shareholding of at least 15%, (b) the value of the transaction is at least £25 million, and (c) the target has a UK nexus.[112]

c) Proposals to Amend the Act to Ensure Better Enforcement of Killer Acquisitions

The Bureau, similar to the UK's CMA, has voiced its apprehension that the existing merger framework is not sufficient to effectively tackle killer acquisitions. In early March 2023, the Bureau proposed to amend the *Act* to include a new standard for reviewing potential killer acquisitions.[113] Although the new standard proposed by the Bureau is somewhat unclear, it likely entails lowering the threshold for intervention such that the mere possibility that a nascent firm could someday compete with the dominant firm would be sufficient for the merger to be blocked.[114] Moreover, discussions have emerged of possible changes to the *Act*'s pre-merger notification criteria, including a possible reduction in the "size of parties" threshold, as a means of increasing detection of these types of acquisitions.[115] Further, when challenging killer acquisitions, the timeframe for assessment is crucial.[116] Many of the effects from such mergers will only become clear further into the future than what most competition agencies currently consider.[117] Accordingly, it has been proposed that a longer timeframe for the limitation period for challenging mergers after approval be adopted to allow the Bureau to gather evidence of actual (rather than potential) harms and

efficiencies that may take longer to be realized.[118] Thus, if these proposals were to be adopted, it is likely that greater enforcement will be seen in this area in the future, thereby indirectly combatting climate change through the increased protection of green innovations, among others.

B) Competitor Collaborations

The *Act* adopts a dual-track approach to certain types of competitor collaborations. Section 45 of the *Act* houses the *per se* provisions which make it a criminal offence for two or more competitors in the supply of products or services to conspire, agree or arrange to fix prices, allocate customers or markets, or restrict the output of a product or service, regardless of the effect on competition.[119] The civil track provision is found in section 90.1 which prohibits agreements between competitors that do not fall within the scope of section 45, but only if they substantially prevent or lessen competition.[120] Depending on the type of competitor collaboration, those with environmental effects will be reviewed under either section 90.1 or 45.

In addition to the creation of this dual track, the 2009 amendments to the *Act* also removed the defence to section 45 for conspiracies, combinations, agreements or arrangements that related, among other things, to measures to protect the environment.[121] After the removal of this defence from the *Act*, the Competition Law Section of the Canadian Bar Association suggested that a 'safety valve' be created for certain categories of agreements that are not anti-competitive in nature but are still considered illegal under the revised section 45, to replace the gap left by the removal of the environmental defence. However, this was never incorporated into the adopted revisions.

Even in the absence of an express safety valve for these environmental agreements in section 45, otherwise illegal sustainability agreements may still be able to proceed. Section 45(4) of the *Act* includes a defence for agreements that are ancillary and necessary to a broader or separate legitimate agreement.[122] Accordingly, certain agreements between competitors aimed at the implementation of higher environmental standards in a given industry or at the development of more sustainable products could benefit from this defence if the collaborative aspect of their agreement is directly related to the achievement of sustainability goals, and reasonably necessary for their effectiveness.[123] However, the defence is only available where parties to an agreement can establish that: "(i) a *per se* illegal price, allocation or output restriction is ancillary to a broader agreement that includes the same parties; (ii) the restriction is reasonably necessary to achieve the objectives

of that broader agreement; and (iii) the broader agreement does not contravene the *per se* price-fixing, market allocation or output prohibitions."[124] Additionally, although in 2009 an explicit reference to environmental agreements as a potential successful use of the ancillary restraints defence was included in the Bureau's "Competitor Collaboration Guidelines",[125] this was removed in the 2021 updates to the collaboration guidelines.[126] As the elements for establishing this defence are often difficult to prove and the comfort of explicit reference to the use of this defence in environmental agreements has been removed from the Bureau's guidelines, even careful self-assessment may not be enough to provide the security needed by firms to enter into these agreements.

i) Advancements of Environment Goals Through Collaboration

Despite this trepidation, many forms of collaboration between businesses for the achievement of sustainability goals are unlikely to raise any competition law issues.[127] Further, beneficial forms of cooperation intended to advance environmental objectives are unlikely to harm competition, provided that the businesses do not have significant market power.[128] As outlined in Section II above, tensions are most likely to develop where the promotion of environmental objectives through collaboration significantly restricts competition.[129] However, this does not mean that environmental goals cannot be furthered through the use of collaborative agreements.

One of the most significant ways that environmental objectives have been advanced through cooperative agreements is the use of standard setting to move an entire industry towards the production of more environmentally-friendly products.[130] Nonetheless, standard setting in the environmental context has the potential to reduce competition.[131] For example, rivals can use the process to eliminate opportunities for product differentiation which may facilitate collusive outcomes.[132] Standard setting can also create barriers to entry for new competitors or eliminate products that may appear less desirable in light of environmental protection goals, but are cheaper for consumers.[133] Both of these situations reduce choice and increase prices for consumers.[134]

Regardless of the potential for a reduction in competition as a result of cooperation in the sustainability context, these types of agreements may lead to the advancement of environmental objectives. However, once the door is open for businesses to cooperate, unintended consequences may arise as a result.[135] Accordingly, many companies looking to cooperate to positively promote environmental goals may find their behaviour at odds with

competition law and therefore subject to potential liability. Consequently, the perceived uncertainty about the legality of agreements associated with environmental benefits has led to many companies being dissuaded from entering into such cooperative agreements in the first place.[136]

ii) Global Jurisprudence on the Enforcement of Collaborative Agreements

Although there is a perception of greater risk in entering these types of agreements because of the increased potential for liability, jurisprudence globally suggests that generally only the truest collusive conduct will be reviewable. In its recent *Car Emissions* case, the European Commission fined five carmakers for colluding on slowing down the entrance into the market of technology for nitrogen oxide emissions cleaning for diesel cars.[137] Despite the technology being available to the manufacturers, the competitors agreed not to implement it in order to maintain their competitive advantage.[138] The Commission found this cooperative agreement to be an illegal cartel.[139]

Further, in the 2015 case exploring the "Chicken for Tomorrow" initiative, the Dutch Consumer and Markets Authority ("**ACM**") held that an industry-wide agreement to improve living standards of broiler chicken in the Netherlands restricted competition under article 101(1) of the *Treaty of the Functioning of the European Union* and could not be exempted under article 101(3).[140] Under the "Chicken for Tomorrow" agreement, parties agreed on a new minimum standard for chicken welfare that included slower growing chicken, fewer chickens per square meter in broiler chicken barns, more dark hours, and various environmental measures.[141] Most importantly, the ACM found that this agreement would result in a complete replacement of all regular chicken in the participating supermarkets with this new, more expensive product.[142] Accordingly, even though the agreement did provide benefits to animal welfare and sustainability, the ACM held that this did not outweigh the disadvantages for consumers arising from decreased choice and higher product prices.[143]

Finally, in France, the French competition authority found that competitors and their trade association in the hard-wearing floor covering sector had entered into an agreement to limit advertising on the individual environmental performance of their floor coverings, beyond the legal requirements.[144] Although the parties claimed that the agreement was meant to prevent excessive greenwashing, the agency held that the practice was

likely to distort customers preferences and dissuade manufacturers from providing more innovative and sustainable products.[145]

iii) Greater Guidance is Necessary for Sustainable Collaboration

At the 2022 Green Growth Summit, in his opening remarks the Canadian Commissioner recommended that competition law promote pro-competitive collaboration as a means to achieve environmental objectives.[146] Many argue, however, that the limited guidance provided by the Bureau in this area may actually chill or prohibit such cooperation.[147] As mentioned, for example, the Bureau's most recent Competitor Collaboration Guidelines, released in May 2021, do not explicitly refer to sustainable competitor collaborations.[148] However, there is the potential that even if guidance is provided, companies may not take advantage of it, as they have done in the past. For example, in April 2020, the Bureau released guidance on competitor collaborations during the COVID-19 pandemic, which companies failed to take advantage of.[149]

Nevertheless, if pro-competitive collaboration can be used as a venue through which environmental goals may be achieved, it may be beneficial to consider amending the *Act* to reintroduce the "environmental defence" to accusations of wrongdoing under the criminal cartel provisions of the *Act* as well as civil competitor collaboration measures. Although likely repealed for lack of use, so long as sufficient clarity is provided as to the application of the defence, the emerging focus in Canada on sustainability may enable the defence to create the correct balance between promoting environmental goals and ensuring anti-competitive agreements are avoided. This rather minimal legislative change may be all that is necessary to provide much needed clarification to some sustainable collaborations.

Further, the recent amendments to the *Act* included an expanded list of factors that the Tribunal may consider in cases of civil-track reviewable competitor collaborations to determine whether there is or is likely to be a substantial lessening or prevention of competition, including network effects, any tendency to entrench the market position of leading incumbents, and the effect of the collaboration on price or non-price competition including quality, choice or consumer privacy.[150] Although these new factors were included to address potential competitive harms in the digital market and are potentially applicable more broadly to the environmental context, a lack of guidance in this area likely leaves these factors practically unusable.[151] Therefore, although it is possible that these amendments may open the door for greater enforcement from the Bureau in the area of sustainable

competitors collaborations, absent more specific guidance, it is conceivable that these amendments may instead prevent necessary sustainable agreements intended to advance environmental goals from being entered into in the first place.

C) Abuse of Dominance Claims

Although there is little jurisprudence on the matter, in theory, environmental goals may also be considered in abuse of dominance claims in section 79 of the *Act* through anti-competitive practices such as environmental standard setting.[152] An abuse of dominance occurs when "a dominant firm or a dominant group of firms engages in a practice of anti-competitive acts, with the result that competition has been, is, or is likely to be prevented or lessened substantially in a market."[153]

With the high demand by consumers for greener products, there is the potential for increasing anti-competitive conduct as firms look to create competitive advantages for themselves, even illegally, in this progressively competitive space. These anti-competitive actions might include conduct by a dominant firm that is predatory, exclusionary, disciplinary, or intended to affect competition adversely.[154] Exclusionary abuses in the sustainability sphere may occur where a dominant incumbent with a polluting technology abuses its leading position by foreclosing a rival firm with greener technology.[155] For example, a dominant producer of chemical-based household cleaning products may attempt to abuse its dominant market position to push a producer of organic, environmentally-friendly cleaning products out of the market due to fear of actual or potential rivalry. Predatory bidding strategies used to foreclose rivals can also be at issue in greener product markets. For example, the European Commission recently opened an investigation into a potential abuse of dominance by Public Power Corporation in the wholesale electricity sector in Greece. In that case, the Commission alleged that the company might have distorted competition by adopting predatory bidding strategies to prevent rivals from competing in the wholesale market and reducing investments into the generation of clean energy.[156]

i) Tensions in Considering Environmental Objectives in Abuse of Dominance Cases

However, not all anti-competitive conduct that relates to sustainability results in harm to the environment. In fact, dominant firms may engage in conduct that might be considered abusive but also beneficial to the environment, creating a tension between the goals of competition law and the achievement of a greener climate. Some potential examples of this tension

include, companies refusing to deal with downstream suppliers that do not meet the environmental criteria set by the regulatory standards of the industry; firms choosing to enter long-term exclusive arrangements in order to recover significant environmental investments; or the operation of an e-commerce platform that prioritizes a firm's own green products whilst demoting the more pollutive products of a rival.[157]

This tension is highly evident in cases of industry standard-setting by incumbents, as this practice is generally seen as highly efficient and pro-competitive.[158] However, standard-setting in the context of environmental benchmarks has recently been subject to increased skepticism due to its potential to hinder new entrants and decrease innovation.[159] The "Abuse of Dominance Enforcement Guidelines" already contemplate the idea of standard-setting industry groups,[160] such as those at issue in the FCA's decision in *Toronto Real Estate Board v Commissioner of Competition*.[161] In that case, the FCA held that the Toronto Real Estate Board ("**TREB**"), a trade association, had abused its dominant position by restricting the manner in which real estate agents could use information from the MLS database, effectively instituting a standard that the industry was required to follow. Accordingly, dominant firms that come together, even for benign reasons such as increasing sustainability standards, may be found to have contravened the abuse of dominance provisions as the conduct may have a disciplinary or exclusionary effect on smaller competitors.[162]

ii) The Potential for Increased Enforcement

As discussed in Section III(A)(i)(a), the SCC in *Tervita* established a hierarchy wherein quantifiable evidence is favoured over qualitative evidence. Although this finding in *Tervita* was in relation to the efficiencies defence, there was a fear that this hierarchy may impede on the analysis of abuse of dominance conduct as well. However, the FCA's decision in *TREB* may have put these qualms at ease as the Commissioner did not lead any quantitative evidence that TREB's conduct resulted in higher prices or decreased competition. The FCA held that quantitative evidence is not necessary to prove a substantial lessening of competition and the Commissioner has no legal burden to lead quantitative evidence at all.[163] Accordingly, it is likely that either party may rely on environmental effects, regardless of their qualitative nature, when analyzing whether a substantial lessening of competition has resulted from potentially anti-competitive conduct by a dominant firm, which may positively or negatively impact enforcement strategies in the future.

Moreover, the recent amendments to the *Act* in June 2022 have expanded the scope of the abuse of dominance provisions under the *Act*.[164] The amendments extended a private right of action for abuse of dominance cases to private parties, allowing them to apply directly to the Competition Tribunal if they are directly and substantially affected by the conduct.[165] Previously, only the Commissioner could raise abuse of dominance allegations before the Tribunal. Although it is possible that the extension of private party claims will result in an uptick in the number of cases brought under the abuse of dominance provision, this might be muted by the inability for private parties to seek monetary damages from the harm suffered.[166]

The amendments also included an expanded definition of "anti-competitive act".[167] The *Act* now defines an anti-competitive act as one that is "intended to have a predatory, exclusionary, or disciplinary negative impact on a competitor, *or to have an adverse effect on competition*" (emphasis added).[168] The Bureau has indicated that, in its view, the addition of the words "or to have an adverse effect on competition", has broadened the potential harm captured by the abuse of dominance provisions to include not only conduct that harms competitors but also competition or the competitive process more broadly.[169] As a result of this broader definition, anti-competitive conduct relating to environmental considerations may now be punished under the *Act*, leading to a potential for increased enforcement and greater liability for arguably dominant firms.

One of the goals of revising the definition of "anti-competitive act" was to clarify the definition of anti-competitive conduct in light of contradictory jurisprudence as well as address perceived gaps and inconsistencies created by a potentially overly limited scope of section 78.[170] More specifically, this updated definition, which includes both harms to competitors and harms to competition, was intended to codify the legal standard articulated in the jurisprudence post-*TREB*.[171] However, questions have been raised regarding how section 78 of the *Act* should now be interpreted, how the goals of section 78 interact with those of the *Act* as a whole in section 1.1, and how firms are expected to comply with such a broad and ambiguous provision. Therefore, although intended to increase certainty, it appears as though these amendments have, in practice, created greater uncertainty and have made it more difficult for companies to distinguish between aggressive pro-competitive conduct and anti-competitive abuses of dominance.[172] Although the Bureau released guidance on the amendments in October 2023,[173] some outstanding questions still remain regarding how the new definition will be used in practice.

These issues are only exacerbated when green products and services are at play. Due to the already limited jurisprudence, companies will face significant uncertainty when choosing to engage in conduct that promotes environmental goals but may have potentially anti-competitive results due to the increased possibility for an abuse of dominance claim. Although the Commissioner has yet to bring an allegation of abuse of dominance relating to the environment, it is clear that the tools are available for the Bureau to be successful in a potential allegation of anti-competitive environmental standard setting. This new provision is also a potential "catch all" for various conduct which harms both the environment and competition and therefore, has the potential to become much more active in the sustainability space in the future.

Although the new guidance from the Bureau does address the new factor in section 79(4) (the effect of the practice on price and non-price competition, including quality, choice or consumer privacy) when assessing if a practice is or is likely to prevent or lessen competition substantially, there is no further explanation as to how this factor may be used in practice.[174] Additionally, there is no mention of the environment at all in the new guidance. Therefore, absent further guidance from the Bureau, companies may well err on the side of caution when engaging in behaviour which may fall under the newly expanded abuse of dominance provisions. Firms should also carefully evaluate how the environmental impacts of their behaviour may be considered after the decision in *TREB* expanded the Commissioner's ambit by removing the requirement for the Bureau to present quantitative evidence when alleging anti-competitive conduct.

D) Greenwashing

The increasing concern by Canadians for the environment has led to an increase in demand for "green" products and services.[175] More specifically, studies have found that the vast majority of consumers globally would change their consumption habits to reduce their environmental impact.[176] This has resulted in an uptick in green innovation as companies look to reduce their environmental impact and differentiate themselves to capitalize on this increased demand.[177] However, as the supply of green products has increased, so has the number of false or misleading environmental ads or claims, an act known as greenwashing.[178] This practice harms competition and innovation as, while consumers may be prepared to pay a premium for a good or service that gives the impression of being better for the environment,[179] it is an area where consumers can easily be misled, preventing them from being able to make informed purchasing decisions.[180]

Greenwashing has become a real problem due to the marketability of sustainability and its potential to increase profit margins.[181] This has resulted in the potential for misaligned incentives as increased demand from customers for more sustainable products creates an incentive for firms to highlight those features, sometimes in a false manner.[182] To fight this, competition law has emerged as the primary enforcement mechanism in Canada to combat greenwashing.[183]

As greenwashing is the utilization of false or misleading advertising or claims about the relative environmental attributes of products or services, it is regulated under the deceptive marketing provisions in section 74.01 of the *Act*.[184] To determine whether an environmental claim is false or misleading in a material respect and therefore reviewable conduct under section 74.01, the courts will look to the general impression left by the representation as well as its literal meaning.[185] The general impression will be that of a 'credulous', 'hurried' and 'technically inexperienced' consumer, who is seeing the advertisement for the time.[186] This has been interpreted as a fairly low standard of sophistication for the viewer thereby placing a heavy onus on the company to prove that the advertisement is clear and accurate.[187] Further, performance claims falling under section 74.01(1) must also be supported by 'adequate and proper' testing thereby requiring advertisers to have substantiated their claims before they are utilized for advertising purposes.[188]

Reviewable deceptive marketing can be challenged either as a civil offence with administrative remedies, or as a criminal offence.[189] In June 2022, amendments to the *Act* came into force that increased the civil offence administrative monetary penalties.[190] The new maximum administrative monetary penalty for corporations is the greater of (1) $10 million for first infringements ($15 million for each subsequent violation), or (2) three times the value of the benefit derived from the deception (or, if this cannot be reasonably determined, up to 3% of a company's annual worldwide gross revenues).[191] This surpasses penalties imposed by the US Federal Trade Commission for similar conduct.[192] The Bureau maintains that the increase in administrative monetary penalties was necessary to address concerns that the prior penalties amounted to a pittance for the world's largest firms.[193] Accordingly, the Bureau contends that the penalties needed to be greater than the profit that the firm might realize as a result of its anti-competitive conduct in order to provide a strong financial incentive for businesses to comply with the *Act*.[194] However, liability is not limited to administrative monetary penalties for contravention of the deceptive marketing provisions as businesses also face the increasing risk of consumer class actions.[195] For example, in a class action settled between Volkswagen, Audi, and various

consumers for emissions representations, Volkswagen and Audi were required to pay $2.1 billion to consumers in settlement.[196]

i) An Overview of Canadian Greenwashing Jurisprudence

The Bureau has pursued a number of cases through the deceptive marketing provisions of the *Act* in the area of greenwashing, proving their intention to take these claims seriously.[197] In 2016, Volkswagen Group Canada Inc and Audi Canada Inc entered into a consent agreement with the Bureau after its investigation found that the car manufacturers had misled consumers by promoting their 2.0 litre diesel engine vehicles sold or leased in Canada as having diesel engines that were cleaner than an equivalent gasoline engine, in contravention of paragraph 74.01(1)(a) of the *Act*.[198] In addition to the class settlement payout of $2.1 billion discussed above, Volkswagen and Audi also agreed to pay an administrative monetary penalty of $7.5 million each.[199]

In 2018, Volkswagen and Audi were the subject of another investigation by the Bureau, this time with Porsche Cars Canada, Ltd., regarding similar representations made in respect of their 3.0 litre diesel engines.[200] The Bureau's investigation found that Volkswagen and Audi misled consumers, in contravention of paragraph 74.01(1)(a) of the *Act*. The investigation also found that Porsche misled its consumers when promoting vehicles sold or leased in Canada by representing them as having engines in compliance with emissions standards[201] The Bureau entered into a consent agreement with the auto manufacturers under which Volkswagen and Audi committed to paying an administrative monetary penalty of $2.5 million each.[202]

Finally, at the beginning of 2022, the Bureau left the automotive space and concluded its investigation into Keurig Canada Inc.'s environmental claims regarding the recyclability of its single-use coffee pods.[203] The Commissioner concluded that these representations created the general impression that K-Cup pods are recyclable in each location where those representations were made to the public.[204] The investigation also found that Keurig Canada's claims about the steps involved to prepare the pods for recycling were false or misleading as they gave the general impression that consumers could prepare the pods for recycling by peeling the lid off and emptying out the coffee grounds, but some cities required additional steps to be taken to recycle the pods.[205] In its settlement agreement, Keurig Canada agreed to pay a $3 million administrative monetary penalty, pay for the Bureau's investigation at an additional cost of $85,000, and donate $800,000 to a Canadian environmental organization.[206] Pursuant to the

consent agreement, Keurig Canada agreed to change its recycling claims and the packaging of the K-Cup pods as well as publish corrective notices about the recycling of its product on its website and social media, in national and local news media, in the packaging of all new brewing machines, and via email to its subscribers.[207]

ii) Guidance on Greenwashing in Canada and Globally

Despite the increasing jurisprudence in this area, the Bureau has issued minimal guidance for the making of environmental claims. In 2008, the Bureau published "Environmental Claims: A guide for industry and advertisers", which was intended to act as guidance with respect to the Bureau's enforcement of the misleading advertising provisions of the *Act*.[208] However, the Bureau archived this guide on November 4, 2021, noting that it may not reflect the Bureau's current policies and practices.[209] Unfortunately, no substantive direction has been provided since, such as that provided in comparable jurisdictions including the Green Guide in the United States, the Green Claims Code in the United Kingdom, or New Zealand's Environmental Claims Guidance.[210] A general overview of the guidance provided by each of these jurisdictions is provided below.

The present US Green Guide is the fourth iteration of the Federal Trade Commission's guidance designed to help marketers avoid making environmental claims that mislead consumers.[211] The Green Guide provides direction including, general principles that apply to all environmental marketing claims; how consumers are likely to interpret particular claims; how marketers can substantiate their environmental claims; and how firms should qualify their marketing claims to avoid deceiving consumers.[212]

In July of 2020, the Commerce Commission of New Zealand ("**NZ Commission**") released its own guidelines to help firms avoid breaching the New Zealand *Fair Trading Act* when making environmental claims.[213] The direction provided in the guidelines covers general principles and examples of cases brought by the NZ Commission in the past as well as further guidance for firms on common environmental claims such as, lifestyle claims, comparative claims, branding, and certification stamps.[214]

Most recently, in 2021, the CMA in the UK released its "Green Claims Code".[215] The CMA developed this code to provide businesses with a framework for reviewing their environmental claims.[216] This framework includes a checklist with six key points to evaluate whether environmental claims made by a firm are genuinely green as well as extensive guidance to help businesses feel more confident about their green claims.[217] Although

primarily created to assist businesses, the CMA's guidance also ensures greater consumer confidence in the green claims made by businesses.[218] As a result, the "Green Claims Code" also sets out a series of tips to help consumers determine if environmental claims about the products and services they are purchasing are genuine.[219]

It is evident from the Bureau's investigations into Keurig and various automotive manufacturers that it is taking an active role in addressing greenwashing in Canada. Although this greater emphasis may be the result of a conscious uptake in enforcement by the Commissioner, there has also been an increase in false, misleading, or unsupported environmental claims in Canada.[220] As the emphasis on environmental protection grows, the incentive for firms to invest more in the marketing of their sustainable products will only increase. Accordingly, the deceptive marketing provisions of the *Act* will be crucial in maintaining faith in these claims in the eyes of consumers such that they continue to purchase products that are marketed as environmentally friendly. Consequently, greater guidance is needed from the Bureau to ensure that firms feel confident in their claims and continue to pursue sustainable agendas.

IV. The Inherent Limitations in Expanding the *Act* and the Path Forward

As demonstrated above, the *Act* does provide for the potential consideration of environmental policy objectives in its current competitive analysis framework where the goals of competition and the environment are aligned. However, these two aims are sometimes at odds, creating a tension that requires a hierarchy to be instilled between them. Furthermore, there are sections of the *Act* where environmental effects have not yet been considered but have the potential to do so. To the extent discussed above, these areas provide opportunities for enforcement to be expanded and the boundaries of competition law to be pushed.[221] Nonetheless, as will be argued below, there are inherent limitations and dangers in doing so.[222] Accordingly, it is not surprising that despite the increasing prevalence of environmental concerns within the Canadian political sphere, discussions by the Bureau or legislators surrounding amendments to the *Act* to expressly reflect environmental policy objectives have not arisen.[223]

However, that does not mean that all is quiet on this front. As mentioned in Sections I and II, a debate has been forming regarding the normative question as to whether competition law should take into account sustainability considerations at all.[224] This paper is not intended to compare and

contrast the arguments in this normative debate, it has instead focused on the precursor question: can the current iteration of the *Act* successfully consider environmental goals in its competitive analysis? As this has been answered in the affirmative, for completeness it is important to briefly discuss the main arguments against the explicit consideration of environmental effects in the *Act* to demonstrate the inherent limitation it places on the analysis of sustainability concerns, specifically where an expanded scope of the *Act* is necessary.

Those that contend that competition law should not consider environmental effects argue that competition law should not be used to pursue policy objectives that go beyond the core promotion and maintenance of efficient market structures as this could dilute the effectiveness of antitrust, be difficult to enforce, and result in unintended spill-over effects.[225] These scholars contend that although integrating environmental benefits as they relate to competition can promote the goals of the *Act* as well as environmental objectives, antitrust analysis should not try to fit in environmental considerations where they do not belong.[226] Accordingly, to the extent that competition and environmental policy objectives are at odds, competition law cannot address these concerns.[227] Moreover, even where the *Act*'s current framework implicitly allows for the consideration of environmental effects, the Bureau has generally chosen not to use its enforcement powers to pursue an environmentalist agenda.[228]

Another significant issue with the consideration of environmental effects in the competitive analysis framework is the risk, specifically in Canada, that the Bureau could overstep its jurisdiction. It is cautioned that environmental issues should not be used as a trojan horse to impede on another's jurisdiction, specifically that of the provincial government as the environment is not explicitly governed by one distinct head of power. As a result, both Parliament and the provincial government can legislate in respect of the environment so long as they maintain their respective jurisdictions.[229] Thus, there is considerable risk for Parliament in attempting to regulate environmental issues within the competition law framework that it may overstep its jurisdiction. This may prevent Parliament from engaging with amendments to the *Act* regarding environmental goals out of fear of encroaching on provincial jurisdiction.

Further, legislative reform is slow. Accordingly, even if Parliament were to expand the scope of the *Act* to allow for the explicit consideration of environmental effects, the implementation of these amendments would take

time. Even then, despite Parliament's best efforts, once enacted, the regulation may still be insufficient to reach the desired outcome.[230]

Finally, in general, competition and environmental law each serve broad policy aims.[231] Each could potentially advance market efficiency in their own ways. However, their market failures are distinct and the institutional remedies to combat these failures are generally very different as a result.[232] Therefore, to maintain predictability within the competition law regime, it is critical that the conceptual differences between the two policy tools are kept clear.[233] Accordingly, although competition law is still integral to addressing climate change through its potential role in reshaping markets to adjust consumer preferences towards more sustainable products and services, any policy instability or uncertainty concerning how enforcement by the Bureau will unfold may have the effect of stifling environmentally beneficial investments.[234]

As demonstrated throughout this paper, the *Act* is already capable of considering environmental effects, especially those with an economic dimension. However, there are inherent limitations when advancing environmental objectives through competition law, especially where the provision requires the *Act* to expand its scope. Accordingly, regardless of the larger, normative question, it is clear that the Bureau must be careful when considering environmental effects within the current competitive framework, especially when doing so pushes the current limitations of the *Act*, such as in the newly expanded abuse of dominance provisions.

Consequently, as the potential for the inclusion of environmental effects grows, if the Bureau wishes to use its powers as a means to promote sustainability it should focus its efforts on common sustainability cases, such as greenwashing claims through the deceptive marketing provisions or mergers, as these are provisions of the *Act* where the potential for tension between sustainability and competition goals is least likely. As a result, the Bureau's activities in these areas are the most likely to have the greatest positive effect on competition and sustainability. The consideration of environmental objectives in abuse of dominance claims, on the other hand, is much more hypothetical and requires further guidance from the Bureau prior to increases in enforcement measures to ensure predictability and legitimacy. Similarly, when considering sustainable competitor collaborations, though they have the greatest potential to promote sustainability, it is unclear where the line is between harmful cartels and pro-competitive collaborations and the possibility for being accused of illegal collusion may well be too high for firms to risk. Thus, it is in the author's view unlikely

that firms will turn to this particular tool in advancing their sustainability agendas, absent guidance from the Bureau and/or reinstatement of the "environmental defence" to allegations under section 45.

Regardless of the enforcement route taken by the Bureau, if any is taken at all, greater formal and informal guidance is necessary as stakeholders have increasingly expressed concerns that one of the main hindering factors towards sustainable innovation is the fear of competition law implications.[235] The Bureau plays an important role in creating "soft law" guidance for businesses to clarify how the agency will address these issues.[236] The Bureau's current approach to enforcement in this space, especially with respect to deceptive marketing and competitor collaborations, remains far from clear.[237] Moreover, even where further guidance is provided from the Bureau in areas such as abuse of dominance, the consideration of environmental effects or the environment in general appear to be continually absent.[238] It is especially important in these cases that the Bureau provide frequent guidance and increased transparency to ensure that sustainable innovation continues. Businesses are looking for some consistency and guidance so that they can make the necessary investments in the sustainability sphere.[239] Guidance from the Bureau is crucial in advancing environmental objectives in this way.

V. Conclusion

Although not expressly contemplated in section 1.1 of the *Act*, environmental effects can be considered in the competitive analysis framework so long as the objectives of sustainability and the goals of competition are aligned. Especially where these effects can be easily quantifiable and have an economic dimension, the *Act* is properly positioned to promote environmental objectives through the fostering of innovation and consumer choice. The current framework is flexible enough to consider environmental effects through the efficiencies defence, green killer acquisitions, competitor collaborations focusing on sustainability, standard setting in abuse of dominance allegations, and the deceptive marketing practice of greenwashing. However, if environmental objectives are pursued through the *Act*, it has been argued that less emphasis should be placed on the enforcement of abuse of dominance and competitive collaboration provisions until further guidance from the Bureau can be issued due to a lack of clarity in these areas. Rather minimal legislative changes such as reinstating the "environmental defence" to accusations of wrongdoing under the criminal cartel provisions of the *Act* as well as the civil competitor collaboration measures would also assist, in the first instance. Moreover, if it chooses to do so, the

Bureau should focus its efforts on greenwashing claims through the deceptive marketing provisions and mergers, as these two areas create less tension between environmental objectives and competition goals, and are the most likely to have a lasting, positive effect on competition and sustainability.

ENDNOTES

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11 "Killer acquisitions" occur when a company acquires control of an innovative, nascent firm with the intention of eliminating a possible source of future competition.

12 "Greenwashing" is the use of false or misleading environmental ads or claims to promote a company or a company's product of being more environmentally friendly.

13 Beaulieu, *supra* note 3.

14 *Act*, *supra* note 5, s 1.1.

15 *Tervita Corporation v Commissioner of Competition*, 2013 FCA 28 at paras 155-56, rev'd 2015 SCC 3 [*Tervita* FCA].

16 *Ibid.*

[17] *Ibid.*
[18] Bednar, *supra* note 7 at 8.
[19] Church, *supra* note 8 at 3.
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[23] Competition & Markets Authority, "Guidance: Environmental Sustainability and the UK Competition and Consumer Regimes: CMA Advice to the Government" (14 March 2022), online: *Competition & Markets Authority* <https://www.gov.uk/government/publications/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government/environmental-sustainability-and-the-uk-competition-and-consumer-regimes-cma-advice-to-the-government>.
[24] The 2022 Amendments to the *Act* included the addition of a new consideration in subsection 93(g.3) that allows the Competition Tribunal to consider any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy when evaluating whether a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially. See, *Act*, *supra* note 5, s 93(g.3).
[25] OECD, "Environmental Considerations", *supra* note 1 at 10.
[26] *Ibid.*
[27] *Ibid.*
[28] *Ibid.* See also, Maarten Pieter Schinkel & Yossi Spiegel, "Can collusion promote sustainable consumption and production?" (2017) 53 Int'l J of Industrial Organization 371 at 375, 384, 387.
[29] Philippe Aghion et al, "Environmental Preferences and Technological Choices: Is Market Competition Clean or Dirty?" (2020) National Bureau of Economic Research Working Paper No 26921 at 1. See also OECD, "Environmental Considerations", *supra* note 1 at 10; Schinkel & Spiegel, *supra* note 28 at 384, 387.
[30] OECD, "Environmental Considerations", *supra* note 1 at 10.
[31] *Ibid.*
[32] Maurits Dolmans, "Sustainable Competition Policy" (2020) 5/6:4/1 Comp L & Policy Debate 2 at 8; Theon Van Dijk, "A New Approach to Assess Certain Sustainability Agreements Under Competition Law", in Simon Holmes, Dirk Middelschulte & Martijn Snoep, eds, *Competition Law, Climate Change & Environmental Sustainability* (Paris: Concurrences, 2021) at 66.
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[35] OECD, "Environmental Considerations", *supra* note 1 at 14.
[36] *Ibid.*
[37] *Ibid* at 15.
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45 Coral Davenport, "Justice Department Drops Antitrust Probe Against Automakers That Sided With California on Emissions", *The New York Times* (7 February 2020), online: <www.nytimes.com>.

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52 *Ibid*, s 96.

53 Colleen Cunningham, Florian Ederer & Song Ma, "Killer Acquisitions" (2021) 129:3 J of Pol Economy 649 at 650.

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56 *Tervita* SCC, *supra* note 47 at para 89. See also, *Canada (Commissioner of Competition) v Superior Propane Inc*, 2002 Comp Trib 16 at para 399, aff'd 2003 FCA 53.

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[66] *Secure Energy*, *supra* note 60 at para 517.
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[68] Beaulieu, *supra* note 3 at 153; Ralph A Winter, "Tervita and the Efficiency Defense in Canadian Merger Law" (2015) 28 Can Comp L Rev 133.
[69] Trebilcock & Ducci, *supra* note 63 at 195.
[70] CD Howe Institute, *supra* note 65 at 5.
[71] *Ibid* at 4; Beaulieu, *supra* note 3 at 153.
[72] Trebilcock & Ducci, *supra* note 63 at 195.
[73] *Ibid*.
[74] Beaulieu, *supra* note 3 at 153.
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[76] Li & Patenaude, *supra* note 61.
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