THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Vol. 33 | 2021 | Nº 2

# CANADIAN COMPETITION LAW REVIEW

# REVUE CANADIENNE DU DROIT DE LA CONCURRENCE

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ISSN 1929-6851 (Online) / ISSN 1929-6843 (Print)

THE CANADIAN BAR ASSOCIATION
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# ARTICLES

## GREEN COMPETITION: INTRODUCTION TO THE INTERACTIONS BETWEEN COMPETITION AND ENVIRONMENTAL POLICY IN CANADA

Julien Beaulieu[1]

*More than ever, environmental issues have a predominant influence on the elaboration of public policies in Canada, impacting governmental intervention in matters traditionally less associated with sustainable development. However, Canada's competition policy seems to resist to this tendency. For instance, the Competition Act (the "***Act***") does not include any specific provision pertaining to the promotion of sustainability, and the Competition Bureau (the "***Bureau***") has not committed to the achievement of any express environmental objective. Nevertheless, there are indications that some of the objectives stated in the Act and Canada's environmental commitments are not irreconcilable, as demonstrated by the courts' recognition of certain environmental effects as gains in efficiency, as well as the few enforcement actions led by the Bureau against greenwashing. Similarly, certain provisions of the Act, even if they have not yet been interpreted in that context, could provide leeway for an enforcement approach that promotes sustainable business practices. This begs the question of whether the incorporation of environmental objectives in Canadian competition law, either through a legislative reform or through the creative interpretation of the current legislative framework by the enforcer and the Competition Tribunal (the "***Tribunal***"), could dilute the effectiveness of the Act, and be incompatible with the Bureau's and the Tribunal's respective mandates and expertise. On the other hand, however, a total rejection of these considerations could impede competitor collaborations aimed at developing new eco-friendly products and sustainability-oriented industry standards. As such, some jurisdictions have started to promote an interpretation of pre-existing competition rules that takes into consideration environmental concerns. In that context, Canada should modernize its competition law policy to better reflect its international environmental commitments, either by updating the Bureau's mandate and reviewing its current enforcement guidelines, or through minor legislative amendments designed to incorporate environmental concerns into the Act.*

*Plus que jamais, les questions environnementales occupent une place prépondérante dans l'élaboration des politiques publiques au Canada, teintant de plus en plus l'action gouvernementale dans des champs de compétence traditionnellement peu associés aux enjeux de développement durable.*

*Cependant, la politique canadienne en matière de concurrence semble faire exception à cette tendance. Par exemple, la Loi sur la concurrence (la « Loi ») ne prévoit aucune disposition spécifique visant à promouvoir la protection de l'environnement, et le Bureau de la concurrence (le « Bureau ») n'a formulé aucun engagement relatif à l'accomplissement de quelconques objectifs de développement durable dans l'application de celle-ci. Néanmoins, certains éléments portent à croire que les objectifs visés par la Loi et les engagements environnementaux du Canada ne sont pas irréconciliables, tels que la reconnaissance jurisprudentielle de certains effets environnementaux dans l'application de l'exception pour gains en efficience, ainsi que les quelques dossiers menés par le Bureau en matière d'éco-blanchiment. De même, certaines dispositions de la Loi, bien que n'ayant pas encore été interprétées dans ce contexte, pourraient permettre une application favorable au pratiques commerciales durables. L'intégration d'objectifs environnementaux au droit de la concurrence, que ce soit par une réforme législative ou par une interprétation créative du cadre actuel par le Bureau et les tribunaux, pourrait avoir pour effet de diluer l'effectivité de l'application de la Loi, et s'avérer incompatible avec le mandat et l'expertise du Bureau et du Tribunal de la concurrence. Inversement, un rejet complet de ces considérations risquerait de restreindre les initiatives entre concurrents visant à collaborer pour développer de nouveaux standards et produits écoresponsables. Ainsi, certaines juridictions ont commencé à favoriser une interprétation des règles de concurrence actuelles qui tient davantage compte des enjeux environnementaux. Dans ce contexte, le Canada devrait moderniser sa politique en matière de concurrence afin de mieux refléter ses engagements en matière d'environnement, que ce soit par la mise à jour du mandat du Bureau et la révision de ses lignes directrices actuelles, ou par des amendements législatifs mineurs visant à intégrer les objectifs environnementaux dans la Loi.*

As recently argued by European Commissioner M. Vestager, "businesses have a vital role in helping to create markets that are sustainable in many different ways, and competition policy should support them in doing that".[2] With environmental concerns becoming increasingly prevalent in Canada and around the world, could Canada's competition policy have a role to play in future efforts to protect the environment?

In 2016, the Canadian federal and provincial governments issued the *Pan-Canadian Framework on Clean Growth and Climate Change*, a collective agenda designed to provide a detailed plan for achieving Canada's international climate commitments, including a 30 percent reduction of national greenhouse gas emissions from the 2005 levels.[3] Though the

framework focussed on carbon pricing and other complementary policies such as the promotion of non-emitting electricity systems and energy efficiency, it also gave way to policy objectives less closely related with the protection of the environment, such as the creation of jobs, the increase of exports, the promotion of innovation, and, most importantly, the development of a competitive Canadian economy. Historically, some of these policy objectives have conflicted with the protection of the environment, as enhanced environmental regulatory obligations can increase the cost of doing business, thereby negatively impacting international competitiveness, exports and employment. In answer to these concerns, it was acknowledged in the *Pan-Canadian Framework* that the impact of environmental policies on competitiveness should be minimized where possible, and that, in parallel, "policies that help drive down emissions can also help the economy to keep growing by cutting costs for Canadians, creating new markets for low-emission goods and services, and helping business use cleaner and more efficient technologies that give them a leg up on international competitors".[4]

This conciliatory approach should not come as unexpected, as it is generally in line with the United Nations' sustainable development goals, which Canada has committed to implement.[5] It is also consistent with the Government of Canada's acknowledgement of "the need to integrate environmental, economic and social factors in the making of all decisions by government", as recognized in the 2008 *Federal Sustainable Development Act*.[6] What may be surprising, however, is that this governmental attempt to balance competitiveness, innovation and the environment is currently not reflected in Canada's competition law policy. For example, the Competition Bureau (the "**Bureau**"), which is the federal agency responsible for the enforcement of Canada's competition law regime, is not among the agencies which are required to prepare a sustainable development strategy complying with and contributing to the Federal Sustainable Development Strategy.[7] In addition, environmental concerns are not referenced in the 2020–2024 "Strategic Vision" and 2020–2021 "Annual Plan" of the Bureau.[8] Similarly, the *Competition Act* (the "**Act**"), the purpose of which is to maintain and encourage competition in Canada, includes no provision explicitly targeting corporate conduct that harms the environment, or expressly exempting competitor collaborations aimed at the implementation of sustainability standards and the development of greener products.[9]

Over the last decades, some have argued that using antitrust to pursue policy objectives barely related to economic efficiency, such as national security, employment, media plurality and industrial policy, but also the protection of the environment, could have unintended consequences and

reduce the effectiveness of law enforcement.[10] However, this does not mean that competition policy and the fight against climate change are inherently irreconcilable, especially given the potential convergence between the efficient use of economic resources and environmental resources. For example, and as discussed in further detail below, in *Tervita Corp v Canada (Commissioner of Competition)*, the Supreme Court confirmed that a merger's environmental effects can be considered under the merger review framework of the Act when such effects have an economic dimension, as long as they are adequately proven.[11] Environmental marketing claims is another area where environmental and competition policy have converged in the past: in 2008, the Bureau collaborated with the Canadian Standards Association for the development of guidelines on deceptive marketing practices relating to environmental claims, and in 2016 and 2018, it entered into two consent agreements with car distributors who had allegedly made misleading environmental marketing claims in respect of their products' toxic emissions.[12]

This paper is a preliminary introduction to past and potential future interactions between environmental considerations and Canadian competition law from a regulatory, enforcement and judicial perspective. The objective of this exercise is not to provide an exhaustive multijurisdictional overview of recent developments on this topic occurring around the world, but to explore how a compromise between the promotion of competition and the achievement of sustainability goals could materialize in a Canadian setting. This article also includes a general overview of the risks and benefits of interfering with the general political neutrality that has characterized Canadian competition policy since the inception of the current Act in 1986, as well as some proposals aimed at harmonizing its current framework with Canada's environmental commitments, in light of some developments occurring in leading jurisdictions.

## A. Canada's Competition Law Regime: A Certain Definition of Efficiency

As of today, the Act remains Canada's only statute exclusively dedicated to the promotion and protection of competitive markets through the regulation of economic concentration and the anticompetitive exercise of market power. The Act, which provides for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition, was introduced in 1986 during the peak of the "Chicago Economics" period.[13] At the time, competition policy was not seen by Parliament as an interventionist industrial policy tool, but rather as a regulatory

mechanism that would instill the foundations of a "competitive and fair market-based economy".[14] As a result, the promotion of economic efficiency has been the main focus of Canadian competition policy since 1986, even if additional policy considerations are also reflected in the purpose clause of the Act, such as the adaptability of the Canadian economy, the participation of Canadian enterprises in world markets, the participation of small and medium-sized businesses in the domestic economy and the promotion of competitive prices and product choices for consumers.[15] Although the Act does not include a definition of the concept of economic efficiency, which could therefore be broadly interpreted to include the promotion of commercial conduct that enables the saving of environmental resources, this consideration is not mentioned in the Act.[16]

The various industrial policy objectives listed in the Act's purpose clause manifest themselves through various provisions of the Act, but none of them expressly refers to the promotion of sustainability and the achievement of environmental goals. For example, even if the Act is a statute of general application which was designed to be applied to a wide variety of situations and industries, it does include certain sector-specific exemptions: the Act does not apply to agreements pertaining to collective bargaining of employers with their employees in respect of salary or wages and terms or conditions of employment, and certain mergers subject to regulatory oversight by the Minister of Finance or the Minister of Transport cannot be challenged before the Competition Tribunal by the Commissioner.[17] In addition, the Act was designed to promote industrial policy objectives less closely related with the maintenance and promotion of competitive market structures in Canada, such as the promotion of the participation of Canadian businesses in international trade. As indicated above, the Act was created in 1986, in a period where the liberalization of global trade was threatening the participation of Canadian enterprises in global markets, and increasing the presence of foreign competitors in the Canadian domestic market.[18] This concern is reflected in a few provisions of the Act: the participation of Canadian companies in world markets is mentioned in the purpose clause; the impact on imports and exports is expressly identified as a factor to be considered when determining whether an anticompetitive agreement or merger may benefit from the defence for gains in efficiencies, and price-fixing agreements relating only to the export of products from Canada may not constitute a criminal offence in certain circumstances. However, no similar exemptions or defences exist in the Act in respect of environmental concerns or sustainable development. For instance, the Act does not exempt a merger from review under the Act on the basis that it involves the issuance

or transfer of a permit granted by the provincial or federal departments responsible for the enforcement of environmental regulations.[19] Similarly, it remains to be confirmed whether an agreement between competitors could be exempted from the prohibition to fix prices, allocate markets and control the production or supply of a product on the single basis that its purpose was to implement improved sustainability standards in a given industry.

In sum, environmental considerations are absent from the Act and, as explained by the Federal Court of Appeal in *Tervita*, to attribute an environmental purpose to the Act could contradict the legislator's original intent, and be inconsistent with the expertise of the Competition Tribunal: [20]

> I question whether the environmental effects of a merger, where no economic effect is ascribed to them, can be taken into account in a merger review under the Competition Act. The purposes of the Competition Act are set out in its section 1.1, which refers solely to economic considerations: promoting the efficiency and adaptability of the Canadian economy; expanding opportunities for Canadian participation in world markets; ensuring that small and medium-size enterprises have an equitable opportunity to participate in the Canadian economy; and providing consumers with competitive prices and product choices. Environmental concerns having no economic impact are not listed, nor are they otherwise considered under the Competition Act.
>
> Some may well find it desirable to include environmental values within a merger review. Nevertheless the introduction of such values into the Competition Act is a policy matter which properly belongs to Parliament to decide. I add that the [Competition] Tribunal, in its present form, is not particularly well-suited to decide environmental issues since its members (or at least its lay members) are chosen on the advice of persons who are knowledgeable in economics, industry, commerce and public affairs, but not necessarily in the environment: Competition Tribunal Act, subsection 3(3).

However, despite these comments, some provisions of the Act have had a peripheral impact on the protection of the environment since its inception in 1986, including those regulating merger review. In addition, other provisions of the Act could potentially be interpreted in favour of sustainability concerns in the future, even if it has not yet been the case. These past and hypothetical points of contact are further described below.

## B. Interactions Between Environmental Considerations and the *Competition Act*

### a. Mergers

Under section 92 of the Act, an agreement or a merger which is likely to prevent or lessen competition substantially may be prohibited by the Competition Tribunal ("**Tribunal**"), unless such agreement or merger is likely to bring about gains in efficiency that will be greater than and offset the economic loss resulting from the prevention or lessening of competition pursuant to section 96 of the Act.[21] As indicated by the Bureau in its *Merger Enforcement Guidelines*, this defence for gains in efficiency is the recognition that the integration of two firms' activities following a merger may result in "[p]roductive efficiencies [resulting] from real cost savings in resources, which permit firms to produce more output or better quality output from the same amount of input", in line with the Act's purpose to promote economic efficiency.[22] Such efficiencies can, for example, take the form of reduced production costs enabled by less resource-intensive production methods, or lower transportation costs resulting from the smaller distance between the merging parties' plants and distribution centres. Under this framework, a merger that would lessen competition substantially but at the same time result in the creation of a new entity with more efficient production techniques could be granted clearance if sufficient gains in efficiency are proven by the merging parties, which would ultimately benefit the environment. On the other hand, a merger that would prevent the entry of a new competitor which was developing a more sustainable product than its competitors could be challenged before the Tribunal on the basis that it is likely to prevent competition substantially.

The Act does not expressly indicate if a merger's environmental effects should be considered as part of this exercise. However, this question was raised in the *Tervita* merger review case, where the courts examined whether a merger's environmental effects could rightfully be considered within the framework of the Act's merger review regime.[23] *Tervita* involved the review of the purchase of a non-operating landfill site in North-Eastern British Columbia by the operator of the two only operating landfills in the area. According to the Commissioner, who was challenging the transaction after its closing had occurred, the merger was likely to prevent competition substantially in the market for the supply of secure landfill services for solid hazardous waste from oil and gas producers in the relevant geographic area, because it would prevent the entry of a new competitor, and therefore maintain the purchaser's market power in the relevant market.

In the first instance, the Tribunal agreed with the Commissioner that the merger was likely to prevent competition substantially in the relevant market.[24] According to the Tribunal, in the absence of the transaction, the landfill site would have eventually become operational and would have exercised competitive pressure over the purchaser, likely resulting in lower average prices for secure landfill services. But for the merger, these lower prices would have, among other things, incentivized waste generators to increase their clean-up efforts at waste sites, which would have benefitted the overall environment. The Tribunal accepted these effects on the environment as qualitative anti-competitive effects that would likely have been imposed by the merger. Although the Tribunal ruled that the Commissioner had failed to meet her burden to appropriately quantify the merger's anticompetitive effects, it concluded that these effects, including the environmental ones, could still be assessed qualitatively, and that they were not counterweighed by the "marginal" merger specific gains in efficiency proven by the parties.[25]

> [I]n the Tribunal's view, the qualitative Effects, when taken together merit substantial weight. That weight is greater than the weight attributable to the aggregate of the cognizable quantitative and qualitative efficiencies under any reasonable approach. In brief, those qualitative Effects are (i) reduced site clean-up and the benefits that such remediation would confer upon "area residents, wildlife, and the overall environment"; and, more importantly, (ii) reduced "value propositions" than would likely otherwise emerge in the relevant market, linking prices to various new or enhanced services.
>
> Most importantly, in the absence of the Order, the Merger will maintain a monopolistic structure in the relevant market. In other words, the Merger will not only give rise to the qualitative effects summarized immediately above, but it will also preclude benefits of competition that will arise in ways that will defy prediction.

This conclusion was challenged before the Federal Court of Appeal ("**FCA**"), as the merging parties considered the methodology of the Tribunal in the application of section 96 of the Act to be subjective and unpredictable, because the Tribunal had not entirely rejected the anticompetitive effects that had not be properly quantified by the Commissioner.[26] With respect to the qualitative environmental effects, the appellants submitted that they were not cognizable under the present structure of the Act.

In answer to these concerns, the FCA indicated that a merger's environmental effects could only be taken into account in the application of the efficiencies defense under the Act if an economic effect could be ascribed

to them, as the Act's purpose is not to consider environmental values, but to focus exclusively on the economic considerations listed in the purpose clause.[27] According to the FCA, the reduced site clean-up effects proven by the Commissioner did have an economic dimension, as they were correlated with lost market expansion; however, such effects had been accounted twice by the Tribunal: firstly, as deadweight loss that had not been properly quantified, and secondly, as qualitative anticompetitive effects. According to the FCA, such effects should have only been considered once in the deadweight loss analysis as lost market expansion effects, and not as qualitative environmental effects.[28] In the end, the Court confirmed the Tribunal's decision, despite the failure of the Commissioner to meet her quantification burden, considering that the gains in efficiency resulting from the merger were "insignificant" compared to the undetermined quantitative anticompetitive effects.[29]

In appeal of the FCA's decision, the Supreme Court explicitly confirmed that a merger's environmental effects could rightfully be considered in the application of the efficiencies defense as long as they had an economic dimension.[30] In addition, the Supreme Court agreed with the FCA that such effects were not cognisable in the case at issue, given the Commissioner's failure to quantify them:[31]

> I agree with the Commissioner that where environmental effects have economic dimensions, these effects may properly be considered under the s. 96 analysis. Indeed, I do not read the Federal Court of Appeal as saying otherwise. The issue raised by the Commissioner is whether the environmental effects put into evidence by the Commissioner did have an economic dimension. I agree that an effect such as a contingent liability on the books of a company which has to remediate a site is an economic aspect of an environmental effect. However, while there was evidence before the Tribunal with respect to this kind of contingent liability, this evidence cannot be considered in this case.
>
> First, there is no evidence as to whether the waste covered by the contingent liability in question fell within the Contestable Area. Second, there is no evidence as to the price elasticity of demand of the customer in question. Finally, and as the Federal Court of Appeal found, if this effect did fall within the Contestable Area, it was quantifiable and therefore should have been quantified by the Commissioner. As explained above, anti-competitive effects which are quantifiable will not be treated qualitatively as a result of a failure to quantify. Therefore, and although the environmental effects in this case had an economic dimension, the Tribunal erred in assessing these effects qualitatively.

However, the Court disagreed with the conclusions of the Federal Court of Appeal on the balancing of the merger's anticompetitive effects and efficiencies. According to the Supreme Court, a failure by the Commissioner to meet its quantification burden should result in a weight given to the quantifiable effects of zero (instead of "undetermined" weight). In light of this revised balancing exercise, the transaction was allowed to proceed.

The outcome of the *Tervita* case is a clear statement that the environmental effects of a merger can be considered in the application of the efficiencies defence if they have an economic dimension, either as a form of economic efficiency or anticompetitive effect, as long as they are adequately proven. However, the quantification burden set by the Supreme Court in its decision was criticized by many given that, in theory, all effects on competition are in some way quantifiable.[32] As such, as argued by T. W. Ross, the Supreme Court's preference for quantification has created a "hierarchy of evidence that has the potential to place even very low quality quantitative evidence above convincing qualitative evidence in evaluating any anticompetitive effects or efficiencies".[33] Some could worry that this evidence requirement will be detrimental to the recognition of environmental effects in the application of the efficiencies defense in the future. However, the Supreme Court's statement that "[e]ffects that can be quantified should be quantified, even as estimates" provides some flexibility to the Commissioner and merging parties, as it does not impose any particular method or standard for the quantification of anticompetitive effects and/or efficiencies. Therefore, as suggested by R. M. Duplantis and I. Cass, the quantification of environmental externalities could be accomplished using environmental impact studies, which are frequently used by the government to quantify the environmental impact of development projects.[34] Certainly, there would appear to be greater scope for the consideration of environmental externalities in future merger cases in Canada.

### b. Competitor Collaborations

Part VI of the Act includes provisions that prohibit certain criminal offences in relation to competitor collaborations, such as section 45 of the Act, which makes 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. This section used to include a defence for conspiracies, combinations, agreements or arrangements that related, among other things, to measures to protect the environment, define product standards, and/or cooperation in research and development, but it was removed when section 45 was

amended in 2009.[35] In its comments on these legislative amendments, the Competition Law Section of the Canadian Bar Association suggested the creation of a "safety valve" for certain categories of agreements that are not anti-competitive in nature but could be considered illegal under the revised section 45, including environmental agreements, standards-setting agreements and research and development agreements.[36] However, this proposed block exemption was never incorporated in the revised Act.

Even if the current version of section 45 does not expressly recognize or refer to environmental concerns and has not yet been interpreted in that context, it does leave some room for the consideration of environmental concerns in certain situations. For example, section 45 of the Act, includes a defence for agreements that are ancillary to a broader or separate legitimate agreement:

> (4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if
>
> (a) that person establishes, on a balance of probabilities, that
>
> (i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and
>
> (ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and
>
> (b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

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 defense if their impact on the fixation of prices, allocation of customers or markets, or restriction of output is directly related to the achievement of those goals, and reasonably necessary for their effectiveness. In its non-binding guidelines on competitor collaborations, the Bureau expressly recognizes the potential application of the ancillary restraint defence to sustainability agreements that lead to price increases:[37]

> For example, an agreement among competitors to implement certain measures designed to protect the environment or implement a new industry standard may increase the costs of producing a product and ultimately result in an increase in price. However, the Bureau does not consider such initiatives

> alone to be agreements to fix or increase prices. Even if such arrangements are considered to be agreements to fix or increase prices, such agreements could be subject to the ancillary restraints defence (…).

Assuming that an agreement between competitors benefits from the ancillary restraint defence, such agreement could still be subject to scrutiny under the civilly enforced section 90.1 of the Act, which empowers the Tribunal to prohibit agreements which are likely to lead to a substantial lessening or prevention of competition. However, this type of agreement may still benefit from the defence for gains in efficiency in the same way as a merger, as described above. For example, the gains in efficiency generated by a legitimate research and development joint venture between two competitors for the development of more sustainable products could be reviewed and allowed if the gains in efficiency resulting from it are greater than and offset the agreement's anticompetitive effects.[38]

Some pro-environment agreements between competitors could also be exempted from criminal treatment under section 45 of the Act if they are expressly regulated by a provincial or federal regulatory scheme, such as participation in a mandatory carbon or energy price fixing framework.[39] As recently summarized by the Tribunal, Canadian courts have held that the criminal prohibition of price fixing, market allocation and supply restriction under the Act does not apply "where the conduct giving rise to the alleged contravention was required, directed or authorized, expressly or impliedly, by other validly enacted legislation".[40] In *Law Society of Upper Canada*, the Court confirmed that this regulated conduct defence applies equally to both regulators and regulatees, which would include the participants in the carbon pricing regulatory framework in the example mentioned above.[41] The availability of the regulated conduct defence for horizontal agreements in the environmental context was recognized by the Bureau in a 2010 submission to the OECD, in which the Bureau mentioned that it would carefully consider whether potentially anticompetitive conduct is regulated by an environmental legislative regime when determining its enforcement response.[42] However, this does not mean that competitors subject to an environmental regulatory framework are entirely exempted from the application of the Act, as the conduct must be specifically authorized for the defence to be available.[43] According to the Tribunal, this defence is only available for violations of section 45 of the Act, and may not be invoked in respect of the civil prohibition of anticompetitive agreements between competitors, or in respect of the provision regulating the abuse of a dominant position, as such provisions do not contain the appropriate leeway language required for the regulated conduct defence to be available.[44]

Although Canadian case law has not yet ruled on the application of these exceptions in a context where environmental issues are at play, there have been some cases elsewhere around the world where competition authorities have reviewed and/or taken action against competitor collaborations allegedly designed to achieve sustainability goals. For example:

- in 2011, the European Commission imposed a fine of over €315 million on Procter & Gamble and Unilever for operating a cartel together with Henkel which involved efforts to maintain their respective shares of the household laundry powder detergents market in eight E.U. countries.[45] The coordinated behavior was the result of a trade association initiative to improve the ecological performance of washing powders and detergents, which involved price fixing practices designed to maintain the competitor's competitive position during the shift towards more environmentally friendly products. The European Commission concluded that that the initiative's environmental objectives could have been rightfully achieved without a coordination of prices or other anti-competitive practices.

- The Indonesia Palm Oil Pledge, a pledge between major palm oil producers which had been initiated in 2014 for the achievement of enhanced sustainability standards in the palm oil industry, was publicly criticized by the Indonesian competition authority, which was concerned that the agreement would facilitate the creation of a cartel.[46] Among other things, palm oil producers had pledged to stop purchasing palm oil from farmers engaging in illegal deforestation, and imposed sustainability standards that went beyond the rules imposed by Indonesian regulation. As a result of the threat of an antitrust investigation, the pledge was dissolved in 2016.[47]

The outcome of these cases may encourage the critics of private sustainability agreements to use competition law rules to prevent their implementation by seeking the assistance of antitrust agencies, both in Canada and in other jurisdictions. For instance, a group of soybean farmers has recently sought the intervention of the Brazilian competition authority against a moratorium entered into by soy crushers and traders which prevents them from purchasing soy cultivated in areas that were deforested after 2008.[48] It remains to be seen how similar considerations would be treated in the future under the framework of the Act, especially since the existence of the efficiency defence in Canada's civil provisions may give greater scope for environmental concerns explicitly to be recognized as an anti-competitive effect.

### c. Misleading Advertising

The Act's misleading advertising provisions, which prohibit the making of misleading or false marketing representations and performance claims without adequate and proper testing, have been the basis of a few enforcement actions led by the Bureau to protect consumers from misleading environmental claims. For example, in 2007, the Bureau investigated the marketing claims of a sportswear retailer relating to the materials used in its clothing products, which had been advertised as containing health-promoting seaweed fibres.[49] Similarly, in 2009–2010, the Bureau entered into a series of consent agreements with a number of spa retailers following claims that their products qualified for an energy efficiency program administered by the Government of Canada.[50]

More recently, in 2016 and 2018, the Commissioner entered into two consent agreements with three vehicle distributors after completing an examination of their environmental marketing claims.[51] The Commissioner was concerned that the vehicle distributors had made, for the purpose of promoting the sale of their vehicles, environmental marketing claims to the Canadian public that were false or misleading in a material respect, and representations on the environmental performance or efficacy of their vehicles that were not based on adequate and proper testing. Pursuant to the terms of the consent agreements, the respondents had to pay a total of $17.5 million in administrative monetary penalties, cease the impugned conduct, and establish and maintain a corporate compliance program. The alleged practices also resulted in the payment of $2.4 billion in damages pursuant to class actions settlements in Canada, as well as a record $196.5 million fine for the breach of Canadian environmental laws following the guilty plea of Volkswagen AG in 2020.[52]

The deceptive marketing provisions of the Act have also been used as the basis of a best practice guide on environmental marketing claims developed by the Canadian Standards Association in collaboration with the Bureau (the "**Guide**").[53] This document, which was issued in 2008, was developed with the objective of assisting advertisers in complying with the federal rules regulating deceptive marketing practices. The Guide is based on the requirements of the international standard *ISO 14021:2016 Environmental labels and declarations—Self-declared environmental claims (Type II environmental labelling)* ("**ISO 14021**"), and formulates the general rule that self-declared environmental claims should not provide false or misleading representations, no matter the form of the claim (statements, symbols or graphics on the product or its package; product literature, traditional

advertising or Internet publications). Such claims must be unlikely to result in misinterpretation and should not imply multiple benefits for a single environmental change (for instance, implying that waste reduction resulting from recycling leads also to cleaner air). The Guide also includes recommendations on claims of sustainability, the use of symbols for environmental claims, and the making of selected claims on degradability, energy consumption, water consumption and reusability. As of today, the Guide remains the latest extensive guideline issued on the topic by the Bureau, but it was criticized by the Competition Law Section of the Canadian Bar Association because of its failure to clearly relate the ISO 14021 international standard to the provisions of the Act, and the lack of interpretation guidance tailored to the enforcement of the Act by the Bureau.[54]

## C. Should More Be Done?: Risks and Benefits of Reflecting Environmental Concerns in Competition Law

As demonstrated by the outcome of the few Canadian competition law cases which involved environmental concerns, the pursuit of economic efficiency contemplated in the Act's purpose clause is often favourable to the achievement of environmental goals. In other words, the pursuit of core competition goals can have positive effects on the environment, and vice versa. By ensuring that the competitive structure of the marketplace is maintained, competition law contributes to the creation of a commercial environment where innovative, environmentally friendly technologies and products can enter the marketplace, and where sustainable products can be advertised and replace less efficient alternatives. In fact, competition may even enable the production of "healthier, safer, environmentally responsible and more ethical and equitable products", which can be driven by consumer preferences for such products, as well as promote innovation and therefore "achieve environment targets in an efficient and cost-effective manner, as recognized by United Nations Conference on Trade and Development."[55]

However, many have argued that competition law should not be used to pursue policy objectives that go beyond the core promotion and maintenance of efficient market structures, as doing so could dilute the effectiveness of antitrust, be difficult to enforce and result in unintended spill-over effects. As argued by T.J. Brennan, the mandate of antitrust agencies should not be broadened to include the achievement of environmental policy goals:[56]

> [E]nvironmental protection is an important policy goal. But environmental protection has long been the province of other laws; the U.S. has an agency with that name charged with that mission. And that agency should no more worry about antitrust consequences of its regulations than competition

> agencies should worry about the environmental effects of whether or not to enforce the antitrust laws. Trying to have both agencies pursue both mandates, either guessing what the other is going to do or engaging in extensive attempts at cooperation and setting the same priorities, is just the kind of administrative calamity that the aforementioned "division of policy labor" principle can help avoid.

Along these lines, even if the Act's current framework implicitly allows for a certain consideration of environmental issues, the Bureau has generally chosen not to use its enforcement powers to pursue an environmentalist agenda over the past decade. For example, in 2010, during an OECD policy roundtable on Horizontal Agreements in the Environmental Context, the Bureau acknowledged that collaboration between market participants for the development of environmental programs could result in clear benefits, but that "public considerations, including environmental objectives, are distinct from pure considerations of competition and are, as such, beyond the scope of the Bureau's mandate under the Act".[57]

Similarly, in 2016, the Bureau concluded that broader public interest considerations were generally not provided for by the Act's merger review regime.[58] According to the Bureau, the Canadian government has chosen not "to broaden the merger mandate of competition authorities beyond core competition objectives […] to achieve various public interest goals", and instead has decided to "leave these broader considerations to other agencies with different mandates and expertise," such as the Minister of Innovation, Science and Economic Development and the Minister of Canadian Heritage.[59] Although the Bureau has indicated that it will cooperate with other governmental agencies and ministries responsible for conducting simultaneous or superseding merger reviews, it will focus on its own mandate and area of expertise, which as mentioned above does not include the protection of the environment.

There is no indication that the Bureau is willing to change this policy standpoint in the upcoming years. Even if the Bureau is technically bound by the federal government's acknowledgement of "the need to integrate environmental, economic and social factors in the making of all decisions by government" stated in the 2008 *Federal Sustainable Development Act*, the legal obligations resulting from this statute are unclear, as the agency is not among those which are required to prepare a sustainable development strategy in compliance with the Federal Sustainable Development Strategy.[60] In addition, the Bureau's Strategic Vision 2020–2024 indicates that the agency's main focus during that period will be to prevent anticompetitive

conduct in the digital marketplace, and the Bureau's 2020–2021 annual plan indicates that the agency will focus its enforcement work on digital services, online marketing, financial services and infrastructure, without mentioning sustainability or environmental concerns on a single occasion.[61]

Nonetheless, although this may have not yet occurred in Canada, a "division of policy labor" approach like the one supported by the Bureau can sometimes result in conflicting enforcement actions by the competition authorities and other branches of government, especially in sectors where multiple governmental agencies with differing mandates have jurisdiction to regulate corporate conduct. For instance, in September 2019, the United States Department of Justice initiated an investigation into four car manufacturers which had entered into a voluntary agreement with the state of California for the implementation of car emissions standards.[62] This investigation, which was eventually closed in February 2020, was criticized as an attempt by the federal administration to prevent the enforcement of stricter vehicle emissions standards by the State of California, and had a deterrent effect on at least one car company which had initially considered joining the agreement.[63] Interestingly, a few decades earlier, the exact opposite had occurred, when the United States alleged that some vehicle manufacturers had conspired to eliminate competition for the development of air-pollution control equipment and to delay its installation, resulting in a judicial consent decree which provided that the manufacturers would cease the alleged conduct.[64] These events suggest that competition law enforcement can both support and harm environmental goals, depending on the applicable environmental regulatory framework and the approach of competition law agencies in dealing with conduct that involves environmental concerns.[65]

The 2020 U.S. investigation into automobile manufacturers also demonstrated that, if not managed properly, competition law enforcement has the potential to have a chilling effect on competitor collaborations aimed at achieving environmental goals, such as agreements on the reduction of production and transportation costs or the acceleration of research and development through the pooling of resources.[66] Competitor collaborations can also enable the creation of private environmental certifications, standards and codes of conduct for the reduction of waste and the improved use of natural resources, which may be particularly impactful in industries or jurisdictions where public regulation is defective.[67] I. Scott identifies three categories of pro-environmental agreements which could be chilled because of deficient competition law enforcement: (1) resource conservation agreements limiting output, (2) mandatory group boycotts, and (3) price

stabilization and maintenance agreements in flawed markets. According to I. Scott, this chilling effect may be particularly significant for agreements that are prohibited *per se* by antitrust rules, which do not require the proof of a prevention or lessening of competition, such as section 45 of the Act.[68] As explained by J. H. Adler, such rules constitute a potential challenge for resource conservation, given that what "antitrust enforcers fear—agreements which restrain output—is precisely what conservation demands."[69]

## D. How to Move Forward

The Center for International Sustainable Development Law (the "**CISDL**"), an independent international legal research institute based in Montreal, has identified three different ways of incorporating sustainable development concerns into competition law and policy: (1) the implementation of substantive competition rules that foster social and ecological purposes, (2) the integration of exceptions, exemptions and exclusions to existing competition rules for the benefit of pro-environment conduct, and (3) the enhanced application of competition law, which ultimately will result in the creation of a fair marketplace where more sustainable products can successfully enter the market and compete with less efficient alternatives.[70] According to the CISDL, these forms of measures each have a different degree of regulatory impact, with substantive rules having the strongest impact, and enhanced enforcement having the lowest.[71]

So far, the increased prevalence of environmental concerns in the Canadian political sphere has not resulted in discussions on amending the Act to expressly reflect environmental policy objectives through new substantive rules. As discussed above, Canada is already dedicated to the strong enforcement of its competition rules, and some of the exemptions provided in the Act could be interpreted for the benefit of the environment such as the regulated conduct defence, the ancillary restraint defence and the defence for gains in efficiency. However, the Act does not include any exceptions, exemptions or exclusions expressly designed to achieve environmental goals. In the absence of legislative reform, Canada could alternatively follow the lead of the few enforcement agencies which have departed from an orthodox enforcement approach towards of a more environmentally friendly form of antitrust, either through the publication of new policy orientations by the competition authorities or the creative interpretation of existing legislative frameworks. In support of this approach, European Commissioner M. Vestager has recently argued that existing regulations should be used to "produce the sort of outcomes that we want to see" in

respect of sustainability, including through the development of new compliance guidelines, without reforming existing substantive rules.

For example, earlier this year, the Dutch competition authority issued draft guidelines on sustainability agreements, which recognize the positive impact that competitor collaborations may have on public sustainability objectives, which the agency broadly defined to potentially include the protection of the environment, biodiversity and climate, as well as public health, animal welfare, and fair trade. The guidelines explain how sustainability agreements can be developed without breaching Dutch antitrust rules, either because they are not anticompetitive or because they can benefit from a statutory exemption for efficiency gains.[72] The guidelines identify four categories of sustainability agreements that will generally not be considered anticompetitive: (1) non-binding agreements by competitors to positively contribute to a sustainability goal (e.g., where competitors determine their own objectives and how to achieve them); (2) codes of conduct which promote practices that take into consideration the environment and the impact on climate; (3) agreements for the concurrent improvement of product quality and reduction of sales of less sustainable alternatives (as long as there is no substantial impact on price or product diversity); and (4) agreements where a collaboration is required to obtain sufficient scale or production resources to create new products. The guidelines also set out how to demonstrate that a sustainability agreement has benefits that offset its restrictions of competition, and therefore qualify under the exemption for efficiency gains. As indicated in the guidelines, the Dutch competition authority's enforcement policy in respect of sustainability agreements is "aimed at finding solutions that will make it possible to be able to reap the sustainability benefits of initiatives, and is not aimed at enforcement based on fines."[73]

Another example of "sustainable" competition law enforcement is the clearance by the European Commission of a commitment by twenty manufacturers—all members of the European Committee of Manufacturers of Electrical Machines and Power Electronics ("**CEMEP**")—to reduce by at least 50% their sales of less energy efficient electric motors by the end of 2003 in order to reduce carbon dioxide ($CO_2$) emissions. The European Commission concluded in 2000 that the arrangement did not restrict competition, because energy efficiency was not an important factor for users, and because participants to the agreement had significant discretion on how to achieve their objectives, which were monitored by CEMEP independently from the knowledge of each competitor.[74] The European Commission had made similar conclusions in the JAMA and KAMA cases a year earlier, where commitments made by associations of vehicle manufacturers for the

reduction of $CO_2$ emissions were cleared on the basis that their objectives were collective instead of individual, and that each participant could individually determine its own contribution.[75]

As indicated above, the current framework of the Act does allow for the consideration of environmental policy objectives in certain situations, and case law has occasionally supported this type of interpretation. As such, the following policy changes could be implemented to reform competition law enforcement in Canada without having to amend the Act:

- The Bureau could be added to the list of federal agencies which are required to prepare a sustainable development strategy complying with and contributing to the Federal Sustainable Development Strategy. There are already a few federal agencies which are subject to this requirement and have used their enforcement powers to achieve environmental objectives, including organizations which do not have a mandate that is closely related with environmental concerns.[76] For example, the Canada Border Services Agency has recently focussed its actions on deterring the introduction of invasive alien species, and plant and animal diseases into Canada.[77] Likewise, the Public Health Agency of Canada has committed to develop and implement a new Infectious Disease and Climate Change program to reduce the risks associated with climate-driven infectious diseases.[78] There are no reasons why similar objectives could not be established and achieved by the Bureau in its own enforcement field.

- The Bureau's various enforcement guidelines could be edited to provide additional guidance on the agency's approach to business conduct that impacts the environment, especially with respect to mergers and anticompetitive agreements. The recent review of the Bureau's *Competitor Collaboration Guidelines*, which already provide some guidance on the potential applicability of the ancillary restraint defence to sustainability agreements, would have been an excellent opportunity to initiate this process.

In addition to these policy changes, an increased regulatory impact could be achieved through a few minor legislative amendments to the Act, as suggested by the CISDL. For example:

- The Act's purpose clause could be amended to include a reference to the necessity of promoting sustainability goals through the enforcement of the Act. As indicated above, other statutes already include a reference to Canada's commitment to foster sustainability, and

this amendment would facilitate an interpretation of the current provisions of the statute which is more consistent with the *Federal Sustainable Development Act* and Canada's environmental commitments, while clearly rejecting the view that sustainability goals should be dissociated from competition law enforcement.

- The impact of a given conduct on the environment could be included as an aggravating or mitigating factor when determining the amount of an administrative monetary penalty for a breach of the Act's provisions regulating deceptive marketing practices and abuse of dominant position.

- A merger's economic impact on the use of resources (including resource savings and negative externalities) could be included in the list of factors to be considered when determining whether a merger will likely result in a prevention or lessening of competition, and will benefit from the exception for gains in efficiency.

These changes all have the potential to enhance the predictability and transparency of competition law enforcement with respect to sustainability initiatives, which is essential to avoid a "regulatory chill" on pro-environment business conduct.

## E. Conclusion

Climate change and sustainability concerns used to be confined to politics and environmental law; however, in recent years, they have slowly transitioned to other legal spheres that were traditionally unrelated to the environment, such as the increased prevalence of climate change litigation in insurance law and securities law, and the regulation of benchmarks based on Environmental, Social and Governance (ESG) criteria in financial law.[79] At the same time, there is increased pressure for the elaboration of environmental rules and programs that reflect broader industrial policy concerns such as employment, innovation, international trade, and the promotion of competition. In this context, the fruit may be ripe to stop considering competition law and the environment in isolation. As indicated by the United Nations Conference on Trade and Development, the promotion of competition is, in itself, a way to achieve sustainable economic development, but an even more significant regulatory impact can be achieved from the integration of carefully crafted exemptions for sustainability agreements and the consideration of environmental effects in the assessment of anti-competitive behaviour.[80] Other jurisdictions have already started to pave the way for competition law sustainability reform, and Canadian competition

law should be next. As noticed by M. Caldecott, there has been an increased "alignment in the objectives of the federal government and the Bureau, suggesting that the intersection of politics and antitrust is likely to be a key area of focus in Canada in the coming years".[81] The current policy context may therefore be favourable to the creation of a competition law framework that is more reflective of Canada's environmental commitments.

## ENDNOTES

[1] The author is a graduate student in economics and has worked for two years as an associate in the Competition/Antitrust and Foreign Investment Group of a leading Canadian law firm. He would like to thank Dominic Thérien, Martin Thiboutot, Éliane Roux-Blanchette, Susan Hutton and the editorial board of the CCLR, and most importantly Marie Talaïa-Coutandin for their generous help in the development and review of this paper.

[2] See Thomas G. Wolfe, "EC Commissioner underscores competition's role in attaining more sustainable world" *Antitrust Law Daily, Wolters Kluwer* (2019) online: <https://lrus.wolterskluwer.com/news/antitrust-law-daily/ec-commissioner-underscores-competition-s-role-in-attaining-more-sustainable-world/97975>

[3] See Environment and Climate Change Canada, "Pan-Canadian Framework on Clean Growth and Climate Change : Canada's plan to address climate change and grow the economy" (2016), online (pdf): <http://publications.gc.ca/collections/collection_2017/eccc/En4-294-2016-eng.pdf.>

[4] *Ibid* at 9.

[5] See United Nations, "Canada's Voluntary National Review—Report Synopsis" (2018), Sustainable Development Goals Development Platform, online: *Sustainable Development UN* <https://sustainabledevelopment.un.org/memberstates/canada.>

[6] SC 2008, c 33, at 5.

[7] *Ibid* at 11.

[8] See Canada, Competition Bureau, "Competition in the digital age: The Competition Bureau's Strategic Vision for 2020-2024" (2020), Strategic Vision of the Commissioner of Competition from 2020 to 2024 (Commissioner: Matthew Boswell), online: *Canada* <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04513.html>. See also Canada, Competition Bureau, "2020-2021 Annual Plan: Protecting competition in uncertain times" (2020), Annual Plan of the Commissioner of Competition for the year 2020-2021 (Commissioner: Matthew Boswell), online: *Canada* <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04533.html >.

[9] See *Competition Act*, RSC 1985, c. C-34.

[10] See Timothy J. Brennan, "Should Antitrust Go Beyond "Antitrust"?" (2018), 63(1) The Antitrust Bulletin 49, online: <https://doi.org/10.1177/0003603X18756143>.

[11] See 2015 SCC 3.

[12] See Canadian Standards Association, "Environmental claims: A guide for industry and advertisers" (2008), Developed in partnership with the Competition Bureau, online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02701.html >; Consent Agreement, *Commissioner of Competition v Volkswagen Group Canada Inc. and Audi Canada Inc.*, Doc CT-2016-017, online: *Canada* <https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462496/index.do?q=volkswagen >. See also Consent Agreement, *Commissioner of Competition v Volkswagen Group Canada Inc. and Audi Canada Inc. and Porsche Cars Canada, Ltd.*, Doc CT-2018-003, online: <https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462469/index.do?q=volkswagen.>

[13] See Michael Caldecott, "Paradigm or Paradox: Canada's Competition Law Regime in the New Age of Populism" (2020) 33:1 Can Competition LR at 54.

[14] See House of Commons Debates, 33rd Parl, 1st Sess, No 8 (7 April 1986), at 11926 (Hon Michel Côté) as cited in *Commissioner of Competition v Superior Propane Inc.*, 2002 Comp Trib 16 at 81; quoted by Caldecott, *supra* note 14.

[15] *Competition Act, supra* note 9 at s 1.1.

[16] There are a few recent federal and provincial statutes which have incorporated sustainability considerations in their preambles, such as the *Impact Assessment Act,* S.C. 2019, c.28, which indicates at s.1 that the "Government of Canada is committed to fostering sustainability". Similarly, the Quebec *Mining Act*, CQLR c M-13.1, recognizes the necessity "to engage in mineral development in a manner respectful of the environment". It should be noted, however, that this acknowledgment was absent from the Quebec *Mining Act* until it was significantly reformed in 2013.

[17] The responsible Ministers may however seek the Commissioner's input to assess the merger's impact on competition as part of his or her broader assessment of the transaction. Some transactions may also be subject to the concurrent review of the Commissioner and other federal agencies, such as foreign investments subject to review under the *Investment Canada Act*, and transactions in the telecommunications and broadcasting sector reviewable by the CRTC. See Canada, Competition Bureau, "Competition Bureau submission to the OECD Competition Committee roundtable on Public Interest Considerations in Merger Control" (2016), online: *Canada* <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04101.html >.

[18] *Supra* note 14.

[19] In Canada, mergers and acquisitions are generally not subject to the approval of these departments, unless a transaction results in the expansion of an existing project or the launch of a new project that meets the applicable environmental thresholds. In Québec, in the context of asset transactions that involve the transfer of an authorization issued by the Québec Minister of the Environment and the Fight against Climate Change, the *Environment Quality Act* requires that a notice of transfer of the authorization be sent to the Minister, who has the ability to reject the transfer for a limited number of reasons. However, in the context of a share transaction or change of control transaction which does not involve a substitution

of the entity holding the authorization issued by the Minister, a consent or notice is not required.

[20] See *Tervita Corporation v Commissioner of Competition*, 2013 FCA 28.

[21] This defence does not apply to agreements prohibited under the criminal provisions of the Act.

[22] See Canada, Competition Bureau Canada, "Merger Enforcement Guidelines" (2011), online: *Canada* <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html.>

[23] *Supra* note 11.

[24] See *The Commissioner of Competition v CCS Corporation et al*, 2012 Comp Trib 14.

[25] *Ibid* at para 316-317. See also Ralph A. Winter, "Tervita and the Efficiency Defence in Canadian Merger Law" (2015) 28:2 Can Competition LR at 139.

[26] *Supra* note 20.

[27] *Ibid* at 155.

[28] *Ibid* at 163.

[29] *Ibid* at 170.

[30] *Supra* note 11.

[31] *Supra* note 11 at 163-165.

[32] See Thomas W. Ross, "Competitive Effects and Efficiencies: The Canadian Supreme Court's Decision in Tervita" (2016) 2:1 Competition L & Policy Debate 54; Edward M Iacobucci, "The Lessons of Tervita" (2015) 57:2 Can Community LJ 217. See also Jennfier Quaid and Mistrale Goudreau, "Bref commentaire sur l'affaire Tervita de 2015 (Comment on the Supreme Court of Canada decision in Tervita (2015))" (2016) 28 Cahiers de propriété intellectuelle 703.

[33] Ross, *supra* note 33 at 61.

[34] See Renée M. Duplantis and Ian Cass, "The importance of quantifying non-price effects in Canada" (2017) 2 Concurrences 51 at 56.

[35] See *Budget Implementation Act, 2009*, SC 2009, c 2.

[36] See John Bodrug, "*Competition Act Amendments—Bill C-10*" (2009), online (pdf): <https://www.cba.org/CMSPages/GetFile.aspx?guid=2de27c51-a87d-42e2-a915-93dbeab6cbb9>.

[37] See Canada, Competition Bureau Canada, "Competitor Collaboration Guidelines" (2009), online: *Canada* <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf/$FILE/Competitor-Collaboration-Guidelines-e-2009-12-22.pdf.>

[38] See United Nations Conference on Trade and Development, "The role of competition policy in promoting sustainable and inclusive growth" (2015), note by the UNCTAD secretariat, online: *United Nations Conference on Trade and Development* <https://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8d6_en.pdf. >

[39] For an exhaustive discussion on the regulated conduct doctrine, see Robert Mysicka, "The Regulated Conduct Doctrine: Canadian Competition Law and the Politics of Undueness" (2011) 24:1 Can Comp LR 18.

[40] See *Commissioner of Competition v Vancouver Airport Authority*, 2019 Comp Trib 6.

[41] See *Law Society of Upper Canada v Canada (Attorney General)*, (1996), 67 CPR (3d) 48 (Ont Ct Gen Div) at 467.

[42] See OECD Competition Committee, "Policy Roundtables: Horizontal Agreements in the Environmental Context", DAF/COMP(2010)(39) at 37, online: *OECD* < http://www.oecd.org/daf/competition/cartels/49139867.pdf.>

[43] See *Commissioner of Competition v Vancouver Airport Authority, supra* note 40 at 193, partly quoting *Hughes v Liquor Control Board of Ontario*, 2018 ONSC 1723. See also *Garland v Consumers' Gas Co*, 2004 SCC 25 and *Attorney General of Canada v Law Society of British Columbia*, [1982] 2 SCR 307, 72 OR (3d) 80.

[44] In *Garland v Consumers' Gas Co*, *supra* note 43, the Supreme Court indicated that two conditions must be met for the regulated conduct defence to be available in respect of a given federal statute: (i) the federal statute must reflect the express or necessarily implied intention of Parliament to clearly grant "leeway" to those regulated by a valid provincial legislation, and (ii) the valid provincial rule must authorize or require the conduct that would otherwise be prohibited by the federal legislation. The first of these two conditions is typically met when the federal statute contains the requisite leeway language, such as the presence of the words "in the public interest" or "unduly". Such wording was included in section 45 prior to 2009, but it was removed when the Act was amended in 2009. The leeway language was replaced by subsection 45(7), which states that the "rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province in defence to a prosecution under subsection 45(1)" that were available in respect of subsection 45(1) prior to the 2009 amendments continued to be in force in the amended version of the Act. In *Commissioner of Competition v Vancouver Airport Authority, supra* note 40, the Tribunal confirmed that subsection 45(7) had provided for a "statutory RCD for the criminal provisions under section 45", despite the removal of the leeway language. The Tribunal also noted that similar statutory "leeway" exemption had not been included in respect of the new section 90.1.

[45] See European Commission, "Antitrust: Commission fines producers of washing powder € 315.2 million in cartel settlement case" (2011), online: *European Commission* <https://ec.europa.eu/commission/presscorner/detail/en/IP_11_473.>

[46] See Arlina Arshad, "Jakarta wants oil majors to ditch 'zero deforestation' pact", *The Straits Times* (2019), online: <https://www.straitstimes.com/world/jakarta-wants-oil-majors-to-ditch-zero-deforestation-pact>; quoted by Unilever, "Sustainability cooperations between competitors & Art. 101 TFEU Unilever submission to DG COMP", online: <https://www.unilever.com/Images/unilever_submission_sustainability_competition_law_tcm244-551751_en.pdf. >See also Ahmad Dermawan and Otto Hospes, "When the State Brings Itself Back into GVC: The Case of the Indonesian Palm Oil Pledge" (2018) 9:52 Global Policy 21, online: < https://onlinelibrary.wiley.com/doi/full/10.1111/1758-5899.12619.>

[47] *Ibid.*

[48] See Roberto Samora, "Europe says Brazil's move to end soy moratorium threatens $5-billion market" (2019), online: *Reuters* <https://www.reuters.com/article/us-brazil-soybeans-environment/europe-says-brazils-move-to-end-soy-moratorium-threatens-5-billion-market-idUSKBN1XZ1CV.>

[49] See Marina Strauss and Paul Waldie, "Lululemon ditches tags touting health benefits" *The Globe and Mail*, (2007) online: < https://www.theglobeandmail.com/report-on-business/lululemon-ditches-tags-touting-health-benefits/article1213995/. >

[50] See Consent Agreement, *Commissioner of Competition BRENT MARSALL (also known as Brent Marshall), also doing business in Alberta as DYNASTY SPAS AND GAMES ROOM, ROCHELLE MARSALL (also known as Rochelle Marshall), DYNASTY SPAS INC., also doing business as ECOSMART SPAS, and 1232466 ALBERTA LTD., also doing business as DYNASTY SPAS* , Doc CT-2010-06, online: <https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463511/index.do. >

[51] *Supra* note 12.

[52] See Environment and Climate Change Canada, "Volkswagen Aktiengesellschaft ordered to pay $196.5 million fine after pleading guilty to 60 charges for offences under federal environmental legislation" (2020), online: *Canada* <https://www.canada.ca/en/environment-climate-change/news/2020/01/volkswagen-aktiengesellschaft-ordered-to-pay-1965-million-fine-after-pleading-guilty-to-60-charges-for-offences-under-federal-environmental-legisla.html >

[53] *Supra* note 12.

[54] National Competition Law Section of the Canadian Bar Association, "Environmental claims—A guide for industry and advertisers" (2007), online (pdf): < https://www.cba.org/CMSPages/GetFile.aspx?guid=01024ac6-2122-425d-8d0e-e84d76471223. >

[55] *Supra* note 38.

[56] *Supra* note 10.

[57] *Supra* note 42 at 3.

[58] *Supra* note 17. The Bureau did recognize that it may play a public interest function in rare, highly complex merger cases where the treatment of income redistribution is examined under the efficiencies defence.

[59] *Ibid.*

[60] *Supra* note 6 at s 11. For additional information on the impact of the *Federal Sustainable Development Act* on Canada's environmental policy, see Jason MacLean, "Will We Ever Have Paris? Canada's Climate Change Policy and Federalism 3.0" (2018), 55:4 Alberta LR 889 at 907. See also Amissi Melchiade Manirabona, «Une évaluation critique de la première loi canadienne sur le développement durable» (2010) 42 :1 Revue de droit d'Ottawa 29.

[61] *Supra* note 8.

[62] David Shepardson, "U.S. ends antitrust probe of four automakers over California emissions deal" (2020), online: *Reuters* < https://www.reuters.com/article/us-autos-emissions-antitrust/u-s-ends-antitrust-probe-of-four-automakers-over-california-emissions-deal-idUSKBN2012NP. >

[63] *Ibid.*

[64] See *United States v Automobile Mfrs. Ass'n, Inc.*, 307 F Supp 617 (CD. Cal 1970); quoted by OECD, *supra* note 42 at para 11.

[65] See Markus W. Gehring, "Competition Law and Sustainable Development: A CISDL Working Paper" (2003), Center for International Sustainable Development Law, online (pdf): <https://cisdl.org/public/docs/news/CISDL_Competition_Law_SD.pdf.>

[66] Inara Scott, "Antitrust and Socially Responsible Collaboration: A Chilling Combination?" (2016) 53:1 American Business LJ, online:< https://ssrn.com/abstract=2851226Chilling>

[67] *Ibid.*

[68] *Ibid.*

[69] *Ibid*, quoting Jonathan H. Adler, "Conservation Through Collusion: Antitrust Barriers to Cooperative Fishery Management" (March 2002), online: <http://dx.doi.org/10.2139/ssrn.305921>.

[70] *Supra* note 65.

[71] *Ibid.*

[72] See Netherlands Authority for Consumers and Markets, "Guidelines—Sustainability agreements: Opportunities within competition law" (2020), online (pdf): <https://www.acm.nl/sites/default/files/documents/2020-07/sustainability-agreements%5B1%5D.pdf.>

[73] *Ibid* at 6.

[74] See European Commission, "Commission clears European manufacturers' agreement to improve energy efficiency of electric motors" (2000), online: *European Commission* <https://ec.europa.eu/commission/presscorner/detail/en/IP_00_508 >; quoted by Unilever, *supra* note 47.

[75] Unilever, *supra* note 47.

[76] The full list of federal agencies which are subject to this requirement can be found in the schedule of the *Federal Sustainable Development Act*.

[77] Canada Border Services Agency, "Departmental Sustainable Development Strategy 2019–2020" (2019), Minister of Public Safety and Emergency Preparedness, online: *Canada Border Serive Agency* <https://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/sds-sdd/sds-sdd-19-20-eng.html.>

[78] Public Health Agency of Canada, "2017-2020 Departmental Sustainable Development Strategy: 2019–20 Update" (2019), Minister of Health, online: *Public Health of Canada* <https://www.canada.ca/en/public-health/corporate/mandate/about-agency/sustainable-development/2019-2020-update-departmental-sustainable-development-strategy.html. >

[79] See Francis Kean, "Climate change litigation threats to directors and officers" (2019), online (blog): *Willis Towers Watson* < https://www.willistowerswatson.com/en-US/Insights/2019/11/climate-change-litigation-threats-to-directors-and-officers >; Benjamin Berringer, "Securities-Based Climate Litigation in the United States: What is the Status?" (2020), online (blog): *Clifford Chance* <https://www.cliffordchance.com/insights/resources/blogs/business-and-human-rights-insights/securities-based-climate-litigation-in-the-united-states-what-is-the-status.

html> ; See also European Commission, "EU climate benchmarks and benchmarks' ESG disclosures", online: *European Commission* <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/eu-climate-benchmarks-and-benchmarks-esg-disclosures_en>.

[80] *Supra* note 38.

[81] *Supra* note 14.

# CGI SOCIAL MEDIA INFLUENCERS & DECEPTIVE MARKETING

Katie Healy

*This article analyzes the use of influencer marketing in relation to the misleading advertising provisions of the Competition Act. It focuses on the new practice of using computer generated images (CGI) of human-like avatars. These avatars have millions of followers on social media and post content in which they look and behave like human influencers. This paper argues that from a competition law standpoint, advertisements involving CGI influencers can be problematic because they run the risk of misleading consumers. This paper discusses the potential for misleading advertising practices to arise in two key arenas. First, deception may arise when influencers fail to disclose their material connections to the brands for which they are advertising. Second, endorsements by CGI influencers are cause for concern because these avatars cannot provide a genuine review of the merits of a given product.*

*L'auteure analyse le recours au marketing d'influence en ce qu'il a trait aux dispositions de la Loi sur la concurrence portant sur la publicité trompeuse. Elle axe l'article sur la nouvelle pratique fondée sur la génération d'images par ordinateur d'avatars ayant des traits humains. Ces avatars sont suivis pas des millions de personnes sur les médias sociaux et publient du contenu dans lequel ils se présentent et agissent comme des influenceurs humains. L'auteure soutient que du point de vue de la concurrence, les publicités qui comportent des influenceurs qui sont des images générées par ordinateur peuvent causer des problèmes, car elles courent le risque de tromper les consommateurs. Elle discute du potentiel de pratiques de publicité trompeuse dans deux domaines principaux. En premier lieu, la tromperie peut survenir lorsque les influenceurs ne révèlent pas leur lien avec les marques pour lesquelles ils font de la publicité. En second lieu, les appuis par des influenceurs qui sont des images générées par ordinateur sont des sources de préoccupations, car ces avatars ne peuvent pas donner un avis réel quant aux mérites d'un produit donné.*

Consumer-facing businesses have adopted new marketing strategies in response to the widespread use of social media.[1] One of these strategies involves advertising through social media influencers. Social media influencers are "regular" individuals turned online personalities who generate and share content with their followers through various online platforms.[2] Influencers often specialize in a particular sector such as fashion, cooking, design, travel.[3] Brands compensate influencers to post advertisements on their social media pages, but consumers may struggle to

discern that the content is actually an advertisement. This creates the potential for consumers to be misled.[4] Thus, a growing problem in the influencer marketing space is the lack of compliance with misleading advertising provisions under the *Competition Act*.[5] This problem is further confounded with the emergence of computer-generated image (CGI) influencers.

CGI influencers, sometimes called virtual influencers, are a recent phenomenon that operate in a similar way to human influencers—the obvious difference being that CGI influencers are simply avatars. Consider the example of Lil Miquela[6], a Time's ranked most influential internet person personality[7], musician, model, and CGI influencer. She interacts with followers, writes human-like captions, posts pictures with real humans, is a social justice activist, and promotes third party brands.[8] She has been featured in advertising campaigns by several major brands, including Prada and Calvin Klein.[9]

So, what bearing does an influencer robot have on competition law? The most serious concern is the ability of a CGI influencers to deceive Canadian consumers. The issue of consumer protection is enhanced in instances where CGI influencers are presented in a way that obfuscates their identity, allowing them to masquerade online as humans. The risks are twofold: 1) where the CGI influencer does not disclose material connection to a brand in a sponsored post, the consumer is at risk of being misled because the content appears impartial but is not; and 2) a CGI influencer cannot use a product nor provide an authentic opinion, so it is impossible for a CGI influencer to genuinely endorse a product.

## I. CGI INFLUENCERS

Like human influencers, CGI influencers are highly relatable and can have sizable followings on social media. CGI influencers are inherently relatable because of their eerily realistic appearance. Technology is such that consumers may view a photo of a CGI influencer and fail to recognize that the "person" in the image is not a real human.[10] CGI influencers are intended to be as realistic as possible, not only in their appearance but also in their online personas. A study examining the similarities between Lil Miquela and a comparable human influencer found that Lil Miquela aims to appear human-like by posting highly-relatable content with which her followers can empathize.[11] Her social media platform deliberately blurs the line between human and robot. Indeed, her CGI identity was not revealed for some two years after her emergence, a period during which legitimate questions about her realness arose.[12] "Shudu" is another virtual model whose

nature was initially kept hidden by her creator. Her creator explained, "CGI and 3D artists aim for absolute realism … If she was convincing people, I was on the right track. To perpetuate that she was real was part of my learning process."[13] Comments on the avatar's posts also suggest that consumers believe in the realism of the avatar, with millions of social media users engaging with her content as if she was a human being.

Since social media influencer campaigns are effective in reaching a group of target consumers, brands can use realistic CGI influencers to accomplish the same results. The use of CGI influencers offers a number of benefits to companies. For instance, CGI allows an advertiser to generate a photo with any backdrop and avoid costs by not hiring models, photographers, stylists, nor paying to rent out a location.[14] In addition, brands can avoid the volatility of human influencers who may speak or behave in a way that does not align with the brand's values and may damage the brand's intangibles.[15] However, along with these practical benefits of employing CGI influencers comes the serious risk of violating misleading advertising provisions.

## II. HUMAN SOCIAL MEDIA INFLUENCERS

Both human and CGI influencers have a similar ability to offend the misleading advertising provisions of the *Competition Act*, so before delving in to the legal issues raised specifically by CGI influencers, it is useful to understand the phenomenon of human social media influencers, out of which Lil Miquela and the like were born.

### i) Human Influencer Marketing

Influencers are perfectly positioned to connect with a target group of engaged consumers. Accordingly, many companies choose to collaborate with influencers for marketing purposes. Influencer marketing is a booming business, both in Canada and worldwide. The industry is currently estimated to be worth $8 billion USD and projected to reach $15 billion USD by 2022.[16] A recent report found that up to 75% of Canadian marketers have specific budgets dedicated to influencer and/or content-based marketing.[17] Influencers are compensated by companies to post content that features the brand. These partnerships take on different appearances ranging from formal contracts to more creative structures, such as the influencer receiving a free product from a company in exchange for making a post about the product.[18] Another common structure involves affiliate links, where influencers include a unique link alongside their content. The link is coded such that when a consumer makes a purchase using the link, the company can credit the purchase to the influencer and attribute a commission.[19]

Because of their perceived expertise in their given area, consumers regard influencers as a trustworthy source for advice and product recommendations. Research suggests that both the informative value of the influencer's content and the influencer's credibility[20] increases follower trust in the influencer's sponsored posts.[21] This means that influencers who specialize in a particular area have the ability to communicate with a group of likeminded and trusting consumers. Brands should choose to work with influencers who operate within their relevant industry and easily reach a mass number of target consumers. These campaigns can be effective because influencers have the ability to sway consumer purchase decisions by virtue of the trust placed in them by their consumer followers.[22]

In addition to the unique ability to reach target consumers, another advantage of influencer marketing is the ability to evade ad blocking software. Nearly half of Canadian consumers employ an ad blocker while using a desktop computer.[23] This significantly affects the ability of marketers to reach consumers through traditional means of advertising[24]—a problem which can be easily avoided through influencer marketing. Influencer content is not caught by the blocker but instead sought out by the consumer.

Social media influencers clearly grant tactical benefits to 21st century advertisers, but also pose serious concerns from a competition law standpoint, especially with respect to the disclosure and testimonial components of the misleading advertising provisions. Consumers can be misled when influencers do not disclose that their content is actually an advertisement and not authentic content. Consumers may also be misled by testimonial or endorsement-like content where the influencer has not actually used the product they are endorsing. CGI influencers raise many of the same challenges posed by their human counterparts. Thus, before analysing the CGI-specific challenges, this paper will discuss the misleading advertising pitfalls that stem from *both* human and CGI influencers.

## III. MISLEADING ADVERTISING

### i) Why is misleading advertising a competition law concern?

In consumer-facing industries, advertising is a tool that is necessary to capture market share. Vendors use advertising in attempts to persuade consumers to purchase their particular product rather than the product of competitor.[25] Where advertising is not truthful or does not meet disclosure standards, consumers may be swayed to make a choice that they would not otherwise have made. Misleading advertising impairs a consumer's ability to make an informed purchase decision[26] which not only causes damage to

the consumer and competing sellers, but also jeopardizes the overall health of the market. Consumers who have been hoodwinked into making a bad purchase by dishonest sellers may lose trust in the "integrity of the free market."[27] To achieve an efficient marketplace, consumers must be empowered to make purchases with the assurance that they are not being misled.[28] In addition, honest competitors may lose out on sales to unscrupulous sellers.[29] Thus, in Canada, misleading advertising laws provide a mechanism with which regulators can ensure a fair marketplace—for consumers and competing businesses alike.

### ii) Regulation in the Digital Economy

Regulation is especially critical in the digital economy where it is not possible for consumers to meet their seller or inspect the product prior to purchase.[30] The internet provides consumers with an unprecedented platform to conduct research about a product before buying. Social media in particular enables consumers to seek out product information from influencers to whom they can relate. In the Bureau's view, "[influencers] act as a curator and a trusted voice for like-minded consumers who do not have the time, expertise or resources to carefully research and navigate every decision."[31] However, in seeking out product information, consumers may be exposed to advertisements that are dressed up as unbiased, arms-length information.[32] For example, a consumer interested in buying a new item of clothing may use a social media platform to search "#fashion" and stumble upon an influencer's post featuring their outfit. If the post is actually an undisclosed advertisement for the clothing, the consumer is at risk of being misled. Clearly, paid advertisements elicit a different response from consumers than non-sponsored content.[33] As such, if the consumer had known the seller was behind the information, they may have altered their behaviour accordingly either through declining to purchase or evaluating the product with a more critical eye.[34] The Competition Bureau is well aware of the unique risks associated with influencer marketing, evident in the recent release of a digest dedicated to the topic.[35]

### iii) The Competition Act: Canadian Misleading Advertising Legislation

The *Competition Act* has both a civil and criminal regime for misleading advertising. Both regimes target the same type of conduct. In the past, the Competition Bureau has indicated that it will typically opt to bring

proceedings under the civil regime,[36] likely because of the practical benefits associated with the lower burden of proof and absence of the *mens rea* requirement.[37]

The civil provision, s. 74.01(1), provides that a person engages in reviewable conduct if they make a representation to the public that is false or misleading in a material respect.[38] In assessing whether a representation is false or misleading, the court will consider the representation's literal meaning and the "general impression" it conveys.[39] In regards to materiality, if a representation is so pertinent that it could influence an ordinary citizen's decision to purchase the product, it is sufficiently material.[40] It is not necessary to establish that a consumer was actually deceived, nor that the representation was made to a consumer who was within Canada.[41]

### iv) American Legislation

Canadian competition authorities have not yet acted against social media influencers—human or otherwise. Thus, some of this paper's analysis relies on examples from the United States and therefore warrants a brief comment on American legislation. The Federal Trade Commission (FTC), the Competition Bureau's American equivalent, has acted relatively frequently against social media influencers and brands.[42] At the highest level, American deceptive marketing offences are largely the same as those contained in the *Competition Act.* The misleading advertising provisions of both jurisdictions prohibit representations that are materially deceptive and likely to mislead the public.[43]

## IV. THE IMPORTANCE OF DISCLOSURE

The merits of disclosure are relatively straightforward: in order for the free market to thrive, consumers must be able to evaluate the merits of a good or service and make an informed choice. Undisclosed advertisements threaten the ability of consumers to make informed decisions because consumers may consider the information to be impartial and rely on it to make a choice they otherwise would not have made.[44] Advertisements that do not clearly disclose the connection between a brand and the advertiser pose harm both to competitors and the marketplace at large.

Consumers who use social media are inundated with content that blurs the line between advertising and editorial content. It is exceedingly difficult for consumers to identify advertisements because many influencer advertisements take the form of native advertising. An example of native advertising may be a recipe posted on a cooking blog that features a

particular kitchen appliance. The post is not only a recipe, but also an advertisement for the kitchen appliance. In situations like this, consumers often struggle to identify advertisements as such because the advertisement is "presented alongside and intermingled non-sponsored content on the same platform."[45] Native advertising can be used legitimately, but is problematic where an advertisement too closely resembles a platform's content.[46] If the creator of the advertisement does not adequately disclose that the content is an advertisement, consumers could be misled.

### i) Disclosure: Canadian Legislation & Guidelines

The Competition Bureau has released clear instructions for all parties engaged in influencer marketing. Influencers must clearly and conspicuously disclose material connections with brands in order to avoid liability for misleading advertising under the *Act*.[47] A material connection is defined as, "any relationship between an influencer and a company that has the potential to affect how consumers evaluate the influencer's independence."[48] A influencer's relationship to a brand warranting disclosure may include compensation in any form (including free "gifts"), a personal connection, receiving a discount, or any other benefit.[49]

The Bureau's guidelines also outline the standards for compliant disclosures. There is no uniform method of disclosure because influencer content encompasses a variety of online platforms, each with their own nuances. However, the Bureau's guidelines outline standards that can be applied broadly across the web. For instance, influencers must take care that their disclosures are highly visible and consumers do not have to sift through text to uncover the disclosure.[50] They should also avoid the use of ambiguous disclosure language to ensure that the average consumer will understand and appreciate the meaning of the disclosure. Phrases such as, "Thank You Company X!", "Ambassador", "Partner", "Company X", "SP", "Spon,"[51] is not adequate because the existence of a material influencer-brand relationship is not sufficiently clear. It is worth noting that several platforms have built-in disclosure abilities, such as a tag on Instagram which allows users to post sponsored content under the heading "Paid partnership with [XYZ brand]." While these developments may be a step in the right direction, the FTC has indicated that these built-in tools do not necessarily suffice.[52]

There has not yet been insight from Canadian regulators on the topic of CGI influencers and disclosure. However, CNNMoney reported the comment of an FTC spokesperson who stated, "the FTC doesn't have specific guidance on CGI influencers, but advertisers using CGI influencer

posts should ensure that the posts are clearly identifiable as advertising."[53] For disclosure purposes, there is nothing inherently different about the types of posts made by CGI influencers than those made by human influencers. The misleading advertising provision applies broadly and extends to all kinds of representations, made by "any means whatsoever,"[54] suggesting that whether the representation is made by a natural person is immaterial to the disclosure requirement.[55] Therefore, Canada should adopt the view that CGI influencers are subject to the same disclosure regulations as their human counterparts. There are no distinguishing characteristics tied to CGI influencer posts that warrant a different regulatory approach—with respect to disclosure.

### ii) Prevalence of Non-Disclosure

While the Bureau's guidelines for disclosure are clear, compliance rates are dismal. A 2016 American study approximates that only about half of brands even asked influencers to disclose a material connection.[56] However, a 2019 Canadian survey indicates that 43% of surveyed consumers are more likely to trust an influencer's content if they disclose paid advertisements.[57] So why are non-compliance levels so high? There are at least two explanations for the high level of non-disclosure: ignorance of the law or deliberate deceit. According to a 2018 study, just 23% of Canadian marketers claimed familiarity with the Ad Standards Canada (ASC) guidelines and 28% were not even aware the guidelines existed.[58] ASC is a self-regulatory body for advertisers and its guidelines on social media influencers have been deemed a useful resource by the Competition Bureau.[59] With respect to intentional non-compliance, the same 2018 Canadian study found that nearly 3 in 10 content creators have been asked by brands not to disclose the fact of compensation. The study caveats that this rate may be higher, considering the sensitivity of the question.[60]

Although one might assume that because CGI influencers are controlled by a creator or brand, their disclosures would be more likely to be compliant. However, a brief examination of Lil Miquela's Instagram suggests that this may not be the case. It is not clear whether Lil Miquela has a material connection to the brands she references in her content. The CGI model often tags brands without using any disclosure language.[61] Although this evidence is merely anecdotal, it exemplifies the possibility for CGI influencers to run afoul of disclosure requirements.

### iii) Enforcement Efforts: Disclosure

In late December 2019, the Canadian Competition Bureau sent approximately 100 advisory letters to various brands and marketing agencies who engaged in influencer marketing, particularly in the "health and beauty, fashion, technology and travel" sectors.[62] According to the related press release, the letters advised the recipients to review their marketing practices to ensure compliance.[63] This marks the first official action taken with respect to influencer marketing. When considering enforcement of non-disclosures, it is also helpful to refer to the Bureau's guidance on astroturfing. Astroturfing refers to the practice of a person publishing reviews or ratings that "that masquerade as the authentic experiences and opinions of impartial consumers" without disclosing the compensatory nature of the brand-reviewer relationship.[64] While influencers' non-disclosures are not perfectly captured by this definition, in both instances the concern is that consumers will rely on the review as an authentic endorsement. The underlying policy justification of protecting consumers and honest competitors is the same.

The FTC has been relatively active in taking action against brands and influencers.[65] For instance, in September 2017 the FTC took its inaugural action against individual influencers. Two influencers had promoted their company CGSO Lotto, Inc to followers on YouTube and Twitter without disclosing that they owned the company.[66] Their ownership of the company was clearly a material connection to the brand. In acting, the FTC aimed to send a message to other influencers that material connections must be clearly and conspicuously disclosed in order to protect consumer purchase decisions.[67]

The FTC has also acted against advertising agencies who administrate a brand-influencer relationship. In response to non-compliant disclosures by YouTube influencers, the FTC investigated Microsoft Corporation, its advertising agency Starcom Media Vest Group, and Machinima, Inc, the network which contracted with the influencers. YouTube influencers were paid by Machinima to endorse Microsoft products but did not attach adequate disclosures to their content. The FTC did not take enforcement action against Microsoft and Starcom but entered into a consent agreement with Machinima.[68]

Despite the FTC's frequent enforcement activity, a recent example suggests that these actions are not wholly successful in effecting compliance. In 2017, the FTC took action in response to complaints about influencers' non-disclosure, issuing over ninety warning letters to brands and influencers

regarding non-compliant Instagram posts.[69] The letters emphasized the importance of disclosing the brand connection in a conspicuous location and addressed insufficient disclosures such as the use of "#sp," "Thanks [Brand]," and "partner." To determine the efficacy of the letters, Public Citizen, a consumer advocacy organization, monitored the Instagram accounts of forty-six of the letter recipients over a month-long period.[70] Public Citizen found that only one influencer consistently used compliant disclosures. In total, 79% of the advertisements posted during the monitoring period failed to comply with FTC disclosure requirements.[71] The FTC sent twenty-one follow up letters demanding a response from the influencer detailing the actions they would be taking to ensure future compliance.[72] Clearly, the regulation of influencer disclosures have not been mastered by Canada or the United States. The following section proposes solutions to the persistent problems underlying non-compliant and non-existent disclosures. These solutions can apply equally to human influencers and CGI influencers.

### iv) Proposed Solutions

Disclosure efficacy i.e., the ability of a consumer to recognize content as an advertisement, is closely connected to language clarity.[73] In the Influencer Disclosure Guidelines published by Ad Standards,[74] referenced by the Competition Bureau, acceptable hashtags include "#ad, #sponsored, #XYZ_Ambassador, #XYZ_Partner (where "XYZ" is the brand name)."[75] However, research shows that a number of these phrasings are not actually effective at achieving advertising recognition in consumers. Studies show that "sponsored" increases recognition relative to a control by up to 13.5%[76], and only 33% of consumers grasp the meaning of "#ad".[77] Research further suggests that "#PaidAd" is the most effective hashtag at eliciting recognition of sponsorship disclosure.[78]

As advertising recognition is an underlying goal of misleading advertising regulation and a major obstacle to recognition is unclear language, the Competition Bureau should focus its efforts on developing a universal method of disclosure that is not dependent on language. Several American academics endorse this strategy, suggesting the best way to achieve effective disclosure is to forego the language requirement altogether and instead adopt a universal symbol for sponsored posts that could be affixed to content on any platform.[79] This universal symbol approach is attractive for a number of reasons. First, it eliminates disclosure failures caused by influencers who use ambiguous language. Second, it deals with the problem discussed above, i.e., even when disclosure language is legally compliant, consumers still may not

register the content as an advertisement. A universal symbol would "eliminate the need for disclosure tags on social media" altogether.[80] The issue of influencers who do not disclose intentionally remains, but this approach would increase consumer protection by eliminating unintentional non-compliance. This solution represents a streamlined approach that could affix to human and CGI influencer posts on every platform.

## V. ENDORSEMENT

In this section, endorsement refers to the act of appearing in an advertisement and making a public statement expressing support for the product. With respect to endorsements, the guidance of the Competition Bureau is clear: "when influencers express opinions online, they must be genuine and *based on actual experience*."[81] For human influencers, this is a straightforward task. But what about virtual influencers who are incapable of experiencing anything?[82] Even if CGI influencers disclose their brand connections perfectly in every sponsored post, the problem of their inability to endorse persists.

### i) Legislation

The CGI endorsement dilemma is analogous to the practice of astroturfing, which refers to "the practice of making commercial representations, such as reviews or testimonials, and having them falsely appear as though they came from legitimate consumer experiences and opinions." The problem underlying astroturfing and CGI endorsements is the same: reviews and endorsements that masquerade as authentic consumer opinions have the potential to mislead consumers.

While the Competition Bureau has not specifically dealt with CGI endorsements, the Bureau has issued guidance dealing with the problem of astroturfing, stating that, "… consumers are more likely to accept representations about products made by other consumers when apparently based on practical use and conveyed with a candor that may itself vouch for the reliability of the representations."[83] Astroturfing constitutes reviewable conduct under s. 74.01. Guidance for the Bureau notes that where circumstances do not fit within the scope of specific provisions but still constitute misleading advertising, enforcement will be pursued under the general misleading advertising provisions, either the criminal or civil track.[84] Therefore, a representation relating to a product made by a CGI influencer would fall under section 74.01(a). Section 74.01(a) triggers the "general impression test" to determine whether the impugned representation is materially misleading.[85] In relation to false reviews, the Bureau has stated, "Insofar as the general

impression is concerned, there can be little doubt that consumer reviews are seen to reflect the authentic experiences of impartial consumers."[86] Likewise, when a CGI influencer posts a sponsored advertisement of them with a product, the general impression can be characterized as a genuine endorsement of the product. This is especially true where consumers do not know that the influencer is a CGI. Bureau guidance also notes the existence of an "actual use requirement" in order to avoid liability for misleading advertising.[87] The rationale is that it can be reasonably expected that "consumers would assume that a third party touting a product had actually used or tested the product before commenting on it."[88] Of course, this assumption is only operable where consumers do not know that a CGI influencer is not human. To the extent that consumers *could* believe a CGI influencer is a real person, product representations made by CGI influencers are misleading.

CGI influencer endorsements raise even graver concerns under American law. FTC guidelines mandate that an endorser must have been a "bona fide user" of the endorsed product at the time the endorsement was given.[89] The *Competition Act* and related Bureau publications do not explicitly contain a bona fide user requirement. However, in guidance directed at influencers, the Bureau has insisted that influencers must "base all reviews and opinions on actual experience."[90] Furthermore, the Bureau's guidance regarding astroturfing clearly demonstrates that representations made about a product that are disguised as legitimate consumer reviews are not permissible.

### ii) Commentary

CGI endorsements are especially problematic where it is not clear that the influencer is a computer-generated image. In these instances, consumer deception can occur quite easily. Online, CGI influencers look and behave very similarly to humans. CGI influencers are often portrayed participating in normal activities, such as spending time with friends, eating at restaurants, and travelling. The combination of this online persona with the realistic appearance of the CGI is sufficient to establish the risk that an average consumer could be misled. A similar argument was advanced in response to the practice of using computer generated images of deceased celebrities[91] to endorse products in the American context:

> "… CGIs of deceased celebrity endorsers made by dead celebrities deceive consumers, especially if the consumer does not know they are being advertised to by an 'eerily life-like' CGI. Digitally resurrected CGI endorsers lack discretion as to whether or not to appear in the advertisement and lend their credibility to the product. Therefore, the extent to which consumers believe such discretion exists constitutes consumer deception."[92]

The dead celebrity CGI is arguably less misleading than the CGI influencer endorsement, because the fact of the celebrity's death and corresponding inability to endorse is likely within the public knowledge. Conversely, where the photo of a comparatively unknown CGI influencer appears on a consumer's social media page, the consumer may not have knowledge of the influencer's inability to endorse. In both instances, the concern underlying CGI endorsements is that a consumer *could*[93] believe the "person" in the advertisement has chosen to endorse the product. Because this is an impossibility, such endorsements constitute misleading advertising under section 74.01 of the *Competition Act*. Therefore, advertisers should be wary of using CGI influencers to endorse products.

One view in the CGI marketing industry is that CGIs are simply online versions of mannequins—the lifeless figures used to sell clothing in shop windows.[94] While this analogy may be attractive on the surface, it is predicated on the assumption that a CGI influencer, like a mannequin, is a blank slate. However, this argument ignores the reality that CGI influencers have established personalities and beliefs, interactions with their followers, and ultimately influence over the consumers that follow them. As one journalist writes,

> … with Lil Miquela they're trying to win trust and build authenticity by feigning a real life. Indeed, her life on Instagram is completely plausible, but that doesn't change the fact that they want people to *trust* a person who is only ostensibly real. They're creating a human life that's *more human* than any real life can be. Miquela is a perfect blend of fashion taste, opinion, and lifestyle to connect with her audience.[95]

To compare a CGI influencer to a mannequin is to ignore the entire purpose for which creations like Lil Miquela were designed i.e., to connect with a group of target consumers.

### iii) Proposed Solutions

Despite the deceptive marketing concerns raised by CGI marketing, the use of CGI influencers offers many practical benefits for businesses. Furthermore, the Competition Bureau has taken a recognized the marketing advantages that advertisers stand to gain by using influencer marketing and acknowledges that there is nothing wrong with (human) influencer marketing as long as disclosure requirements are met.[96] Therefore, it is worthwhile to discuss potential solutions to the problems raised by CGI influencers that allow businesses to benefit from the new technology while simultaneously achieving consumer protection.

### a) Additional Disclosure Requirement

The most obvious solution would be to mandate a disclosure of the fact that the influencer is computer-generated and thus can provide no genuine opinions on the product.[97] If this solution were adopted, virtual influencer endorsements and testimonials would not actually be endorsements—rather they would be simple advertisements. Requiring an additional CGI-status disclosure raises several of the issues already established with sponsorship disclosure with respect to efficacy and advertising recognition. The disclosure would have to be sufficiently clear to ensure consumers recognized that the CGI influencer cannot make any genuine representations about the product. Consumer protection could be more easily ensured by mandating a uniform method of disclosure for CGI influencers. This additional disclosure requirement would be a step in the direction of ensuring consumers are not unduly influenced by an online personality that is clearly incapable of assessing a product's merits. In addition, adding this requirement would not significantly add to the existing disclosure burden on advertisers and influencers to disclose material connections.

### b) Can CGI influencers be considered actors?

Some CGI influencer sponsored content may be in the form of a testimonial which is problematic because CGI influencers cannot give a real testimonial and the testimonial would thereby be misleading. However, section 74.02 of the *Competition Act* permits advertisers to broadcast consumer testimonials in advertisements as long as it accords with the previously made testimonial.[98] Further the Competition Bureau clarified that this typically permits the use of actors to portray previously-provided testimonials from actual consumers.[99] This raises the question of whether a CGI influencer can be construed as an actor. That is, whether a CGI influencer can post an advertisement that simply replicates an actual consumer testimonial. The Competition Bureau indicated that the use of actors in this manner may give rise to an inquiry under the Act where "a cosmetic effect is being portrayed or appearance is otherwise material, as it might be, for example, in the case of an advertisement for clothing." This guidance suggests that the act of wearing a piece of clothing is in itself a testimony to the clothing's attractiveness. This is relevant because social media influencers are often used to market products with cosmetic value (e.g., makeup and clothing) and CGI influencers are frequently used in fashion advertising.[100] Even if disclosure requirements were met and the CGI was simply reciting an actual consumer review, the portrayal of any cosmetic effect is inherently problematic. Furthermore, even if the product does not have aesthetic

qualities, the general impression[101] of a CGI posting an actual consumer review must be considered. This analysis is conducted on a fact by fact basis and it is highly dependent on the content.

## VI. CONCLUSION

It is clear that competition law authorities are aware of the emerging challenges stemming from the emerging digital economy.[102] It is equally clear that influencers are here to stay. Accordingly, the regulatory approach must adapt in order to protect consumers and promote fair competition. The Competition Bureau has taken a step in the right direction with the creation of the Digital Enforcement Office which is designed to support the Bureau's efforts in the digital economy.[103] While influencer marketing is a proven method of business growth[104] and offers many benefits, brands and influencers must play by the rules or run the risk of engaging in deceptive marketing. This paper has demonstrated the problems that may arise in relation to influencer disclosures of material connections to brands and advocates for a more uniform method of disclosure which would apply to human and CGI influencers alike. In addition, this paper has argued that, in general, CGI influencers cannot genuinely endorse a product because it is factually impossible. As such, CGI endorsements violate misleading advertising laws. A possible solution to this problem is the introduction of an additional disclosure requirement, mandating that CGI influencers disclose that they are not in fact human and thus cannot lend credibility to the merits of a particular product. The emergence of CGI influencers underscores the need for competition law to adapt to the digitalizing economic landscape.

## ENDNOTES

1 See J Clement, "Number of social network users worldwide from 2010 to 2021 (in billions)" (14 August 2019) online: *Statista* <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/> (in 2018, an estimated 2.65 billion people used social media)

2 See Competition Bureau, *The Deceptive Marketing Practices Digest—Volume 4* (Information Bulletin) (June 5, 2018) [*Deceptive Marketing Digest 4*].

3 See Chen Lou & Shupei Yuan, "Influencer Marketing: How Message Value and Credibility Affect Consumer Trust of Branded Content on Social Media",(2019) 19:1 Journal of Interactive Advertising, 58-73 <DOI: 10.1080/15252019.2018.1533501>

4 See Elizabeth A Casale, "Influencing the FTC to Update Disclosure Rules for the Social Media Era" (2019) 40 Hamline J Pub L & Pol'y 1 at 22.

5 *Competition Act,* R.S.C., 1985, c. C-34, s 74 [*Competition Act*].

6 See **Appendix A**; see also "Miquela (@lilmiquela)", *Instagram,* online: <https://www.instagram.com/lilmiquela/>

[7] Time Staff. "25 Most Influential People on the Internet in 2018", (30 June 2018), online: <https://time.com/5324130/most-influential-internet/>

[8] See Emmeline Clein, "Branding Fake Justice for Generation Z", *The Nation* (16 July 2019), online: <https://www.thenation.com/article/social-justice-cgi-advertising-brud/>

[9] See Katie Powers, "Virtual Influencers Are Becoming More Real-Here's Why Brands Should Be Cautious", *American Marketing Association* (20 June 2019), online: <https://www.ama.org/marketing-news/virtual-influencers-are-becoming-more-real-heres-why-brands-should-be-cautious/> [*American Marketing Association*].

[10] See Shaojing Fan et al., "Human Perception of Visual Realism for Photo and Computer-Generated Face Images" (2014) 11:2 ACM Transactions on Applied Perception 1 at 7, online: <http://dx.doi.org/10.1145/2620030>.

[11] See Deya Kuhlne, "A comparative analysis of CGI Instagram influencer, @lilmiquela, and human Instagram influencer, @_emmachamberlain." (Masters' Thesis, Malmo University, 2019), Malmo University Electronic Publishing (online): <hdl.handle.net/2043/30077> "*Ibid* (e.g., a post by Lil Miquela captioned "I lost my necklace somewhere" which, of course, is impossible).

[12] See Caitlin Dewey, "I think I solved Instagram's biggest mystery, but you'll have to figure it out for yourself," *The Washington Post* (22 September 2016), online: <https://www.washingtonpost.com/news/the-intersect/wp/2016/09/22/i-think-i-solved-instagrams-biggest-mystery-but-youll-have-to-figure-it-out-for-yourself/>

[13] See GQ Staff, "Instagram-famous Shudu is a supermodel with a secret", *GQ India* (March 2018), online: <https://www.gqindia.com/content/shudu-model-worlds-first-digital-supermodel-on-instagram> [*GQ*]

[14] See Ted Max and Chidera Anyanwu, "Kim Kardashian West Won the First CFDA Influencer Award: Will A CGI Supermodel Be Next?" (1 August 2018), online (blog): *Fashion & Apparel Law Blog* <https://www.fashionapparellawblog.com/2018/08/articles/advertising/cfda-influencer-award-digital-models/>

[15] American Marketing Association, *supra* note 9.

[16] See Audrey Schomer, "INFLUENCER MARKETING 2019: Why brands can't get enough of an $8 billion ecosystem driven by Kardashians, moms, and tweens", *Business Insider* (15 July 2019), online: <https://www.businessinsider.com/the-2019-influencer-marketing-report-2019-7>

[17] See IZEA Worldwide, Inc, "2018 Canadian State of the Creator Economy" (November 2018), online (pdf): *IZEA* <https://perma.cc/3QXZ-GKUM> [*IZEA*]

[18] Deceptive Marketing Digest 4, *supra* note 2.

[19] See Laura E Bladow, "Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing" (2018) 59:3 Wrn & Mary L Rev 1123 at 1124.

[20] Lou & Yuan, *supra* note 3 at 68 (credibility refers to the influencer's trustworthiness, attractiveness, and perceived likeness).

[21] *Ibid* at 67.

[22] Bladow, *supra* note 19 at 1128.

[23] Statista, "Share of Canadians who block ads on selected devices as of February 2018" (June 27, 2018), online: *Statista* <https://www.statista.com/statistics/878278/canada-ad-blocking-device/>

[24] IZEA, *supra* note 17 (reporting over 75% of Canadian marketers say ad blocking affects their efforts).

[25] See Brian A. Facey & Dany H. Assaf, *Competition and Antitrust Law: Canada and the United States*, 5th ed (Toronto: LexisNexis Canada, 2019) at 10.1, available at: <https://advance.lexis.com/api/permalink/665106ae-9ad4-42c2-b731-bf98d455e03b/?context=1505209>

[26] See Canada, Competition Bureau Canada, "The Competition Bureau," online: *Canada* <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03336.html>

[27] See Krystal N Lyons, "Disinfecting Market Pathogens: Astroturfing and Its Anticompetitive Impact" (2014) 20 J of L, Bus & Ethics 121 at 124.

[28] Facey & Assaf, *supra* note 25.

[29] See International Consumer Protection and Enforcement Network, "Online Reviews & Endorsements: ICPEN Guidelines for Digital Influencers" (2016) at 5, online: *International Consumer Protection and Enforcement Network* <https://www.icpen.org>. [*ICPEN*] (the Canadian Competition Bureau is an ICPEN member and assisted in the development of these guidelines).

[30] Lyons, *supra* note 27 at 124.

[31] Deceptive Marketing Digest *4*, *supra* note 2.

[32] See Competition Bureau, *The Deceptive Marketing Practices Digest—Volume 1* (Information Bulletin) (10 June 2015) [*Deceptive Marketing Digest 1*].

[33] *Ibid* at 3.4.

[34] See Amy Mudge & Randal Shaheen, "Native Advertising, Influencers, and Endorsements: Where is the Line Between Integrated Content and Deceptively Formatted Advertising?" (2017) 21:5 J Internet L.

[35] Deceptive Marketing Digest 4, *supra* note 2.

[36] See Competition Bureau, *Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the Competition Act* (Information Bulletin) (September 22, 1999).

[37] Facey & Assaf, *supra* note 25 at 10.7.

[38] *Competition Act*, *supra* note 5.

[39] *Ibid* s 75.03(5).

[40] See *Canada (Commissioner of Competition) v Sears Canada*, [2005] CCTD No. 1 (Comp. Trib.) at paras 333-336; restated in *Canada (Commissioner of Competition) v Yellow Page Marketing B.V.*, [2012] OJ No 998 at para 34; see also *Apotex Inc* v *Hoffman La-Roche Ltd*, <(2000) 195 D.L.R. (4th) 244> (Ont CA) at para. 16.

[41] *Competition Act*, *supra* note 5 s 74.03(4).

[42] See "FTC Social Media Actions", (29 August 2019), online: *Truth in Advertising* <https://www.truthinadvertising.org/ftc-social-media-actions/> [*FTC Social Media Actions*]

[43] Facey & Assaf, *supra* note 25 at 10.44.

[44] Deceptive Marketing Digest 4, *supra* note 2.

[45] See Bartosz Wojdynski, Nathaniel J Evans & Mariea Grubbs Hoy, "Measuring Sponsorship Transparency in the Age of Native Advertising" (2017) 52:1 J Consumer Affairs 115 at 117 <https://doi.org/10.1111/joca.12144>

[46] ICPEN, *supra* note 29.

[47] Deceptive Marketing Digest 4, *supra* note 2.

[48] *Ibid*.

[49] *Ibid*.

[50] *Ibid*.

[51] *Ibid.*

[52] US, Federal Trade Commission, Press Release, "CSGO Lotto Owners Settle FTC's First-Ever Complaint Against Individual Social Media Influencers" (2017). [*FTC CSGO Lotto*]

[53] See Kaya Yurieff, "Instagram star isn't what she seems. But brands are buying in" *CNNMoney* (2018), online: <https://money.cnn.com/2018/06/25/technology/lil-miquela-social-media-influencer-cgi/index.html> ["CNNMoney"]

[54] *Competition Act*, *supra* note 5 s 74.01.

[55] *Competition Act*, *supra* note 5 s 74.01.

[56] See Brian Solis, "The Influencer Marketing Manifesto: Why the Future of Influencer Marketing Starts with People and Relationships Not Popularity" (2016) at 16.

[57] Statista, "*Perspectives on factors that increase trust in influencer content in Canada as of February 2018*" (2018), online: *Statista* <https://www.statista.com/statistics/856863/canada-factors-increasing-trust-in-influencer-content/>

[58] IZEA, *supra* note 17.

[59] Deceptive Marketing Digest 4, *supra* note 2 (calling the ASC guidelines "one example of a growing body of valuable guidance")

[60] IZEA, *supra* note 17.

[61] See Appendix A for select screenshots of the Instagram account associated with Lil' Miquela.

[62] Canada, Canada Competition Bureau, "Influencer marketing: businesses and influencers must be transparent when advertising on social media" (Dec. 19, 2019), online: *Canada* <www.canada.ca/en/competition-bureau/news/2019/12/influencer-marketing-businesses-and-influencers-must-be-transparent-when-advertising-on-social-media.html>

[63] *Ibid.*

[64] *The Deceptive Marketing Practices Digest—Volume 1* (Information Bulletin) (June 10, 2015).

[65] FTC Social Media Actions, *supra* note 42.

[66] FTC CGSO Lotto, *supra* note 52.

[67] *Ibid.*

[68] US, "*In the Matter of Machinima, Inc, a corporation*" (complaint) (F.T.C. Docket No. C-4569, 2016).

[69] See US, Federal Trade Commission, Press Release, **"*FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship*"** (2017).

[70] Public Citizen, "Investigation Shows that FTC's Reminder Letters Are Ineffective at Disclosing Paid Posts on Instagram" (June 26, 2017), online: *Public Citizen* <https://www.citizen.org/media/press-releases/investigation-shows-ftc%E2%80%99s-reminder-letters-are-ineffectivedisclosing-paid-0>

[71] *Ibid.* See also Bladow, *supra* note 19 at 1156-1157.

[72] FTC CGSO Lotto, *supra* note 52.

[73] See Evans et al., "Disclosing Instagram Influencer Advertising: The Effects of Disclosure Language on Advertising Recognition, Attitudes, and Behavioral Intent," (2017) 17:2 J Interactive Advertising 138-149, DOI: <10.1080/15252019.2017.1366885>

[74] See Ad Standards Canada, "Influencer Marketing Steering Committee" (2019), online: *Ad Standards Canada* <http://adstandards.ca>

[75] *Ibid* at 8.

[76] Evans et al., *supra* note 75. See also Boerman et al., "'This Post is Sponsored:' Effects of

Sponsorship Disclosure on Persuasion Knowledge and Electronic Word of Mouth in the Context of Facebook," (2017) J Interactive Marketing 38, 82-92.

[77] See Greg Sterling, "Survey: Most Consumers Unaware that Paid Influencer Posts are #Ads." (2017) *Marketing Land*, online: <https://marketingland.com/survey-consumers-unaware-paid-influencer-posts-ads-227021>; See also Evans *supra* note 74 at 4.

[78] Evans et al., *supra* note 75 at 145.

[79] See Christina Sauerborn, "Making the FTC ☺: An Approach to Material Connections Disclosures in the Emoji Age" 28 Fordham Intell. Prop. Media & Ent. L.J. 571 at 571; See also Colin Campbell & Pamela E Grimm, "The Challenges Native Advertising Poses: Exploring Potential FTC Responses and Identifying Research Needs" (2019) 38:1 J Public Policy & Marketing at 17.

[80] Sauerborn, *supra* note 81 at 634.

[81] Deceptive Marketing Digest 4, *supra* note 2. [emphasis added].

[82] See Stacy K. Marcus, Michael Isselin, Noelle Klockner, "Preparing for the Next Phase of Influencer Marketing—The CGI Influencer" (July 2018), online: *Reed Smith LLP* <adlawbyrequest.com> (introduces a similar question in the US context).

[83] See Canada, Canada Competition Bureau, "False or misleading representations," (2018) at 2.1, online: *Canada* <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00513.html> [*False or misleading representations*].

[84] See Canada, Canada Competition Bureau, "Additional information about the Competition Act" (2015), online: *Canada* <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01315.html#Gen>

[85] *Competition Act, supra* note 5 s 74.03(5).

[86] Deceptive Marketing Digest 4, *supra* note 19.

[87] False or misleading representations, *supra* note 86 at 2.1.1.

[88] *Ibid.*

[89] US, Federal Trade Commission 16 CFR, "Guides Concerning the Use of Endorsements and Testimonials in Advertising" at 255.1(c).

[90] Deceptive Marketing Digest 4, *supra* note 2.

[91] See John Reynolds, "Bruce Lee resurrected for Johnnie Walker whisky ad", (10 July 2013), online: *The Guardian* <https://www.theguardian.com/media/2013/jul/10/bruce-lee-johnnie-walker-whisky-ad>: (A 2013 marketing campaign featuring a CGI of the late Bruce Lee endorsing Johnnie Walker Blue Label Scotch.)

[92] Kerry Barrett, "Mad Men and Dead Men: Justification for Regulation of Computer-Generated Images of Deceased Celebrity Endorsers", (2017) 65 Clev. St. LR 561 at 580 [emphasis added].

[93] Recall that under Canadian law it is not necessary to establish that any consumer was actually deceived: *Competition Act, supra* note 5 s 74.03(4)(a).

[94] CNNMoney, *supra* note 53.

[95] See Scott Yoder, "The Instagram Influencer Who is More Human Than Human" (July 2018), online: *Marketing360* <https://www.marketing360.com>

[96] Deceptive Marketing Digest 4, *supra* note 2.

[97] See Annie Lee, "The Rise of CGI Influencers" (July 2018), online: *Venable LLP* <https://www.allaboutadvertisinglaw.com>

[98] *Competition Act, supra* note 5.

[99] Canada, Canada Competition Bureau "Untrue, misleading or unauthorized use of tests and testimonials" (Information bulletin) (2018) at 2.

[100] See GQ, *supra* note 13.

[101] *Competition Act*, *supra* note 5 s 74.03(5).

[102] See Canada, Canada Competition Bureau, "2019-20 Annual Plan: Safeguarding the Future of Competition" (2019).

[103] Canada, Canada Competition Bureau, "The Competition Bureau's Strategic Vision for 2020-2024", online: *Canada* <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04513.html>

[104] See Rosemary Stockdale, Ashir Ahmed, Scheepers, Helana, "Identifying Business Value from the Use of Social Media: An Sme Perspective" (2012) *Pacific Asia Conference on Information Systems 2012 Proceedings*, Paper 169, online: <https://aisel.aisnet.org/pacis2012/169>