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CANADIAN COMPETITION LAW REVIEW

REVUE CANADIENNE DU DROIT DE LA CONCURRENCE





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TACKLING ALGORITHMIC COLLUSION WITHOUT REINVENTING THE WHEEL

JAMES H. BOCKING MEMORIAL AWARD ESSAY

Liam Brunton*

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Self-learning pricing algorithms increasingly allow firms to sustain supra-competitive outcomes without explicit communication, exposing weaknesses in competition regimes that rely on finding “agreements” to establish conspiracy. This paper argues that abuse of dominance provisions, rather than traditional cartel or conspiracy rules, offer the most promising path for addressing algorithmically facilitated coordination across U.S., EU, and Canadian law.

The recent RealPage prosecution in the U.S. illustrates these challenges. Rather than solely prosecuting RealPage for collusion, the Department of Justice has alleged that RealPage’s revenue-management system uses large pools of sensitive competitor data and machine-learning tools to shape common pricing behaviour across rental markets. The case shows how a single algorithmic intermediary can influence market-wide outcomes when competitors neither communicate nor intend to coordinate, underscoring the difficulty of fitting such conduct into agreement-based notions of cartels.

The analysis concludes that abuse of dominance-based tools provide a more coherent doctrinal framework for algorithmically facilitated coordination. However, the RealPage dispute also demonstrates that current legal standards were not designed for AI-mediated market structures. Ensuring effective oversight will require modernized regulatory frameworks capable of responding to coordination that arises from shared algorithms rather than traditional collusive intent.

Les algorithmes de tarification auto-apprenants permettent de plus en plus aux entreprises de maintenir des résultats supraconcurrentiels sans communication explicite, mettant ainsi en évidence les limites des régimes de concurrence fondés sur la preuve d’un « accord » pour établir l’existence d’une collusion. L’auteur soutient que les dispositions relatives à l’abus de position dominante, plutôt que les règles traditionnelles applicables aux cartels ou au complot, constituent l’outil le plus prometteur pour appréhender la coordination facilitée par des algorithmes en droit américain, européen et canadien.

Les poursuites récentes intentées aux États-Unis contre l'entreprise RealPage illustrent bien ces difficultés. Plutôt que de se limiter à alléguer une collusion de sa part, le département de la Justice soutient que le système de gestion des revenus de RealPage repose sur la collecte et l'agrégation de renseignements sensibles provenant des propriétaires sur le plan concurrentiel afin de générer des recommandations de prix sur les marchés locatifs. L'affaire démontre comment un seul intermédiaire algorithmique peut influencer sur les résultats à l'échelle d'un marché, même en l'absence de communication ou d'intention coordonnée de la part des concurrents, ce qui met en lumière la difficulté d'inscrire de tels comportements dans une conception de la collusion fondée sur l'existence d'un accord.

L'auteur conclut que les mécanismes fondés sur l'abus de position dominante offrent un cadre doctrinal plus cohérent pour appréhender la coordination facilitée par des algorithmes. Toutefois, le litige RealPage révèle également que les normes juridiques actuelles n'ont pas été conçues pour des structures de marché médiatisées par l'intelligence artificielle. Assurer une surveillance efficace exigera une modernisation des cadres réglementaires afin de pouvoir répondre à des formes de coordination découlant de l'utilisation d'algorithmes partagés, plutôt que d'une intention collusoire traditionnelle.

I. Introduction

Algorithmic collusion is an issue that is of increasing concern to competition authorities worldwide. Essentially, algorithmic collusion refers to the use of artificial intelligence for coordinating actions among competitors, as algorithms can set prices or analyze market conditions distinctly from humans.¹ Research on algorithmic collusion remains in its nascent stage. However, computational modelling has been used to demonstrate the threat pricing algorithms can pose to competition such that, “in many instances self-learning pricing algorithms lead to collusive outcomes.”²

Under most modern competition law frameworks, some form of tangible agreement to collude is required to establish collusion.³ However, self-learning pricing algorithms can ostensibly monitor prices and consequently artificially inflate prices without competitors explicitly agreeing to collude. In this sense, pricing algorithms can result in “supra-competitive equilibria [...] by aligning prices instead of competing.”⁴ As Nazzini notes, algorithms can make collusive schemes more stable and more straightforward to initiate from the outset.⁵

The caselaw in this area is sparse and there are limited doctrinal or jurisprudential sources that deal directly with this issue. However, recently, the United States Department of Justice (DoJ) filed a complaint⁶ against RealPage, alleging that through its software, RealPage employs AI to artificially inflate rental prices by allowing

“[l]andlords, who would otherwise be competing with each other, [to] submit on a daily basis their competitively sensitive information to RealPage. This nonpublic, material, and granular rental data includes, among other information, a landlord’s rental prices from executed leases, lease terms, and future occupancy. RealPage collects a broad swath of such data from competing landlords, combines it, and feeds it to an algorithm.”⁷

Interestingly, the DoJ’s complaint does not rely solely on establishing an illegal information-sharing exchange. Rather, the complaint also argues that RealPage has engaged in monopolistic practices and abused its position of dominance in the market—an offence which engages civil, and not criminal, standards of review.

This paper will determine the extent to which enforcing algorithmic collusion through abuse of dominance provisions as opposed to more traditional—and stricter—cartel-related provisions (which deal explicitly with collusion) might prove more fruitful for competition enforcement agencies, specifically by assessing the merits of the arguments brought forward by the United States DoJ in the RealPage complaint. The paper will also briefly explore comparative issues in the Canadian and European competition law frameworks to assess the relative hypothetical strength of the DoJ’s arguments under these regimes.

II. The Problem Contextualized

Due to the potential for pricing algorithms to allow competitors to collude without directly communicating, competition enforcement agencies have begun to test the waters, so to speak, by employing new tools to prosecute this type of conduct. According to modern competition law frameworks across many major competition enforcement jurisdictions, an agreement is necessary to engage cartel provisions in competition law.⁸ As such, if firms independently use pricing algorithms to monitor competitor price fluctuations and adjust their prices based on the learnings of the algorithm, they could artificially inflate prices above competitive levels without ever communicating or “forming an agreement” to collude. While it is currently unclear as to whether firms that collude through algorithms would engage cartel-related provisions, many commentators are of the view that such an

outcome is unlikely.⁹ Harrington remarks that “even though it is collusion which is harmful, jurisprudence has made the communication that facilitates it illegal”¹⁰ [emphasis added]. Since communication between firms is often absent in the context of an algorithm, there appears to be no judicially enforceable remedy to deal with algorithmic collusion.¹¹

A) The Caselaw: an Historical Evolution of the Collusion Doctrine and the Notion of the “Smoke-Filled Room”

Traditionally, economists and lawyers make reference to “smoke-filled rooms” when considering anticompetitive collusion.¹² While the concept originates from the trustbusting era of U.S. antitrust literature as a nod to the wealthy U.S. elite who would smoke their cigars while colluding to partition markets and fix prices, as Flannery notes, “[i]n many markets, a ‘smoke-filled room’ style of industry-wide communication is challenging if not impossible.”¹³ This, however, has not stopped major antitrust enforcers from attempts to make communication amongst cartel members more difficult.¹⁴ Unfortunately, this approach has wrought a host of unforeseen consequences. Indeed, the problem with placing so much emphasis on communication—and the actual agreements that result from said communication—has been the unanticipated consequence of communication becoming so integral to the prosecution of cartels, that the law actually shields some collusive behaviour from legal scrutiny where collusion is achieved vis-à-vis means that *do not* require communication. For instance, signalling behaviours, which have been challenged in numerous instances, have often been found not to offend competition legislation. Indeed, in *Atlantic Sugar*¹⁵ the Canadian Supreme Court noted that the posting or signaling of prices was insufficient to render conduct collusive, instead noting that “there must not only be a course of conduct from which acceptance may be inferred, there must also be communication of this offer.”¹⁶

Various other courts have attempted to grapple with this issue. For instance, the Supreme Court of the United States dealt with the issue of tacit (unspoken) collusion in *Theatre Enterprises*,¹⁷ but still reinforced the link between collusion and an *agreement*: “the crucial question is whether [the firms’] conduct [...] stemmed from independent decision or from an agreement, tacit or express.”¹⁸ Consequently, the Court acknowledges that while the communication may not necessarily be direct—an agreement to collude is still necessary.

In the EU, this concept is understood as a *concerted practice*. Similarly to the Supreme Court of the United States, the Court of Justice of the European

Union has buttressed the need for coordination and cooperation to establish collusion. In *Imperial Chemical*,¹⁹ the Court iterated that a concerted practice “is a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.”²⁰ Again here, the requirement of coordination and cooperation does not fully capture an instance where collusion is achieved via uncoordinated means—such as through the widespread use of pricing algorithms.

As noted above, in Canada, the Supreme Court in *Atlantic Sugar* found that tacit collusion can exist as a form of conscious parallelism known as “parallelism by tacit agreement.”²¹ The Court goes on to express that “[i]n order to make an agreement by tacit acceptance of an offer, there must not only be a course of conduct from which acceptance may be inferred, there must also be communication of this offer.”²² Indeed, according to the current Canadian competition law framework, an agreement—and a certain degree of communication—is necessary to engage the cartel provisions of the *Competition Act*.^{23, 24} Therefore, collusive behaviour that is not coordinated, or not explicitly agreed to, would be unlikely to engage the Act. While subsection 45(3) of the Act allows the court to infer the existence of a conspiracy without direct evidence of communication between or among the alleged parties to it, there is still a requirement of proof beyond a reasonable doubt of a “meeting of the minds”, which would be absent, presumably, in the independent adoption of the same pricing algorithm by many firms in an industry.

Consequently, the independent adoption of pricing algorithms by many firms in an industry, it would seem, may fly under this jurisprudential radar in all three jurisdictions.

B) Pricing Algorithms for Dummies

In 2017, Margrethe Vestager, then Commissioner of Competition for the European Union, made the following remarks at a conference in Germany, “[i]t’s true that the idea of automated systems getting together and reaching a meeting of minds is still science fiction. [...] But we do need to keep a close eye on how algorithms are developing [...] so that when science fiction becomes reality, we’re ready to deal with it.”²⁵

One might wonder if she knew just how close we were to ‘science fiction becoming a reality’ back in 2017. According to Timo Klein, professor in competition law and economics at Utrecht University, prices are increasingly set

by algorithms, and it is entirely possible for self-learning pricing algorithms to work out by themselves how to ensure high prices.²⁶ As has been noted above, but is reiterated by Klein, “[s]uch an outcome would be the same as in a price cartel, but without any overt act of communication or agreement required to establish a competition law infringement.”²⁷

In arriving at this conclusion, Professor Klein investigates the collusive capacity of reinforcement learning, or Q-learning, which he describes as “a foundational reinforcement learning algorithm upon which many of the recent breakthroughs in artificial intelligence are based.”²⁸ Essentially, self-learning pricing algorithms, through reinforcement learning, are programmed to iteratively understand what the long-term repercussions are of taking certain discreet decisions, by tracking the consequences of specific actions they take in the short-term.²⁹ As they learn, they balance both the continued need to *explore* new options, so as to have an even stronger understanding of the repercussions of the discrete decisions they make, and *exploiting* their already developed understanding, to optimize the reward they are designed to achieve or maximize.³⁰

Professor Klein, in running a series of simulations where self-learning pricing algorithms competed against one another, found that these algorithms often coordinate at collusive equilibria.³¹ He notes that the algorithms start by learning that there is a short-term benefit to slightly undercutting a competitor’s price—which leads to a gradual decline in prices.³² However, as they continue exploring new actions, they recognize the long-term benefit of what Prof. Klein describes as “resetting” the price vis-à-vis a large increase in price once the gradual and persistent price undercuts have made the price too low.³³ In this respect, the competing algorithms will “often identify a stable high price as mutually optimal, with the gradual price decline functioning as temporary off-equilibrium punishment.”³⁴ Then, as the number of discrete prices set by the algorithm increases—and thus, the greater the amount of data the algorithms have at their disposal to learn and extrapolate from—it becomes apparent that the pricing algorithms will “converg[e] to a stable supra-competitive Edgeworth price cycling pattern (in which periodic price jumps reset a gradual price decline).”³⁵ According to Klein, this cycling pattern is akin to pricing patterns observed in markets where tacit collusion is occurring; and these algorithm-learned patterns ultimately push average prices above their economically competitive level.³⁶ Therefore, despite the fact that the algorithms cannot communicate, they are able to collaborate based solely on the instruction that they should maximize their own profits, such that prices are artificially inflated above their competitive levels.³⁷ In

reinforcing his study, Klein demonstrates that his results stand even in the face of “reasonable changes to the [algorithms’] learning parameters.”³⁸

Essentially, pricing algorithms can compile a significant amount of data with respect to the consequences of discrete actions they take, and then use that “big data”, in addition to reactionary competitor pricing information they collect, so that they coalesce at a price that is higher than the competitive price. What’s more, they achieve all of this without communicating, such that this conduct is not captured as collusive under the law. Consequently, pricing algorithms can lead to anticompetitive harm and outcomes that could normally only be reached through collusion, but without engaging the legal requirements necessary to prosecute collusion.

Where pricing algorithms are used by multiple industry players, the anticompetitive harm can be compounded, especially in industries where competitors’ prices are not observable. Where, as in the RealPage case, the same algorithm is widely adopted, and use of the algorithm requires each user to provide real-time information on actual prices (and other competitively sensitive information) to the algorithm, the anticompetitive harm is compounded. As a result of gathering and using non-public, real-time information about competitors’ prices and sensitive business data, the algorithm achieves what individual market participants—absent information from their competitors—cannot, whether they use pen and paper, or a computerized pricing algorithm.

C) The Reluctance to Prosecute Against Algorithmic Collusion

Given the complicated nature of policing pricing algorithms under competition legislation, it should not come as a surprise that there is a woefully small number of cases where such conduct has been subject to judicial scrutiny.

i) The Jurisprudential History of Prosecuting Algorithmic Collusion

In the United States, a plea agreement was registered in 2015 in the case of *United States v. Topkins*³⁹. *Topkins* represents the DoJ’s first cartel prosecution involving algorithms.⁴⁰ However, the conspirators in *Topkins* pled guilty, depriving the court of the chance to render a formal judgment related to algorithmic collusion. That said, much can be gleaned from the plea agreement. In *Topkins*, the conspirators were alleged to have agreed to sell posters on Amazon for third-party sellers, and utilized pricing algorithms to coordinate prices.⁴¹ The plea agreement explicitly acknowledged

that the conspirators “agreed to adopt specific pricing algorithms for the sale of the agreed-upon posters with the goal of coordinating changes to their respective prices.”⁴² Thus, while *Topkins* is interesting in demonstrating that algorithmic collusion is possible—and that enforcement agencies are prepared to prosecute this conduct—it is unfortunately of little use for the purposes of this paper, as, in *Topkins*, there was a formal agreement between the competitors on using specific pricing algorithms, and therefore the conduct would be captured as collusive under existing caselaw in both the United States and Canada. There have unfortunately not been any judicial decisions in the United States thus far where the conduct that was challenged involved collusion via autonomous pricing algorithms in the absence of an explicit agreement.

Before the advent of AI, some prosecution efforts attempted to deal with the issue of complex signaling between competitors vis-à-vis computerized online booking platforms. For instance, in the late twentieth century, the United States DoJ investigated a number of airline companies for allegedly using a common reservation platform and complex signaling through the posting of upcoming prices in a computerized booking system to collude. According to the DoJ’s Antitrust Division,

“over 50 separate price fixing agreements covering hundreds of routes [were identified]. By supplying or withdrawing changes in fares, the airlines told each other what fares they wanted to charge in which markets, what competitors’ fares were acceptable to them, and what deals they were willing to make”.⁴³

To this effect, the Assistant Attorney General of the DoJ’s Antitrust Division noted that the airlines used their fare dissemination system to engage in communications that were as direct and detailed as those historically conducted by conspirators via telephone or in private meetings; and while the means of communication were novel, the underlying conduct constituted straightforward price-fixing.⁴⁴ Ultimately, however, the matter settled, and thus did not result in a decision. The settlement allowed the airlines to continue to use their fare dissemination system, while eliminating “the information exchange features that let the airlines negotiate prices with each other”.⁴⁵ While this case does not specifically raise the issue of algorithmic collusion, as no algorithms were involved, it highlights the possibility of prosecuting conduct surrounding the sharing of information via intermediary or “facilitating” networks. While in the present case the intermediary facilitating the collusive pricing was a computerized common booking system, there is nothing preventing a similar case from being raised with

respect to collusion based on competitive information exchanged via facilitating pricing algorithms.

A similar story has played out in Europe. Some cases have been brought forward, but all of them have involved simple pricing algorithms that are only used to enforce agreements to collude between competitors.⁴⁶ For instance, the UK Competition and Markets Authority launched an investigation into Trod Ltd. and GB Eye Ltd., a case which also involved parties trading on Amazon who agreed not to undercut each other and used automated pricing algorithms to monitor and adjust their prices to ensure they complied with their agreement.⁴⁷ In this case, the Competition and Markets Authority fined Trod £163,371.⁴⁸ However, this case is also not particularly novel, as here too the presence of the agreement renders the conduct collusive, irrespective of the use of the algorithm to implement the agreement. The European Commission has similarly investigated and fined *Asus*⁴⁹ and *Philips*⁵⁰ who used pricing algorithms to monitor compliance with an illegal retail price maintenance policy.⁵¹ In the Canadian context, no cases explicitly involving algorithmic collusion have been presented before the courts.

Until recently, there seems to have been a reluctance on the part of competition enforcement agencies to bring these kinds of claims forward. This is likely due in part to the fact that they are concerned the conduct will not engage the respective competition legislations. It might also be related to the fact that algorithmic collusion is difficult to prove absent an agreement, given that one would still have to prove—under the criminal standard of beyond a reasonable doubt—that the conspirators intended to undermine competition through coordinated behaviour with others.

Suffice it to say, the DoJ's complaint in the RealPage matter is quite novel insofar as it is the first time algorithmic collusion is being prosecuted in its own right and in the absence of an explicit agreement. This, in turn, makes the litigation strategy the DoJ has employed in this case all the more worthy of detailed examination.

ii) Types of Algorithmic Collusion

It is also worth noting, for the purposes of this paper, that there are various types of algorithmic collusion. Some are more likely to offend competition legislation, while for others the potential to lessen competition is less obvious.

The *Topkins*, *Trod Ltd.*, *Asus*, and *Philips* cases are representative of a first type of algorithmic collusion, whereby an algorithm simply facilitates

the implementation of, or monitors compliance with, an illegal price-fixing policy. These types of algorithmic collusion schemes obviously offend competition laws, given they are used to maintain an illegal *agreement*.

A second type of algorithmic collusion occurs where a lessening of competition occurs spontaneously and with no human intent as machines form their own “agreement”. These are the types of algorithmic collusion schemes discussed by Professor Timo Klein. As Klein notes, in these instances of algorithmic collusion, self-learning pricing algorithms compete against one another and often coordinate at collusive equilibria.⁵² This type of algorithmic collusion becomes difficult to prosecute for the reasons noted above: chiefly, that there is no formal agreement or explicit communication between firms bearing witness to this as a desired outcome.

Another form of algorithmic collusion may occur at the intersection of these two types of algorithmic collusion. In such an instance, there may be no clear indication of an agreement or an intention to raise prices, but nonetheless the algorithm becomes widespread in an industry, and its ubiquitous adoption causes prices to rise. Here, the algorithm acts as a facilitating practice for a coordinated outcome. Again, this type of algorithmic collusion is difficult to prosecute in the absence of an explicit agreement.

The RealPage pricing algorithm seems to lie somewhere in this middle-ground by facilitating an industry-wide increase in prices vis-à-vis its use of competitive information and ubiquitous adoption by landlords in setting prices. Moreover, this outcome is achieved in the absence of a clear indication of an agreement between the individual landlords (i.e. competitors).

It is likely for this reason that the DoJ has opted, in addition to making the case against RealPage under two counts of conspiracy, to also make out the case against RealPage under abuse of dominance. In this sense, the DoJ alleges that RealPage has used anticompetitive coordination among customers as a means to achieve dominance and exclude rivals. In light of the DoJ’s arguments, this paper seeks to explore the potential for more widespread use of abuse of dominance provisions to address this conduct, in case criminal enforcement proves elusive.

III. The RealPage Matter: a Blueprint for the Enforcement of Algorithmic Collusion?

A) A Brief Overview of the Complaint

RealPage operates in the real-estate industry globally and offers services that assist landlords in listing rental properties, among other things. These services are primarily offered through RealPage's "Revenue Management Software." The software, as described by the DoJ, uses competitively sensitive information provided to RealPage by landlords, combines it, and then runs it through an algorithm.⁵³ This information is "nonpublic, material, and granular rental data [that includes] among other information, a landlord's rental prices from executed leases, lease terms, and future occupancy."⁵⁴ The algorithm then spits out "daily, near real-time pricing 'recommendations' back to competing landlords":⁵⁵ recommendations that are directly attributable to sensitive information that RealPage's algorithm has processed from their competitors.⁵⁶

The DoJ alleges that these recommendations are issued with the motivation of subverting competition. To this effect, the DoJ notes that RealPage monitors whether landlords have complied with their *recommendations*, and, in many cases, landlords "effectively agree to outsource their pricing function to RealPage with auto acceptance or other settings such that RealPage as a middleman, and not the free market, determines the price that a renter will pay."⁵⁷ RealPage has described the utility of its algorithm with the slogan "a rising tide raises all ships."⁵⁸ Through utilizing competitively sensitive information via its pricing algorithm, RealPage "eliminates the guessing game for landlords" so they might maximize rents.⁵⁹

The DoJ has emphasized in its complaint that RealPage "has built a business out of frustrating the natural forces of competition."⁶⁰ Indeed, according to the DoJ, "RealPage replaces competition with coordination. It substitutes unity for rivalry. It subverts competition and the competitive process. It does so openly and directly—and American renters are left paying the price."⁶¹

Relying on communiqués and information RealPage has provided to landlords who use its software, the DoJ has highlighted that RealPage's messaging and strategy is inherently anticompetitive:

"In its own words, RealPage **helps curb [landlords'] instincts to respond to down-market conditions by either dramatically lowering price or by holding price when they are losing velocity and/or occupancy ... Our**

tool [] ensures that [landlords] are driving every possible opportunity to increase price even in the most downward trending or unexpected conditions’ (emphases added).⁶²

Moreover, RealPage has described the utility of its software as a means of “avoid[ing] the race to the bottom in down markets” for landlords, that the software is aimed at “driving every possible opportunity to increase price”, and that for landlords, “there is a greater good in everybody succeeding versus essentially trying to compete against one another in a way that actually keeps the entire industry down.”⁶³ In this regard, the DoJ alleges that through RealPage’s algorithm, landlords coordinate prices to ensure that rents stay above naturally competitive levels. Indeed, RealPage’s algorithm is specifically designed to “nudge[e] other competing landlords to increase their rents” when it receives information from competitor landlords that they have increased their price:⁶⁴ coordinating prices above competitive levels. Indeed, in its complaint, the DoJ highlighted multiple instances of landlords understanding the impact of sharing their data through RealPage’s algorithm:

“a revenue management director at Landlord 1 testified that she understood that Landlord 1, and other competing landlords who used [RealPage’s algorithm], agreed with RealPage to share their data, which was combined in a single data pool for use by [the algorithm]. An executive at Landlord 2 noted the advantages to using [the algorithm] at a property if others in the property’s submarket—the small geographic area around the property—also used [RealPage’s algorithm] because “the shared data between the models at different communities can be a benefit in getting accurate transactional data on a timely basis.”⁶⁵

Not only is this a blatant distortion of competition, but as the DoJ notes, it also reifies the dominant position RealPage has in the market—a position that is protected from genuine competition because of the significant data advantage it has over its competitors “due to its massive reservoir of ill-gotten competitively sensitive information from competing landlords. No other revenue management company can match RealPage’s access to landlords’ nonpublic, competitively sensitive rental data.”⁶⁶ In this sense, RealPage has itself acknowledged that it controls at least 80% of the commercial revenue management software market, and that it “does not have any true competitors, mainly because [its] data is based on real lease transaction data.”⁶⁷

Essentially, the DoJ submits that “RealPage is an algorithmic intermediary that collects, combines, and exploits landlords’ competitively sensitive

information. And in so doing, it enriches itself and compliant landlords at the expense of renters who pay inflated prices and honest businesses that would otherwise compete.”⁶⁸

The DoJ’s complaint advances four alleged violations of U.S. competition law for which they seek relief.

First, the DoJ alleges that RealPage has violated section 1 of the *Sherman Act*,⁶⁹ which renders illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations”,⁷⁰ by unlawfully sharing information for use in competitors’ pricing.⁷¹ Here, the DoJ asserts that all of the landlords using RealPage’s software are essentially agreeing with Realpage to pool competitively sensitive information to train the algorithm so it is best able to generate supra competitive-level price recommendations.⁷²

Second, and in line with its first request for relief, the DoJ asserts that RealPage has further violated section 1 of the *Sherman Act* by establishing vertical agreements amongst landlords to align pricing.⁷³ Here, the DoJ asserts that landlords understand the price-fixing nature of RealPage’s software, and alleges that this is the reason landlords opt to sign up for and pay for RealPage’s services.⁷⁴ They further contend that the agreement by a landlord to use RealPage’s software is a “[tacit] agreement to align users’ pricing processes, strategies, and pricing responses.”⁷⁵

The first and second claims advanced by the DoJ form the basis of a classic hub-and-spoke conspiracy claim. In its most basic form, an information sharing hub-and-spoke conspiracy involves entities that engage in the sharing of sensitive information through a third party, who is generally not directly in competition with the other entities.⁷⁶ The cartelization is then achieved via independent agreements between each spoke (in this case, each landlord) and a singular hub (here, RealPage). While the spokes are not directly colluding with each other, they indirectly form a cartel through the sharing and pooling of competitively sensitive information with the hub, who then coordinates the implementation of artificially inflated and anticompetitive fixed prices⁷⁷ (here, through RealPage’s algorithm’s price “recommendations”).

Third, the DoJ submits that RealPage has violated section 2 of the *Sherman Act* through the monopolization of the commercial revenue management software market.⁷⁸ Section 2 of the *Sherman Act* establishes that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the

trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”⁷⁹ Here, the DoJ asserts that RealPage has established monopoly power in the market for real-estate commercial revenue management software, and that it has illegally achieved this monopoly power through “unlawful exclusionary conduct.”⁸⁰ Namely, by amassing a “massive reservoir of competitively sensitive data from competing landlords” to ensure “rivals cannot compete on the merits unless they enter into similar agreements with landlords, offer to share competitively sensitive information among rival landlords, and engage in actions to increase compliance.”⁸¹

Finally, and in the alternative to their third claim, the DoJ posits that RealPage has violated section 2 of the *Sherman Act* for *attempting* to monopolize the commercial revenue management software market.⁸² Here, the DoJ asserts (and warns) that “RealPage has acted with a specific intent to monopolize, and to eliminate effective competition”, and, that “[t]here is a dangerous probability that, unless restrained, RealPage will succeed in monopolizing the commercial revenue management software market in violation of Section 2 of the *Sherman Act*.”⁸³

Ultimately, the DoJ is alleging that RealPage has constructed an unlawful scheme to decrease competition among landlords in rent pricing, and to subsequently monopolize the market for commercial revenue management software that landlords use to price apartments vis-à-vis its pricing algorithm, in contravention of both section 1 and section 2 of the *Sherman Act*.

In response to the DoJ’s complaint, RealPage has denied all of the allegations.⁸⁴ RealPage asserts that its software “simply helps landlords make data-driven decisions in a competitive market” by reflecting market conditions and optimizing occupancy rates.⁸⁵ RealPage has even gone so far as to assert its software ultimately benefits renters “by ensuring the long-term viability of rental properties.”⁸⁶

Moreover, in August 2025, the DoJ entered into a proposed consent decree with Greystar, a large U.S.-based residential property manager, related to its use of RealPage’s software.⁸⁷ The decree requires Greystar to: refrain from using any anticompetitive algorithm that generates pricing recommendations using its competitors’ competitively sensitive data or that incorporates certain anticompetitive features; refrain from sharing competitively sensitive information with competitors; accept a court-appointed monitor if it uses a third-party pricing algorithm that is not certified pursuant to the terms of the consent decree; refrain from attending or participating in

RealPage-hosted meetings of competing landlords; and cooperate with the United States' monopolization claims against RealPage.⁸⁸ This recent development further highlights the merits of the DoJ's arguments.

B) The Merits of the DoJ's Arguments

There are essentially two prongs to the DoJ's litigation strategy. The first prong of its arguments seeks to assert that RealPage's algorithm is inherently conspiratorial insofar as it facilitates an informational hub-and-spoke conspiracy. The second prong of its arguments seeks to recognize RealPage's conduct of collecting competitively sensitive data and then mining it to provide price recommendations as monopolistic. The DoJ then attempts to demonstrate that RealPage is abusing its monopolistic position of dominance in the market.

i) Conspiracy Arguments

As is noted by Professor Benjamin Klein, professor of law and economics at UCLA, American jurisprudence has established that proving a hub-and-spoke conspiracy is critically dependent on the existence of horizontal agreements between the spokes.⁸⁹ He then describes these agreements as "the 'rim' that connects the spokes."⁹⁰ According to Klein, American courts will often reject claims of *per se* hub-and-spoke conspiracies where there is insufficient evidence "that the spokes agreed among themselves to comply with the hub's contract demands."⁹¹ Consequently, in the context of the RealPage matter, for such a claim to be successful, the DoJ would have to demonstrate that these types of horizontal rim agreements exist between the landlords—not just between the individual landlords and RealPage.

Given the DoJ's complaint includes some statements from landlords acknowledging they were alive to how their data would be used by RealPage, it may be possible to support the argument that there were agreements between the individual landlords. However, these agreements, if they are even found to be agreements, would be tacit agreements, which have often been insufficient to establish collusion.⁹² Indeed, the DoJ seems to imply in its arguments that there is a tacit agreement between the landlords (the spokes). In their second claim for relief, the DoJ posits that landlords recognize that by using RealPage's software they are engaging in price-fixing, and that their decision to send competitively sensitive data to RealPage and use RealPage's software is a tacit agreement amongst themselves to align their pricing via RealPage (the hub).

Moreover, the DoJ's argument that tacit agreements exist between the landlords insufficiently contends with the "rim agreements" issue present in hub-and-spoke conspiracy claims. Indeed, as is noted by Klein, parallel acceptance of hub contract terms alone is not sufficient to prove that a horizontal agreement exists between the spokes.⁹³ Klein goes on to assert that this is particularly true in cases where the hub benefits from market power—such as in this case. The reason is relatively straightforward: where the hub has market power, it is easier for the hub to enforce the vertical contract between itself and each individual spoke, absent any horizontal agreements between the landlords.⁹⁴ This is because the sanction—or threat—the hub can impose is sufficient to "obtain universal spoke compliance."⁹⁵ In this case, such an assertion seems to ring true: the sanction of depriving a landlord from accessing RealPage's algorithm is likely sufficient, in and of itself, to achieve compliance from each landlord. In other words, due to the market power of RealPage, and the massive amount of data it has, landlords would be harmed by losing access to RealPage. The landlords are therefore not reliant on horizontal agreements between themselves to facilitate RealPage's algorithm, as the algorithm is already well-developed.

As is noted by Klein, this phenomenon

"vividly illustrates a counterintuitive result of hub-and-spoke analysis: the greater the market power of the hub, and therefore the more likely the vertical contract would fail [...], the less likely a *per se* hub-and-spoke claim will succeed. **Because a hub with market power is more likely to have the ability to impose a sufficient sanction to obtain unilateral universal compliance, it is less likely that unambiguous evidence of an agreement among the spokes will exist**" [emphasis added].⁹⁶

Indeed, in the RealPage matter the DoJ has thus far failed to provide unambiguous evidence of landlords communicating or agreeing between themselves.

Without this explicit agreement or communication, it remains to be seen whether the DoJ's conspiracy arguments will be successful. A pessimistic view is buttressed by the series of cases in which U.S. courts have found *per se* allegations of hub-and-spoke conspiracies insufficient without evidence of agreements between the spokes. Moreover, given RealPage's market power, the phenomenon described by Klein is most certainly at play in this case, further undermining the potential success of the DoJ's hub-and-spoke conspiracy claims.

Here again, we are faced with the problem presented by algorithms in the context of the prosecution of conspiracy: the lack of communication and tangible agreements that are characteristic of the use of algorithms could allow for conduct that is *prima facie* anticompetitive to fly under the legal radar.

That being said, in the *RealPage* case, the DoJ also brought forward a second prong of arguments related to monopolistic practices and abuse of dominance that may be more meritorious.

ii) Abuse of Dominance Arguments

Along with its conspiracy claims, the DoJ is challenging RealPage's alleged monopolization of the market for commercial revenue management software, and its subsequent abuse of its dominance in this market—which, according to the DoJ, has barred other firms from entering and competing in the market.

In the complaint, the DoJ highlights that RealPage's alleged monopoly power stems from its ability to unlawfully exclude competitors through the sheer amount of competitively sensitive data in its possession. By leveraging this data, RealPage excludes competitors, as “rivals cannot compete on the merits unless they enter into similar [anticompetitive] agreements with landlords.”⁹⁷

Of course, these arguments are also bolstered by the fact that RealPage does in fact benefit from a very high market concentration. Indeed, RealPage's internal documents indicate it has an 80% market share, which is exceptionally high.⁹⁸ Moreover, as the DoJ notes, the monopolistic conduct of RealPage creates a “self-reinforcing feedback loop of data and scale advantages.”⁹⁹ In this sense, by sharing and compiling competitively sensitive information and then allowing landlords to benefit from this compiled and coordinated information, RealPage attracts more rival landlords, which then extends the amount of competitively sensitive information it has, which improves the quality of its algorithm, which further exacerbates the chasm between itself and its competitors, which in turn excludes more rivals, and so on. “Over time, RealPage has become more entrenched and has stymied alternatives unless they too enter into similar unlawful agreements with landlords to obtain and use nonpublic transactional data to price units. Even then, RealPage's unparalleled troves of competitively sensitive data provide an ill-gotten advantage”, so says the DoJ.¹⁰⁰

This chasm between RealPage's data and its competitors' data is the cornerstone of its monopoly power. RealPage has explicitly stated as much, often highlighting its "unmatched database" to clients.¹⁰¹ A database filled with competitively sensitive information it has used "to develop an AI-driven revenue management solution that leverages the scale and scope of its data."¹⁰² As this chasm grows through the self-reinforcing feedback loop of RealPage's business model, it will become exceedingly more difficult for other revenue management software to compete. To this specific point, the DoJ highlights an incident of a RealPage executive stating "[RealPage's] revenue management solution does not have any true competitors, mainly because our data is based on real lease transaction data from all kinds of third-party property management systems."¹⁰³ Another RealPage executive, when discussing a potential new entrant to the market, specifically highlighted the significant hurdles that exist for new entrants to procure the data necessary to achieve results as sophisticated as RealPage's software.¹⁰⁴

Given all of this, the RealPage matter most certainly seems to fit the bill for a strong monopolistic practices/abuse of dominance claim. Indeed, in addition to the markedly high 80% market share RealPage benefits from, its business model inherently seems to bar new entrants and reinforces its position of dominance by widening the sophistication gap between its software and that of any potential competitors.

IV. Abuse of Dominance: an Appropriate Path Forward?

A) The Caselaw: How is Abuse of Dominance Established?

In U.S. antitrust law, monopoly power is regulated by section 2 of the *Sherman Act* and is broadly understood as the power or ability to control prices or exclude competitors.¹⁰⁵ However, the simple exercise or possession of monopoly power is not automatically illegal. In this sense, American competition law only prohibits anticompetitive conduct that has as its objective either the acquisition or maintenance of monopoly power.¹⁰⁶ This is often considered from the lens of whether the conduct used to achieve or maintain monopoly power is *predatory* or *exclusionary*.¹⁰⁷

For the purposes of prosecuting abuse of dominance, American courts require that the anticompetitive conduct and the monopoly power be proven; then a causal connection must be demonstrated between the conduct and the creation or maintenance of monopoly power.¹⁰⁸ In this respect, American courts have held that this causal connection can be proven where "a defendant has engaged in anticompetitive conduct that 'reasonably appear[s] capable of making a significant contribution to [...]"

maintaining monopoly power.”¹⁰⁹ Consequently, an algorithm that is used to maintain monopoly power—and exclude competitors from the market—would appear to engage section 2 of the *Sherman Act*.

In EU competition law, article 102 of the *Treaty on the Functioning of Europe*¹¹⁰ broadly prohibits “[a]ny abuse by one or more undertakings of a dominant position within the internal market.”¹¹¹ The Court of Justice of the European Union has subsequently articulated dominance as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”¹¹² Under EU competition law, market shares are often used to provide an initial assessment of an undertaking’s potential market power or dominance.¹¹³ Moreover, in Europe, much like in the U.S., the mere fact an undertaking holds or acquires a dominant position in a market is not automatically a violation of European competition law; a dominant company only infringes article 102 if it takes advantage of (i.e., abuses) its dominant position *to restrict competition*.¹¹⁴ To establish this is the case, the Commission must demonstrate that the undertaking’s conduct prevented or created barriers to competition, as per the *Microsoft CJEU* case¹¹⁵, that the conduct has resulted in anticompetitive effects¹¹⁶, that the anticompetitive effects were reasonably likely to result from the conduct¹¹⁷, and that the anticompetitive effects reinforce market power.¹¹⁸

Interestingly, at paragraph 1061 of the *Microsoft CJEU* judgment, the Court of Justice contends with the notion of a “positive feedback loop” as an indicia of abusive behaviour. The Court then borrows from the Commission’s definition—which was itself borrowed from Bill Gates’ testimony—that a positive feedback loop “describes the phenomenon where, the greater the number of users of a given software platform, the more there will be invested in developing products compatible with that platform, which, in turn reinforces the popularity of that platform with users.”¹¹⁹ This phenomenon is eerily reminiscent of the DoJ’s complaint concerning the anticompetitive effects of RealPage’s algorithm. It therefore seems likely that RealPage’s conduct would sufficiently engage article 102 TFEU.

Finally, under Canadian competition law, abuse of dominance is regulated by section 79 of the *Competition Act*, which was recently amended to have its scope increased.¹²⁰ Section 79 of the Act “requires an assessment of whether ‘one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business.’ In other

words, this first element of the Act's abuse of dominance provision requires a finding of 'dominance'.¹²¹ According to the Bureau, a substantial degree of market power is necessary to establish whether a firm substantially or completely controls a market.¹²² To this effect, the Supreme Court of Canada has held that market power consists of "the ability to 'profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition'."¹²³ In qualifying market power, Canadian courts will often rely on a combination of high market shares and assessing whether a firm's conduct results in significant barriers to entry.¹²⁴ This approach is quite similar to both the U.S. and European regimes. In Canada, however, the Competition Tribunal has gone so far as to say that a market share of over 50% indicates *prima facie* market power, and that in such circumstances, market power will be presumed dominant barring "compelling evidence of easy entry into the [market]."¹²⁵ Once there is a finding of dominance, abuse of dominance is established if the firm "engages in a practice of anticompetitive acts" that is intended to have predatory, exclusionary, or disciplinary effects, or to have an adverse effect on competition.¹²⁶ In this sense, "abuse" can result from intended predatory, exclusionary or disciplinary conduct, but also from conduct that is intended to adversely effect competition.

Recent amendments to the *Competition Act* empower the Competition Tribunal to make a prohibition order against a dominant firm (or group of firms) if their conduct meets either the anticompetitive intent or effect requirement. According to the Competition Bureau, "[t]his will provide a way of stopping dominant firm conduct that has either subverted competition in the marketplace or was intended to do so."¹²⁷ Where all three elements are established, a broader range of remedies is available to the Tribunal, including administrative monetary penalties and disgorgement of profits.¹²⁸ In this sense, the Tribunal can declare conduct as abusive and prohibit its continuation without having to find an anticompetitive effect. It is only if the Tribunal wishes to impose an administrative monetary penalty, or other penalty contemplated by the Act, that it must also be established that there is an anticompetitive effect to the conduct. This lower standard for acquiring a prohibition order brought on by restructuring the legal test for abuse of dominance in the recent amendments to the Act could precisely capture the type of conduct contemplated in the RealPage matter. Under the Canadian regime, RealPage would be presumed dominant, and would likely be found to have engaged in abusive behaviour through its intended exclusion of competitors from the market vis-à-vis its algorithm.

B) The RealPage Matter: an Appropriate Case Study for Abuse of Dominance via Algorithmic Collusion

Based on the legal tests required to establish abuse of dominance canvassed above, I believe that the RealPage matter is an appropriate case for prosecuting algorithmic collusion through the abuse of dominance provisions. Indeed, RealPage's conduct is very likely captured by section 2 of the *Sherman Act* in the U.S. (and would also likely be captured by article 102 TFEU in the EU, and section 79 of the *Competition Act* in Canada).

With respect to the question of dominance, it almost goes without saying that RealPage is dominant in its market. First, RealPage has admitted as much, acknowledging its software “does not have any true competitors.”¹²⁹ Second, its market concentration is exceptionally high. In Canada, for instance, such a high market concentration would result in a presumption that RealPage is dominant, barring compelling evidence the market is easy to enter. In the case at bar, the evidence indicates quite the opposite.

Moreover, RealPage's conduct is assuredly exclusionary such that it can be qualified as abusive. Indeed, RealPage's algorithm is designed to unlawfully create barriers to entry through the leveraging of its “unparalleled troves of competitively sensitive data [that] provide an ill-gotten advantage.”¹³⁰ As is noted by the DoJ, RealPage's leveraging of this competitively sensitive information has then stymied the entrance of competitors to the market, such that, unless competitors enter into the same kinds of “unlawful agreements with landlords to obtain and use nonpublic transactional data to price units” as RealPage, they have no genuine chance of market entry.¹³¹ And, even if they do enter the market, the head start RealPage has in the form of its “troves” of data has created an almost insurmountable chasm between RealPage, as the dominant firm in the market, and any new entrants. This chasm is then reified by what the DoJ qualifies as RealPage's algorithm's “self-reinforcing feedback loop of data and scale advantages.”¹³²

Learning from the European jurisprudence, RealPage's self-reinforcing feedback loop can be seen as an *indicia* of an abuse of dominance.¹³³ The Court of Justice in *Microsoft CJEU* specifically noted that abuse of dominance provisions are “intended to prohibit a dominant undertaking from strengthening its position by recourse to means other than those based on competition on the merits.”¹³⁴ Therefore, it has been accepted in European jurisprudence that this type of self-reinforcing conduct from dominant firms can result in anticompetitive conduct. Such a conception is not at odds with the American abuse of dominance regime as well. Indeed, a

self-reinforcing algorithm could fall within the framework established by the American *Microsoft* case, whereby a defendant—here, RealPage—“has engaged in anticompetitive conduct that ‘reasonably appear[s] capable of making a significant contribution to ... maintaining monopoly power’.”¹³⁵ This, however, is not meant to suggest that the mere existence of network effects is itself an abuse of dominance, as network effects are a feature of a market and not necessarily a choice of a market participant. In this sense, it would be difficult to qualify the mere existence of a network effect as abusive without causation (i.e. whether the challenged conduct excluded competitors). In the case of RealPage the challenged conduct is self-reinforcing in that it benefits from widespread use (i.e., network effects), while also lessening competition among landlords. Thus, the only way for an entrant to challenge RealPage’s dominance is to do something similar to what RealPage is doing. It is this causal link between the network effects and the lessening of competition that can constitute the abuse here.

In the present case, a strong doctrinal argument based in the evidence could be put forward—and has been in the DoJ’s complaint—that the algorithmic model employed by RealPage is an abuse of RealPage’s dominance in the commercial revenue management software market.

However, it bears noting that recourse vis-à-vis abuse of dominance is only possible in this case because of the overwhelming monopolistic power RealPage benefits from, both in terms of its market concentration and in terms of its comparative data advantage over competitors.

C) Abuse of Dominance Provisions are Not a One-Size-Fits-All Solution

Abuse of dominance, by definition, requires dominance. While this seems obvious, it bears emphasis because it is for this precise reason that abuse of dominance provisions cannot be a one-size-fits-all solution for tackling algorithmic collusion. In the RealPage matter, the DoJ’s abuse of dominance claim is strong. However, the same could likely not be said for claims against similar conduct in less concentrated markets. Indeed, bringing forward an abuse of dominance claim will necessarily be a less successful strategy when the firm being prosecuted has less market power.

This, however, poses a significant enforcement paradox. If an enforcement agency has to wait until a firm is dominant, and the firm in question achieves dominance through the implementation of collusive conduct that causes it to attract customers with profits from ill-gotten gains that other law-abiding companies cannot offer, then we are rewarding cartel

behaviour and policing it after the train has left the station. Competition law enforcement agencies should not have to wait for cartels to become dominant—and subsequently cause damage to customers for the years required to become so—before challenging them.

As noted by Professor Chapdelaine at the University of Windsor Faculty of Law, a focus on abuse of dominance with respect to algorithmic pricing “necessarily narrows the analysis to larger suppliers,” despite the fact that “large segments of e-commerce suppliers involve small to medium suppliers.”¹³⁶ To this effect, Chapdelaine observes that abuse of dominance provisions might work where algorithmic pricing is employed by firms that benefit from significant market power.¹³⁷ However, “[t]o the extent that [algorithmic pricing] may occur in (imperfectly) competitive markets as well, [there is] a huge gap that the current regulation of macro-market anti-competitive practices does not address.”¹³⁸ Indeed, this gets back to the fundamental problem resulting from algorithmic pricing and its subsequent potential for conspiracy: that this particular type of conduct is not squarely captured by competition provisions dealing with conspiracy, despite the fact that conspiracy provisions are the competition law provisions where algorithmic collusion would most comfortably fit, from a prosecutorial perspective. This is indeed, to borrow Professor Chapdelaine’s words, a huge gap in the legislation.

Therefore, moving forward, in instances where abuse of dominance claims cannot be so easily relied on in the presence of algorithmic collusion, enforcement agencies may need to advocate for regulatory reform to ensure that these forms of collusion can be captured by competition legislation.

Of course, regulatory reform in this respect is not without its challenges. An outright *ex ante* prohibition making pricing algorithms illegal would prove difficult as pricing algorithms are ubiquitous and have been for some time. Similarly, an approach like “make those pricing algorithms that cause prices to be supracompetitive illegal” would require a fundamental reworking of Canadian competition law as it is essentially asking the Competition Bureau to implement what European competition law calls “excessive pricing,” which fundamentally changes how prices are formed in market economies. While paragraph 78(1)(k) of the *Competition Act* now makes it an anticompetitive act under the abuse of dominance provisions to “directly or indirectly impos[e] excessive and unfair selling prices”, the Commissioner has confirmed that he does not intend for the Bureau to become a price regulator, and that the Bureau reads paragraph 78(1)(k) of the Act in connection with the beginning of section 78—in this sense, he

notes, “that excessive and unfair pricing would be an anticompetitive act only when it is intended to have a predatory, exclusionary or disciplinary negative effect on a competitor or to have an adverse effect on competition. It is very circumscribed.”¹³⁹

Moreover, any potential amendments would need to keep in mind the risk of “false positives”—that is finding an infringement of competition law where no anticompetitive harm exists. Indeed, suppose an aggressive enforcement policy condemns the use of pricing algorithms by 100 firms. And also suppose that without that enforcement policy only one of the 100 would cause a lessening of competition, and there may be significant benefits in the form of increased output from 50 of those firms, it is far from clear that such a policy is the right one.

D) Recent Canadian Developments: Section 90.1 of the *Competition Act*

Along with many other recent amendments to the *Competition Act* in Canada comes the newly revamped section 90.1, which came into force on December 15, 2024. Prior to the amendments, section 90.1 of the Act addressed collaborations between competitors; that is, agreements or arrangements between actual or potential rivals that had the effect, or were likely to have the effect, of substantially lessening or preventing competition in a market. This provision empowered the Competition Bureau to examine collaborative agreements between competing businesses, including joint ventures and strategic alliances, to ensure that such otherwise lawful arrangements did not adversely affect competition. Moreover, before the amendments, the only remedies available to the Tribunal were prohibitive or prescriptive orders. As such, no administrative monetary penalties were previously available.

Following the amendments, section 90.1 of the Act not only contemplates anticompetitive agreements between competitors, but also anticompetitive agreements between non-competitors, where “a significant purpose of the agreement or arrangement, or any part of it, is to prevent or lessen competition in any market.”¹⁴⁰ Furthermore, the Tribunal may now issue administrative monetary penalties not exceeding the greater of \$10 million (or \$15 million for subsequent offences) and “three times the value of the benefit derived from the agreement or arrangement, or, if that amount cannot be reasonably determined, 3% of the person’s annual worldwide gross revenues.”¹⁴¹

The amended s. 90.1 has yet to be tested before the courts. However, a few preliminary remarks can be made. Firstly, this provision seems as though it could capture conduct akin to RealPage's. Because of the broad application of the new s. 90.1, that is, its application to agreements (whether horizontal or vertical) that have an anticompetitive effect, there would no longer be a need to show a conspiracy among the spokes. All that would have to be established is that RealPage's agreements with its customers are causing a lessening of competition in rental markets. Once this is established, that would be sufficient to engage an order by the Tribunal.

A second observation, however, is that the provision is still rooted in an *agreement*. Consequently, while the provision is helpful in mitigating harm caused by agreements between non-competitors, as would likely be the case in a situation akin to the DoJ's complaint in RealPage, it still cannot get at a lessening of competition in the absence of an agreement. Consequently, where algorithms collude in the way Professor Timo Klein contemplates in his study—that is, where a lessening of competition occurs spontaneously and with no human intent—it is less clear to what extent s. 90.1 of the Act is applicable. Indeed, if Canadian courts continue to read communication into the term “agreement”, as the Supreme Court did in *Atlantic Sugar*, collusive behaviour that is not explicitly coordinated or agreed to would still be unlikely to engage the Act.

Finally, it should be noted that s. 90.1 is a civil enforcement provision, not a criminal enforcement provision like many of the cartel-related provisions in the Act. Consequently, despite the potential fines the Tribunal is able to impose being relatively significant, they will not necessarily have the same deterring effect criminal sanctions might. Indeed, according to Wils, effective deterrence with only fines requires impossibly high fines; and based on his findings, the minimum level of fines required to completely deter price cartels is 150% of annual turnover.¹⁴² Given the maximum fine contemplated by s. 90.1 of the Act is 3% of annual worldwide turnover, we are a long way from achieving complete deterrence.

V. Where Do We Go From Here?

A) Technology Moves Faster Than the Law

A general undercurrent to this nascent field of research is that technology often advances at a pace faster than the law. This phenomenon is understood as the “pacing problem.”¹⁴³ Essentially, a consensus in the law and technology literature “recognizes that legal institutions’ capacity to react to innovative technologies is diminishing because innovation driven by

science and technology is accelerating while [governmental] agencies' regulatory processes have slowed down."¹⁴⁴ Moreover, regulatory challenges can stem from "trial-and-error rule-making," attempts to find ways to regulate innovative technologies with existing regulatory frameworks, and considerations for "future contingencies in rulemaking" to ensure that when regulations are eventually enacted, that they do not become obsolete shortly thereafter.¹⁴⁵

The law and technology literature proposes several remedies to this problem. For instance, *principles-based regulation*, which stresses "general and abstract guiding principles for desired regulatory outcomes," as opposed to more rigid rules.¹⁴⁶ This approach allows for greater adaptability in light of changing industry practices.¹⁴⁷ Other recommendations include temporary legislation with sunset clauses, built-in periodic parliamentary reviews of legislation, and enhanced powers to specialized courts and specialized administrative decision-makers.¹⁴⁸

Through some of these proposed remedies it might be possible to reconceptualize collusion through regulatory reform.

B) Paths Forward: Reconceptualizing Collusion Through Regulatory Reform

While in some cases, abuse of dominance may be an acceptable and effective tool in tackling algorithmic collusion—it is not a one-size-fits-all solution, and there will certainly be cases where it cannot be used to curb anticompetitive algorithmic conduct. Indeed, in cases where a firm utilizing an algorithm is not dominant, or not specifically using the algorithm to restrict competition, abuse of dominance provisions are unlikely to apply. In such instances, it may not be possible to prosecute algorithmic collusion without regulatory reform.

While recent legislative amendments may prove fruitful at curbing and prosecuting certain instances of algorithmic collusion, such as the recent amendments to s. 90.1 of the *Competition Act* in Canada, they still do not appear capable of completely addressing all forms of algorithmic collusion. Indeed, potentially recognizing this, the Competition Bureau recently released a short paper and call for information on algorithmic pricing. Consequently, it appears the Bureau—and Canadian regulators more broadly—are beginning to turn their minds to this issue. As they do, they should ensure they assess the impact focussing on "communication" or a "formal agreement" will have on their ability (or potential lack thereof) to prosecute algorithmic collusion. To this effect, they may wish to make more

explicit provisions within the Act that specifically contemplate this type of collusion.

Indeed, courts cannot read the minds of individuals, that is why they have focused on making communication, or the “agreement” between firms, illegal.¹⁴⁹ However, Harrington posits that courts can in fact “read the mind” of an algorithm.¹⁵⁰ Consequently, he proposes updating competition frameworks to account for the use of algorithms and big-data by incorporating forms of conscious parallelism that rely on pricing algorithms into the cartel-related provisions of competition regimes.¹⁵¹ To this effect, competition laws could make collusion via autonomous artificial intelligence illegal as a substitute for an agreement or communication. Alternatively, the judiciary might be persuaded to reconceptualize the jurisprudential test for collusion specifically in the context of pricing algorithms as an acknowledgement of the legislative gap that currently exists in this respect. There are indeed paths forward for reconceptualizing collusion, they may just require judicial or legislative buy-in.

VI. Conclusion

The RealPage matter highlights that competition frameworks are in fact capable of dealing with algorithmic collusion in certain contexts. For example, where the use of the algorithm facilitates the monopolization of a market and the subsequent abuse of that monopoly power to exclude competitors. However, many contexts remain in which algorithmic collusion may not be adequately captured by modern competition laws. In order to combat the anticompetitive practices algorithms can employ, competition enforcement agencies will need to either find creative ways to apply their existing competition laws to these new practices, or advocate for regulatory reform. Sometimes, the most effective solution is in fact reinventing the wheel.

ENDNOTES

* This paper was written as the author's master's research project at the University of Toronto and was completed during the 2024–2025 academic year. The views and opinions expressed in the paper reflect entirely the views of the author and are in no way indicative of the views of any of the author's previous or current employers.

¹ Renato Nazzini & James Henderson, "Overcoming the Current Knowledge Gap of Algorithmic 'Collusion' and the Role of Computational Antitrust" (2024) 4:1 *Stanford Computation Antitrust* 1 at 3 [Nazzini].

² *Ibid* at 1.

³ Joseph Harrington, "Developing Competition Law for Collusion by Autonomous Artificial Agents" (2019) 14:3 *J of Competition L & Econs* 331 at 349 [Harrington].

⁴ Nazzini, *supra* note 1 at 3.

⁵ *Ibid*.

⁶ *United States v RealPage Inc*, 1:24-cv-00710 (US Dist Ct MD NC 2024) (Complaint) [*Complaint*].

⁷ *Ibid* at para 5.

⁸ Harrington, *supra* note 3 at 349.

⁹ *Ibid*.

¹⁰ *Ibid*.

¹¹ *Ibid*.

¹² Timothy Flannery et al, "Is the 'smoke-filled room' necessary? An experimental study of the effect of communication networks on collusion" (2023) 89:4 *Southern Econ J* 1056 at 1056.

¹³ *Ibid* at 1057.

¹⁴ *Ibid*.

¹⁵ *Atlantic Sugar Refineries Co Ltd et al v Attorney General of Canada*, [1980] 2 SCR 644 [*Atlantic Sugar*].

¹⁶ *Ibid* at 657.

¹⁷ *Theatre Enterprises v Paramount Film Distributing Corp*, 346 US 537 (1954).

¹⁸ *Ibid* at 540.

¹⁹ *Imperial Chemical Industries Ltd v Commission*, C-48/69, [1972] ECR 619.

²⁰ *Ibid* at 655.

²¹ *Atlantic Sugar*, *supra* note 15 at 656.

²² *Ibid* at 657.

²³ *Competition Act*, RSC 1985, c C-34.

²⁴ Canada, Competition Bureau, *Big data and innovation: key themes for competition policy in Canada* (Ottawa: Competition Bureau, 2018) at 9.

²⁵ Timo Klein, "Autonomous algorithmic collusion: Q-learning under sequential pricing" (2021) 52:3 *RAND J of Econs* 538 at 538.

²⁶ *Ibid* at 538–39.

²⁷ *Ibid* at 539.

²⁸ *Ibid*.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid* at 540.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *United States v Topkins*, 3:15-cr-00201-WHO (US Dist Ct ND Cal 2015) (Plea Agreement) [*Topkins*].

⁴⁰ Salil K Mehra, “*US v. Topkins*: can price fixing be based on algorithms?” (2016) 7:7 *J of European Competition L & Practice* 470 at 470.

⁴¹ *Ibid* at 471–72.

⁴² *Ibid* at 472.

⁴³ US, Department of Justice, *Justice Department Settles Airlines Price Fixing Suit, May Save Consumers Hundreds of Millions of Dollars* (Press Release, 94-131) (Washington, DC: DOJ, 1994).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Melanie Martin & Nazli Cansin Karga, “Managing the competition law risks of AI” (17 November 2023), online: *Dentons*.

⁴⁷ *Ibid.*

⁴⁸ *Re Online sales of posters and frames*, (2015), Case 50223 (Competition and Markets Authority) at 6.46.

⁴⁹ *Commission Decision of July 24, 2018 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union*, Case AT.40465, [2018] (*Asus (vertical restraints)*), OJ (C 338).

⁵⁰ *Commission Decision of July 24, 2018 relating to a proceeding under Article 101 of the Treaty on the functioning of the European Union*, Case AT.40181, [2018] (*Philips (vertical restraints)*), OJ (C 340).

⁵¹ Christian Bergqvist & Camila Ringeling, “Finding the Ghost in the Shell: EU and US Antitrust Enforcement of AI Collusion” in *Artificial Intelligence and Competition Policy* (Paris: Concurrences, 2024) at 151.

⁵² Klein, *supra* note 25 at 540.

⁵³ *Complaint*, *supra* note 6 at para 5.

⁵⁴ *Ibid.*

⁵⁵ *Ibid* at para 6.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid*

⁵⁹ *Ibid.*

⁶⁰ *Ibid* at para 1.

⁶¹ *Ibid* at para 3.

- ⁶² *Ibid* at para 1.
- ⁶³ *Ibid* at para 7.
- ⁶⁴ *Ibid* at para 9.
- ⁶⁵ *Ibid* at para 19.
- ⁶⁶ *Ibid* at para 11.
- ⁶⁷ *Ibid*.
- ⁶⁸ *Ibid* at para 12.
- ⁶⁹ *Sherman Act*, 15 USC (1890) [*Sherman Act*].
- ⁷⁰ *Ibid* at § 1.
- ⁷¹ *Complaint*, *supra* note 6 at paras 224–34.
- ⁷² *Ibid* at para 225.
- ⁷³ *Ibid* at paras 235–43.
- ⁷⁴ *Ibid* at paras 237–38.
- ⁷⁵ *Ibid* at para 241.
- ⁷⁶ Ansruta Debnath, “Solving the Enigma of Hub-And-Spoke Cartels-Applicability and Enforcement” (2024) 3:1 *The Competition and Commercial L Rev* 1 at 3.
- ⁷⁷ *Ibid*.
- ⁷⁸ *Complaint*, *supra* note 6 at paras 244–48.
- ⁷⁹ *Sherman Act*, *supra* note 69 at § 2.
- ⁸⁰ *Complaint*, *supra* note 6 at para 246.
- ⁸¹ *Ibid*.
- ⁸² *Ibid* at paras 249–53.
- ⁸³ *Ibid* at para 253.
- ⁸⁴ Kelly M Noll, “The DOJ’s Lawsuit Against RealPage: Unpacking the Allegations and Implications for the Rental Market” (30 August 2024), online: *Benesch*.
- ⁸⁵ *Ibid*.
- ⁸⁶ *Ibid*.
- ⁸⁷ US, Department of Justice, *Justice Department Reaches Proposed Settlement with Greystar, the Largest U.S. Landlord, to End Its Participation in Algorithmic Pricing Scheme* (Press Release, 25-826) (Washington, DC: DOJ, 2025).
- ⁸⁸ *Ibid*.
- ⁸⁹ Benjamin Klein, “Inferring Agreement in Hub-and-Spoke Conspiracies” (2020) 83:1 *Antitrust LJ* 127 at 127.
- ⁹⁰ *Ibid*.
- ⁹¹ *Ibid*. See also, *In re Musical Instruments & Equipment Antitrust Litigation*, 798 F3d 1186, 1193 (9th Cir 2015), *Total Benefits Planning Agency, Inc v Anthem Blue Cross & Blue Shield*, 552 F3d 430, 435–36 (6th Cir 2008), *RJ Reynolds Tobacco Co v Cigarettes Cheaper!*, 462 F3d 690, 696–97 (7th Cir 2006), and *PepsiCo, Inc v Coca-Cola Co*, 315 F3d 101, 110–11 (2d Cir 2002).
- ⁹² See *Theatre Enterprises*, *supra* note 17; See also *Atlantic Sugar*, *supra* note 15.
- ⁹³ *Ibid* at 164.
- ⁹⁴ *Ibid* at 130.
- ⁹⁵ *Ibid*.

- ⁹⁶ *Ibid* at 164.
- ⁹⁷ *Complaint, supra* note 6 at para 246.
- ⁹⁸ *Ibid* at para 154.
- ⁹⁹ *Ibid* at para 155.
- ¹⁰⁰ *Ibid* at para 156.
- ¹⁰¹ *Ibid* at para 162.
- ¹⁰² *Ibid* at para 163.
- ¹⁰³ *Ibid* at para 166.
- ¹⁰⁴ *Ibid* at para 167.
- ¹⁰⁵ Kenneth Reinker & Lisa Danzig, “United States” in Patrick Bock & Kenneth Reinker, *Dominance Guide 2020* (London: Meridian House, 2020) 244 at 244.
- ¹⁰⁶ *Ibid* at 245.
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- ¹⁰⁹ *United States v Microsoft Corp*, 253 F3d 34 (DC Cir 2001) at 79 [*Microsoft*].
- ¹¹⁰ *Treaty on the Functioning of the European Union*, 7 June 2016, OJ, C 202/150 at art 102 [TFEU].
- ¹¹¹ *Ibid*.
- ¹¹² *United Brands v Commission*, C-27/76, [1978], ECR-207 at para 65.
- ¹¹³ Patrick Bock & Henry Mostyn, “European Union” in Patrick Bock & Kenneth Reinker, *Dominance Guide 2020* (London: Meridian House, 2020) 85 at 85.
- ¹¹⁴ *Ibid* at 86.
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- ¹¹⁷ *Microsoft CJEU, supra* note 115 at para 1089.
- ¹¹⁸ Bock, *supra* note 113 at 87.
- ¹¹⁹ *Microsoft CJEU, supra* note 115 at para 1061.
- ¹²⁰ *Competition Act, supra* note 23 at s. 79.
- ¹²¹ Canada, Competition Bureau, *Abuse of Dominance Enforcement Guidelines* (Ottawa: Competition Bureau, 2024) at para 1 [Enforcement Guidelines].
- ¹²² *Ibid* at para 23.
- ¹²³ *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 44, citing *Canada (Commissioner of Competition) v Canadian Waste Services Holdings Inc*, 2001 Comp Trib 3 at para 7.
- ¹²⁴ Enforcement Guidelines, *supra* note 121 at para 29.
- ¹²⁵ *Canada (Director of Investigation and Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289.
- ¹²⁶ Enforcement Guidelines, *supra* note 121 at paras 51–59.
- ¹²⁷ Canada, Competition Bureau, *Guide to the December 2023 amendments to the Competition Act* (Ottawa: Competition Bureau, 2023) at para 15.
- ¹²⁸ *Ibid* at para 16.
- ¹²⁹ *Complaint, supra* note 6 at para 166.
- ¹³⁰ *Ibid* at para 156.

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GREEN TRUST OR GREEN HUSH? A CRITICAL ANALYSIS OF CANADA'S NEW ANTI-GREENWASHING RULES AND THEIR IMPLICATIONS

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Greenwashing rules in Canada are currently under review, with proposed amendments pending. This article reflects the state of the law as of December 2025.

This article examines the implications of Canada's 2024 amendments to the Competition Act concerning greenwashing, as well as additional changes proposed by the government in November 2025. Amid growing scrutiny and legal challenges relating to environmental claims, the Competition Act was amended in June 2024 to require businesses to substantiate their environmental benefits claims with "adequate and proper" evidence—though the precise standards for compliance remain undefined. Additionally, since June 2025, private plaintiffs have the right to bring civil deceptive marketing claims directly before the Competition Tribunal if deemed in the "public interest", a right that was previously reserved for the Competition Bureau. While civil society groups have welcomed these reforms, certain businesses have raised concerns about legal uncertainty, the potential chilling effect on environmental claims, and broader implications for freedom of expression. In November 2025, the Government of Canada announced its intent to revise the 2024 amendments to adjust the substantiation requirements for claims about businesses and their activities, and to prevent private lawsuits for a failure to substantiate such claims. This article analyzes the legal framework that existed prior to the 2024 amendments and 2025 proposal, the legislative process that led to 2024 amendments' adoption, the key changes introduced, and the primary objections raised by critics. While we contend that much of the concerns are overstated, we emphasize the need for complementary measures to enhance environmental transparency and regulatory clarity.

Les auteurs examinent les implications des modifications apportées en 2024 à la Loi sur la concurrence du Canada en ce qui concerne l'écoblanchiment, ainsi que d'autres modifications proposées par le gouvernement en novembre 2025. Dans un contexte de surveillance accrue et de contestations juridiques croissantes à l'égard des allégations environnementales, la Loi sur la concurrence a été modifiée en juin 2024 pour exiger que certaines déclarations sur les avantages environnementaux d'une entreprise soient fondées sur des éléments corroboratifs « suffisants et appropriés », bien que les normes précises de corroboration ne soient toujours pas définies. En outre, depuis juin 2025, les demandeurs privés ont le droit d'intenter directement des actions civiles devant le Tribunal de la concurrence pour pratiques commerciales trompeuses,

un droit qui était auparavant réservé au Bureau de la concurrence. Cette autorisation est subordonnée à la démonstration que la demande est dans l'« intérêt public ». Bien que ces réformes aient été favorablement accueillies par la société civile, certaines entreprises ont fait part de leurs préoccupations quant à l'incertitude juridique qu'elles engendrent, à leur effet potentiellement dissuasif sur les plaintes environnementales et à leurs implications plus larges pour la liberté d'expression. En novembre 2025, le gouvernement du Canada a annoncé qu'il prévoyait de réviser les modifications de 2024 afin d'ajuster les exigences de corroboration applicables aux allégations à l'égard des entreprises et à leurs activités, et de retirer le droit d'accès aux recours privés pour les affaires fondées sur un défaut de corroboration de telles allégations. Les auteurs analysent le cadre juridique antérieur aux modifications de 2024 et la proposition de réforme de 2025, le processus législatif ayant mené à l'adoption des modifications de 2024, les principaux changements introduits et les principales objections soulevées par les détracteurs. Tout en affirmant qu'une grande partie de ces critiques est exagérée, les auteurs soulignent la nécessité de mesures complémentaires afin d'améliorer la transparence environnementale et la clarté du cadre réglementaire.

1. Introduction

In June 2024, Canada amended its *Competition Act*¹ (the “**Act**”), the main federal statute regulating deceptive marketing practices, to introduce new prior substantiation requirements (“**PSR**”) for commercial representations to the public with respect to the benefits of a product, business, or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change (the “**Greenwashing Rules**”).² Simply stated, these rules require firms to gather evidence prior to making an environmental benefit claim (“**EBC**”). These evidentiary requirements differ depending on the nature of the EBC: EBCs about products must be substantiated by an “adequate and proper test”, whereas EBCs about businesses and business activities must be supported by “adequate and proper substantiation in accordance with internationally recognized methodology” (“**IRM**”).³ Amendments to the Act were also adopted to allow private plaintiffs to apply for an order by the Competition Tribunal (the “**Tribunal**”) under the Act’s deceptive marketing provisions (the “**Private Access Rule**”).⁴ Such applications will only be allowed to proceed if the Tribunal grants leave to the plaintiff, which the Tribunal may do if “it is satisfied that it is in the public interest to do so”.⁵ The Commissioner of Competition (the “**Commissioner**”) is responsible for enforcing the Act, continues to have the power to conduct inquiries and apply for court orders if potential violations of the deceptive marketing

provisions are identified. The Greenwashing Rules entered into force on June 20, 2024, when they received royal assent.⁶ The Private Access Rule entered into force on June 20, 2025.

The adoption of the Greenwashing Rules and the Private Access Rule (collectively, the “**New Rules**”) followed months of consultation during which a broad range of stakeholders advocated for a strengthened and/or more predictable anti-greenwashing regulatory framework.⁷ These stakeholders argued that the Act’s framework was inadequate to prevent, identify, and sanction greenwashing, and failed to provide legal certainty to businesses.⁸ The expanded New Rules were ultimately adopted, but criticism persists to this day, culminating in a legal challenge alleging violations of the freedom of expression protected by the *Canadian Charter of Rights and Freedoms* (the “**Charter**”).⁹ To provide businesses with greater legal certainty, the Bureau released a final version of its environmental marketing guidelines¹⁰ (the “**Guidelines**”) on June 5, 2025, but this has not quelled many opponents’ concerns.¹¹

In November 2025, as part of the 2025 Budget, the Government of Canada announced a proposal to amend the Act once more to remove the IRM standard from the Act, but retaining the requirement to base EBCs about businesses or business activities on “adequate and proper substantiation”.¹² The government also proposed to amend the Private Access Rule to narrow its scope, removing the right to bring private lawsuits for a failure to substantiate EBCs about businesses or business activities.¹³

To justify this reversal, the government indicated that the 2024 amendments were “creating investment uncertainty and having the opposite of the desired effect with some parties slowing or reversing efforts to protect the environment”.¹⁴ On November 18, 2025, the legislative proposal was tabled by the government as Bill C-15. As of December 2025, this legislative proposal (the “**Revision Proposal**”) had passed the first reading stage at the House of Commons.

Ironically, as we explore in section 6 of this article, despite the New Rules’ aim to curb misleading statements, public discourse around them has included significant misinformation regarding their scope, intent, and impact. This article seeks to clarify these issues for policymakers evaluating the New Rules and the Revision Proposal, legal practitioners navigating compliance and litigation, and eventually courts assessing their constitutionality. By examining the regulatory gaps that the New Rules and the Revision Proposal seek to address, the legislative process behind their

adoption or proposal, their potential effects, ongoing uncertainties, and criticisms, we aim to identify pathways for improving Canada's approach to greenwashing regulation and inform upcoming debates on the Revision Proposal.

Part 2 of this article provides a conceptual definition of greenwashing, based on economics and management literature. Part 3 summarizes the legal framework that existed prior to the amendments introduced in Bill C-59, and Part 4 describes the bill's context. Part 5 summarizes the content and the implications of the 2024 amendments. Part 6 explores the main arguments raised by critics of the amendments. Part 7 discusses the Revision Proposal and concludes.

2. What is greenwashing? A conceptual definition

Following Montgomery and Lyon, we define greenwashing as “any communication that misleads people into adopting overly positive beliefs about an organization's environmental performance, practices, or products”.¹⁵ Greenwashing can be either intentional or unintentional and may or may not lead to legal action.¹⁶

Greenwashing is a practice that usually occurs in a context of information asymmetry between an organization making an environmental claim and its stakeholders, such as consumers, investors, employees and civil society.¹⁷ There are several reasons why stakeholders may want to evaluate an organization's environmental performance. For example, consumers may seek to minimize the environmental footprint of their purchases, investors may prioritize investments in firms committed to sustainability, workers may prefer employers with strong environmental practices, and citizens may want transparency about the environmental impact of industrial activities taking place in their communities.

However, environmental characteristics are often credence characteristics, which cannot be directly observed by stakeholders unless they invest in verification, the cost of which can be high.¹⁸ Environmental characteristics often relate to processes that do not directly influence the physical characteristics of a product, such as the quantity of greenhouse gases emitted during its production.¹⁹ For example, the fact that a good was produced using a carbon intensive source of energy is unlikely to impact its observable characteristics or functionalities. These characteristics remain unobservable even if the good is purchased repeatedly or used over a long period of time.²⁰

Consequently, in the absence of mandatory information disclosure requirements, stakeholders wishing to evaluate the environmental performance of a product, activity or organization must rely on the information that is voluntarily provided by that organization. Information may also be provided by expert third parties, such as environmental certification firms and scientific experts. This reliance on third-party information is an important source of vulnerability for stakeholders.²¹ It is in this context that greenwashing takes place.

In some cases, the audience targeted by greenwashing claims may be able to identify the claims' deceptive nature. This may happen, for example, when greenwashing is exposed by expert intermediaries, such as journalists, scientists, law enforcement agencies, civil society groups or competitors.²² When greenwashing is exposed, stakeholders may update their beliefs and discount the current (and potentially future) information disclosed by the organization.²³ Such revelations may also influence how stakeholders perceive green claims by other organizations, reducing trust and fostering skepticism of environmental claims.²⁴

Suspected greenwashing cases may be publicly exposed through legal filings and complaints, which are then reported on by the media. For example, in 2022, the Bureau opened an inquiry into the Royal Bank of Canada's environmental claims following a complaint by six individuals backed by environmental groups. According to the complaint, the bank's climate-related claims were misleading because of its continued financing of fossil fuel projects²⁵. This complaint received widespread media coverage, which persisted for several months after its submission.²⁶

Legal filings and complaints may also take place after allegations of greenwashing are communicated publicly. For example, in December 2017, the CIRAIG, a Québec-based research institute, published a study on the lifecycle of shopping bags in Québec, which indicated that certain bags described as "recyclable" were in fact discarded by the province's sorting centers.²⁷ Years later, a class action alleging that certain retailers had made false claims about the recyclability of their plastic bags was launched²⁸. The class action, which explicitly referred to the CIRAIG's 2017 study, was authorized by the Québec Superior Court on May 22, 2024.²⁹

Greenwashing can also remain unnoticed, leading stakeholders to rely on deceptive information to make decisions.³⁰ Given that this information conveys an overly positive image of an organization's environmental performance, the decisions of credulous, environmentally conscious stakeholders

may be distorted.³¹ For example, consumers wishing to reduce their carbon footprint may choose a specific product because of an ad stating that the product is carbon neutral. If this information is false, then consumers may end up choosing a product that is not aligned with their preferences. Assuming that carbon-neutral or less carbon-intensive substitutes existed or could be developed by new entrants to the market, these distorted decisions would not only impact consumers, but also competitors willing to offer products with differentiated environmental attributes. These distortions can hinder firms from entering and competing, weaken incentives for innovation and environmental improvement, and ultimately limit the availability of competitive and sustainable product choices.

Moreover, if these decisions lead to a substitution of less environmentally harmful products by more environmentally harmful products in the market, greenwashing can lead to an increase in environmental externalities.³² This feature distinguishes greenwashing from other forms of deceptive marketing, which typically only harm the consumers and firms in a given market.³³

Even when stakeholders are not able to detect instances of greenwashing, they may *anticipate* the possibility of greenwashing, leading them to be generally skeptical of environmental claims. For example, according to a 2023 Deloitte survey, 57% of Canadian consumers “do not believe most green claims brands make”.³⁴ This skepticism can be amplified by a rise in the number of publicly exposed greenwashing cases.³⁵ This distrust can prevent consumers from properly identifying products that correspond closest to their preferences and limit the ability of firms to effectively signal their environmental performance.³⁶

As skepticism grows, stakeholders may face higher search costs, spending more time and effort verifying claims.³⁷ Similarly, firms willing to compete in green markets may need to invest heavily in restoring stakeholder confidence, which constitutes a barrier to entry and competition. Ultimately, as highlighted by Stucke, this can lead consumers to avoid or reduce spending on differentiated products and services and limit the incentives for “honest sellers to differentiate their products and to reap the financial, reputation-related rewards associated with their desirable products”.³⁸ This dynamic undermines product choice, weakens incentives for green innovation, and restricts firms’ ability to compete effectively in the economy.

Academic researchers have mapped a series of greenwashing tactics commonly used by organizations, which are summarized in Appendix A³⁹. We propose to divide these strategies into three main categories: false, misleading,

and speculative. This typology is aligned with the Bureau, which defines greenwashing as “environmental claims that are deceptive because they are false, misleading or not adequately and properly tested or substantiated”.⁴⁰ The first type are environmental claims that are false. Next are claims which, while not necessarily false, are misleading. This can include a broad range of practices, such as cherry-picking positive information while omitting negative information (also known as “selective disclosures”), making vague or general statements, or making misleading comparisons between substitutes.⁴¹ The third type covers speculative claims, which are claims that are not based on sufficient evidence, regardless of their truthfulness. This includes claims relying on certification schemes with insufficient verification processes⁴² and forward-looking claims that are based on unrealistic assumptions and that lack credible implementation plans—a category of claims that have been referred to as “future-washing”.⁴³

These three types of greenwashing can overlap. For example, a product-level carbon neutrality claim may be both speculative and misleading if it lacks proper emissions quantification and excludes a significant portion of the product’s greenhouse gas emissions from the analysis. Similarly, the same claim can be both speculative and false if it is not backed by any evidence and is factually incorrect.

3. The legal framework for greenwashing before the C-59 reform

In this part, we examine the legal framework that applied prior to the amendments introduced by Bill C-59 and that continues to exist alongside the New Rules and the proposed Bill C-15 amendments.⁴⁴ First, we make general comments about the rationale behind the Act’s deceptive marketing provisions. Then, we examine the details of the Act’s criminal and civil deceptive marketing regimes. Finally, we summarize how these provisions are enforced.

3.1 General comments

The Act is a federal statute that aims to “maintain and encourage competition in Canada” by regulating anticompetitive business practices, such as abuse of dominance, cartels and restrictive trade practices.⁴⁵ The Act is not a consumer protection statute.⁴⁶ However, certain business practices may harm the “proper functioning of the market” by deceiving the public, and the Act applies in such cases—most notably, through its deceptive marketing provisions.⁴⁷ As noted by the courts over the years, the purpose of these provisions is to “incite firms to compete based on lower prices and higher

quality”⁴⁸ by “improving the quality and accuracy of marketplace information and by discouraging deceptive marketing practices”⁴⁹. While the focus of the deceptive marketing provisions will often be consumers, this “is not indicative of the objective of the scheme”; this focus aids the “ultimate objective: maintaining the proper functioning of the market in order to preserve product choice and quality”⁵⁰.

The Act’s key provisions on deceptive advertising are found in section 52, which establishes a criminal offence for false or misleading claims, and section 74.01, which provides for civil remedies when a firm makes false, misleading or unsubstantiated claims. These provisions apply to representations “to the public, by any means whatever, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest” (emphasis added) (we will refer to such representations as “**Commercial Representations**”). A plain reading of this wording suggests that representations made solely for other purposes than promoting a product or business interest—such as complying with a regulatory requirement—are unlikely to be covered.

These provisions operate on the assumption that whenever a firm makes deceptive Commercial Representations, “there is *per se* harm to competition”.⁵¹ As such, the Act’s deceptive marketing rules do not require proof of anticompetitive effects. This feature distinguishes the deceptive marketing rules from other provisions of the Act, such as those on abuse of dominance.⁵²

The term “business”, within the meaning of the Act, does not necessarily have a profit motive.⁵³ Moreover, what constitutes a representation “to the public” is not defined in the Act, but it has been interpreted by the Federal Court of Appeal as not being limited by the public or private context of a communication.⁵⁴

In addition, case law has confirmed that a claim does not need to be made to the entire public to qualify as a representation “to the public”. For example, in *Canada (Commissioner of Competition) v Canada Tax Reviews Inc.*, the Federal Court indicated that a representation targeting sub-groups of the general public, such as particularly vulnerable groups in society, would be subject to the Act’s deceptive marketing provisions.⁵⁵

Paragraph 74.03(1)(e) of the Act indicates that for the purposes of section 74.01, a representation that is “contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public, is deemed to be made to the public by and only by the person

who causes the representation to be so expressed, made or contained”. However, the Federal Court of Appeal in *Premier Career* stated that subsection 74.03(1) is concerned with “who is responsible for having made the representation to the public” (in situations where there may be more than one party in a chain of parties, for instance)⁵⁶. That said, this section appears to imply that merely making a representation available to the public (e.g., by submitting it to a publicly available government consultation process) could be considered making “a representation to the public”.

One could wonder whether the concept of representation “to the public” is limited to claims directed at consumers of products or services or extends to claims targeting other stakeholders, such as investors, workers and citizens. For example, would a claim communicated to a group of prospective investors in a public conference qualify as a representation “to the public”?

In our view, the words “to the public” must be interpreted “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”⁵⁷ The Act’s purpose is to maintain and encourage competition in Canada, and the deceptive marketing provisions serve this goal by ensuring that the stakeholders that (i) can influence the competitive dynamics of a market, and (ii) are vulnerable to deception, have access to truthful information, enabling them to make decisions that reflect their preferences. Information asymmetries are not unique to consumer-firm relationships, and there are other members of the public who may be vulnerable to deceptive promotional claims that carry competitive effects. For instance, promotional claims can be part of a firm’s strategy to increase its legitimacy before a wide range of stakeholders, such as investors, employees, members of the communities where it operates, civil society groups, and so on.⁵⁸ These stakeholders’ perception of an organization’s performance may be key to its ability to compete in the marketplace. In that respect, the Act’s emphasis on the “public” contrasts with consumer protection law, which focuses exclusively on the protection of consumers.⁵⁹ Accordingly, in our view, the concept of “public” should be interpreted in a broad way in line with the purpose of the Act and not limited to statements aiming solely to influence consumer transactions.

There has been at least one case where the Bureau has launched an inquiry in respect of Commercial Representations that did not closely relate to consumer transactions. In March 2023, Greenpeace Canada filed a complaint with the Bureau against the Pathways Alliance, a coalition formed in 2021 by six of the country’s largest oil sands producers.⁶⁰ The complaint alleged

that the Pathways Alliance’s “Let’s clear the air” advertising campaign contained false or misleading statements regarding their emissions reduction efforts and their contribution to Canada’s climate goals. The campaign aimed to reach large public audiences via a range of avenues (including major newspapers, television spots, social media, at least one billboard, podcasts, and their website). Greenpeace Canada argued that these messages targeted the Canadian public, aiming to enhance the member companies’ public image.⁶¹ According to Greenpeace Canada, “representations by the Pathways Alliance are aimed at more than just making consumers purchase their products [they] are aimed at business interests that include creating the public and political support necessary to maintain their oil sands production”.⁶² As of December 2025, the status of this inquiry was unknown.

That said, we consider that only information intended for members of the public (i.e., information “to the public”, as opposed to information that is publicly available but not intended for the public) qualifies as a Commercial Representation under the Act’s deceptive marketing provisions.⁶³

3.2 Criminal regime

The key provision of the Act’s criminal deceptive marketing regime is section 52. Under subsection 52(1), no person shall “knowingly or recklessly” make a Commercial Representation that is “false or misleading in a material respect”.⁶⁴ To secure a conviction, prosecutors must prove these elements beyond a reasonable doubt.⁶⁵ However, subsection 52(1.1) specifies that to establish an offence under subsection 52(1), it is not necessary to prove that a person was effectively deceived or misled, that a member of the public was within Canada, or that the claim was communicated in a publicly accessible space.

Subsection 52(4) indicates that to determine whether a representation is “false or misleading in a material respect”, a court shall consider the “general impression conveyed by a representation as well as its literal meaning”.⁶⁶ The Act does not provide a definition of “general impression”, but the concept was interpreted by the Supreme Court of Canada in *Richard* in the context of provincial consumer protection law⁶⁷, and this interpretation has been applied under the Act.⁶⁸

3.3 Civil regime

Prior to the amendments introduced in Bill C-59 and in the Revision Proposal, the key provision of the Act’s civil deceptive marketing regime was subsection 74.01(1).⁶⁹ The burden of proof applicable to this provision is

the civil standard of a balance of probabilities.⁷⁰ Moreover, the criterion of the “general impression” described previously also applies in proceedings under this provision.⁷¹

Paragraph (a) of subsection 74.01(1) is the civil equivalent of subsection 52(1). It prohibits Commercial Representations that are “false or misleading in a material respect”. The substantive criteria of the two provisions are almost identical, the only differences being that paragraph 74.01(1)(a) does not require plaintiffs to prove that the deceptive claims were made “knowingly or recklessly”, and the applicable burden of proof is the civil standard.⁷² As such, paragraph (a) may apply to cases where an organization did not intend to deceive members of the public but nevertheless communicated false or misleading information.

While materiality is not defined in the Act, the courts have interpreted the term ‘material’ to refer to the extent to which a person is affected by the representation when deciding whether to buy the product being advertised.⁷³ For example, in *P.V.I. International Inc. v Canada (Commissioner of Competition)*⁷⁴, materiality was demonstrated by the fact that the sales of a firm had increased significantly after they began making the representations at issue. Thus, a representation is misleading in a “material respect” when the “ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered.”⁷⁵

While we agree with this interpretation, in order for the definition of materiality to correspond to our broad conception of the notion of “public” (which includes, but is not limited to, consumers) we prefer to use the broader definition used in the *Sears* case, according to which a representation is material when it is of “much consequence or important or pertinent or germane or essential to the matter”.⁷⁶

Paragraph (b) of subsection 74.01(1) makes it illegal for a person to make Commercial Representations “in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof” (emphasis added). As opposed to paragraph (a), where the plaintiff must prove material deception, paragraph (b) only requires the plaintiff to demonstrate that a Commercial Representation in the form of a performance claim was made.⁷⁷ Once this has been established, the onus then shifts to the defendant, who must demonstrate that the Commercial Representation has been substantiated adequately and properly.⁷⁸

The PSR contained in paragraph (b) ensures that an organization has a minimum degree of certainty regarding the accuracy of its claims before communicating them to the public. Under a PSR, speculative claims are prohibited, irrespective of their potential truthfulness. The policy rationale underlying PSRs is to prevent firms from making speculative claims that could later prove to be false—after the public has already relied on them to make decisions. As noted by the Tribunal in *The Commissioner of Competition v Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group)*⁷⁹, a PSR “protects the consumer by ensuring that she can rely on statements regarding the performance, efficacy or length of life of a product since those statements are to be based on proper and adequate tests.”⁸⁰

As testing may be costly, PSRs may disincentivize firms from making performance claims if the benefits of doing so are smaller than the costs. However, the implementation of a PSR may also increase the benefits of making a claim if they increase public trust. A PSR may also reduce enforcement costs by facilitating the proof of deceptive marketing cases, a topic that we discuss further in part 6 of this article.

The Act is not the only law in Canada requiring marketing claims to be substantiated prior to their communication.⁸¹

The concept of an “adequate and proper test” is not defined in the Act, but there has been case law under this provision over the years.⁸² For example, the courts have interpreted the concept of testing as a “procedure intended to establish the quality, performance or reliability of something”.⁸³ Case law also indicates that the nature of the testing required will depend on the general impression conveyed by the representation (as defined by case law—see footnote 56) and its nature, including the context in which the product is used and the risks or harm that the product aims at preventing or mitigate.⁸⁴ The testing must eliminate subjectivity as much as possible, notably by being conducted under controlled circumstances or in conditions which exclude external variables.⁸⁵ It must establish the effect claimed, be conducted on more than one independent sample where possible, and the sample must be reasonable; the test does not have to be certain but it must not be the result of chance.⁸⁶ The testing must be performed regardless of the size of the organization or its volume of sales and must be performed prior to the claim being made.⁸⁷ However, there is no requirement that a test be validated by a third party, and the test is not required to meet the standards of a peer-reviewed publication; traditional or scientific testing may not be required.⁸⁸

3.4 Enforcement

Under the Act's pre-existing framework, there were several ways to enforce against greenwashing.⁸⁹ Typically, any action would begin with an inquiry by the Bureau (s.10). Additional information on the inquiry process is provided in Appendix B.

In the course of an inquiry, if the Bureau considers that a breach has occurred under the Act's deceptive marketing provisions, it must decide whether the case warrants criminal or civil enforcement.⁹⁰

If the Bureau deems criminal prosecution appropriate, it will forward the evidence it has gathered to the Attorney General of Canada, who must then decide whether to lay charges (s. 23(1)).⁹¹ Under subsection 23(2), the Attorney General has the authority to prosecute any criminal offence under the Act.

A violation of subsection 52(1) constitutes an offence which, in the most egregious cases, can lead to a fine at the discretion of the court and 14 years of imprisonment. It may also trigger ineligibility for public tendering.⁹² In addition, under section 34, the Attorney General of Canada or the attorney general of a province may seek prohibition orders to prevent the continuation, repetition or commission of an offence.

While only the Attorney General of Canada may lay charges under section 52, subsection 36(1) allows for the recovery of damages whenever a person "has suffered loss or damage" resulting from "conduct that is contrary to any provision of Part VI" (including s. 52) or "the failure of any person to comply with an order of the Tribunal or another court under this Act" (including a court order imposed in relation to a violation of s. 74.01(1)). Such compensation claims are limited to the loss or damages incurred and the investigation and legal costs relating to the matter, excluding any accounting for profits.⁹³ When a court has convicted a person under section 52, the record of such prior proceedings and any evidence brought thereunder can be used to support a compensation claim (s. 36(2)).

Alternatively, when the Bureau opts for civil enforcement, it may apply for a court order before the Tribunal, the Federal Court or the superior court of a province (s.74.1) (a "**Court Order**").⁹⁴ Such Court Orders may require the defendant to cease the deceptive practice, issue a corrective notice, pay an administrative monetary penalty⁹⁵ or, for breaches of paragraph 74.01(1)(a), reimburse the amounts earned from the supply of the products at issue.⁹⁶ When determining the amount of an administrative

monetary penalty, the court must consider the aggravating and mitigating factors outlined in subsection 74.1(5).

A Court Order must be issued with the goal of fostering legal compliance and not for punitive purposes (s. 74.1(4)). Moreover, under subsection 74.1(3), when a person establishes that they have “exercised due diligence to prevent the reviewable conduct from occurring”, the only possible order is to require the person to cease the deceptive practice. On its website, the Bureau indicates that due diligence requires a business’ leadership to have taken “all the steps that were reasonable in the circumstances to prevent someone in your company from breaking the law” (emphasis added).⁹⁷ This applicable burden of proof is the balance of probabilities.

This due diligence defence has been assessed by the courts in the past. For example, in *Canada (Commissioner of Competition) v Chatr Wireless Inc.*⁹⁸, the court described the due diligence assessment as a two-step process: first, the court must assess whether the defendants “took all reasonable steps appropriate for their business to avoid publicly making the fewer dropped calls claim without adequate and proper testing”; second, it must assess whether the defendants “reasonably believed in a mistaken set of facts that, if true, would have meant they had adequately and properly tested the claim”. In the case at issue, the court concluded that the defendants were not duly diligent, notably because of insufficient sampling, reliance on an inadequate testing method, and failure to properly enforce internal compliance policies.⁹⁹

A similar conclusion was reached in *Commissioner of Competition v Gestion Lebski Inc.*, where the Tribunal held that merely asking questions to the Bureau during an inquiry, and subsequently modifying advertisements after the Bureau raised concerns (without adequately dispelling the misleading impression created by the claims) did not amount to due diligence.¹⁰⁰

The broader case law on due diligence defences outside the competition law context can also provide useful guidance.¹⁰¹ For example, in *R. v Commander Business Furniture Inc.*¹⁰², in the context of environmental law, the court identified a list of the main factors identified by the courts to assess due diligence, which have been applied to the Act’s criminal deceptive marketing regime in *R. v Woolworth Canada Inc.*¹⁰³ The factors include the nature and gravity of the conduct’s adverse effect, its foreseeability and the availability of alternative products or services.¹⁰⁴ These factors can be used to evaluate whether the precautions taken by a defendant were proportionate to the potential severity of the misleading impact.¹⁰⁵

Instead of seeking a Court Order, the Bureau may enter into a consent agreement with the person who allegedly breached the Act (s. 74.12(1)). A consent agreement must be based on terms that could be included in a Court Order, but it may also include additional terms that cannot be imposed by a court (s. 74.12(2)).¹⁰⁶ Once registered with the Tribunal, a consent agreement has the force and effect of a Court Order (s. 74.12(4)), and a failure to comply with it can lead to civil and criminal sanctions. Consent agreements can allow the parties to avoid lengthy and costly legal proceedings and secure a more predictable case outcome.

4. Context of Bill C-59 and Bill C-15

In this part, we review how the legal framework that existed prior to Bill C-59 and Bill C-15 applies to greenwashing cases, its limitations and the public consultations and parliamentary debates that led to the adoption of the June 2024 amendments and the November 2025 Revision Proposal.

4.1 Application of pre-existing framework to greenwashing cases

While subsections 52(1) and 74.01(1) do not explicitly refer to environmental considerations, their scope is sufficiently broad to apply to false, misleading and unsubstantiated environmental claims. In fact, there have been several cases of enforcement action, court decisions and complaints that have relied on the Act's deceptive marketing rules in relation to alleged or averred greenwashing cases.

One example is the P.V.I. case, which the Tribunal ruled in 2002.¹⁰⁷ The case involved P.V.I. International, a company which had begun to market the "Platinum Vapor Injector", an automotive accessory, in 1998. According to the company, this device allowed users to burn fuel that would otherwise remain unburned in their car engine, resulting in a decrease in fuel costs and pollution. The company promoted its product by various means: in newspapers, on the radio, in advertising brochures, by fax and on the Internet. In its promotional materials, P.V.I. International claimed that its representations were supported by independent testing conducted by the U.S. government. In fact, the firm was relying on a 1985 U.S. district court decision where a deceptive marketing claim against a company supplying a similar product had been rejected, which P.V.I. International Inc. considered to be evidence that its fuel efficiency claims were true. The company had also conducted certain tests on the accessory to demonstrate its efficacy.

In March 2001, the Commissioner filed an application for an order against P.V.I. International and its shareholders before the Tribunal, alleging that the company had breached paragraphs 74.01(1)(a) and (b) of the Act. The Tribunal analyzed the content of the advertisements and concluded that the representations qualified as Commercial Representations. It then assessed whether these representations were false or misleading in a material respect under paragraph 74.01(1)(a). Expert testimony demonstrated that the claims were scientifically invalid, leading the Tribunal to conclude that the representations about fuel savings and emissions reductions conveyed a general impression that was materially false or misleading. The Tribunal also found that the references to U.S. government testing violated paragraph 74.01(1)(a) because they falsely implied that the government had tested the accessory when it had not.

With respect to paragraph 74.01(1)(b), the Tribunal identified several issues with tests brought forward by the respondents, including a lack of adequate baselines and an alteration of variables preventing the identification of a causal effect. The Tribunal also rejected the use of a research paper and a report where testing had been conducted in a different technological context or to measure different performance indicators. Given these flaws, the Tribunal concluded that the respondents had also contravened paragraph 74.01(1)(b). Ultimately, the firm was ordered to pay administrative monetary penalties and prohibited from reiterating its deceptive statements. The decision was confirmed by the Federal Court of Appeal in 2004.¹⁰⁸

Another example is the so-called “Dieselgate” case. In 2016, Volkswagen Group Canada Inc. and Audi Canada Inc. entered into a consent agreement with the Commissioner regarding a contravention of the provisions related to deceptive marketing practices.¹⁰⁹ The firms had claimed that certain Volkswagen and Audi vehicles were environmentally friendly and equipped with clean 2.0-litre diesel engines, which reduced emissions and were cleaner than equivalent gasoline engines in Canada. In reality, the engines’ emissions far exceeded the emission standards under which the vehicles had been certified. Following an investigation, the Commissioner concluded that the representations contravened paragraph 74.01(1)(a) of the Act. As part of the consent agreement, Volkswagen and Audi agreed to pay an administrative monetary penalty of \$7.5 million each. In 2018, Volkswagen, Audi and Porsche Cars Canada, Ltd. were the subject of another Bureau investigation regarding similar representations about 3.0-litre engines. A new consent agreement was reached¹¹⁰ and the parties agreed, among other things, that Volkswagen and Audi would pay an administrative monetary penalty of \$1.25 million each. \$2.4 billion in damages were also paid in class

action settlements in Canada, and a record fine of \$196.5 million was levied against the defendants for environmental law violations.¹¹¹

Another recent example is the Keurig case. In 2021, Keurig Canada Inc. was the subject of a complaint filed by the University of Victoria's Environmental Law Clinic under subsection 74.01(1) for misleading statements regarding the recyclability of its coffee capsules.¹¹² The company had claimed that these capsules were recyclable, but this claim was not valid in several Canadian jurisdictions, where recycling infrastructure was not compatible with these products. The complaint led the Bureau to investigate and negotiate a consent agreement with the company. As part of this agreement, Keurig was required to issue corrective notices, modify its claims and pod packaging, establish and maintain a corporate compliance program, pay a \$3 million administrative monetary penalty and the Bureau's investigation costs, and make an \$800,000 donation to charity.¹¹³

There are also a few earlier examples of consent agreements involving deceptive environmental claims.¹¹⁴ For example, in 2011, the Bureau entered into a consent agreement with spa retailers who had made allegedly misleading representations regarding the energy efficiency credentials of their products.¹¹⁵ Similarly, in 2013, the Bureau entered into consent agreements with Hyundai Auto Canada Corp.¹¹⁶ and Kia Canada Inc.¹¹⁷ regarding allegedly misleading representations about the fuel consumption ratings of vehicles sold in Canada.¹¹⁸

In addition to the above enforcement cases, there have been several cases of greenwashing complaints filed by non-governmental organizations, some of which have led the Bureau to launch inquiries under section 10 of the Act. Appendix C contains a summary of the greenwashing complaints that have been made public since 2019.¹¹⁹ There are also at least two ongoing class actions alleging that manufacturers misrepresented the environmental benefits of their products. One concerns bags marketed as "compostable,"¹²⁰ while the other involves paper products displaying environmental certifications¹²¹. Both proceedings parallel similar class actions currently underway in the United States and do not seem to result from the adoption of the Greenwashing Rules.

Recently, the Bureau indicated that the Act's civil (rather than criminal) deceptive marketing provisions (including the ones adopted recently in the context of Bill C-59) were the "most relevant to environmental claims", confirming this enforcement approach.¹²² The remainder of this article will focus on the Act's civil provisions.

4.2 Limitations of the pre-existing framework regarding environmental claims

As noted above, there have been a few successful enforcement cases against greenwashing under the framework that existed prior to the June 2024 amendments (we will refer to it as the “pre-existing” framework). However, certain features of this pre-existing framework limited the likelihood that greenwashing claims would be detected, litigated, and ultimately result in a Court Order. Below, we examine these limitations.

4.2.1 Limited scope of the prior substantiation requirements

One key constraint of the pre-existing framework was the evidentiary burden of paragraph 74.01(1)(a). As noted above, to successfully invoke this provision in a greenwashing case, the plaintiffs must demonstrate that a claim is “false or misleading in a material respect.”¹²³ However, demonstrating the deceptive nature of a claim and proving its materiality can be particularly challenging in the environmental context.

First, environmental claims are often complex and technical, and information asymmetries between firms and external stakeholders can make it difficult for plaintiffs to identify and demonstrate deceptiveness. Second, certain types of environmental claims—such as an organization’s net-zero pledge—may not be directly tied to the purchase of a specific product or service, making it difficult to establish a material impact on the decisions of members of the public.

A hypothetical example illustrates these challenges. Assume, for instance, that a mining company runs a televised advertising campaign in which it claims to be the “least carbon-intensive in its industry”. The goal of the campaign is to promote the company’s public image as a good corporate citizen. Proving this claim false in a material respect would require several steps. The plaintiff would need to obtain data on the company and its value chain’s overall carbon footprint and hire environmental experts to assess this information. Additionally, the plaintiff would need to conduct similar assessments for other companies in the sector to verify the truthfulness of the claim. Moreover, the plaintiff would need to demonstrate how an ordinary citizen was likely influenced by the advertising campaign. This process could be lengthy and resource-intensive, especially for an agency like the Bureau which does not have extensive expertise in environmental impact assessments.¹²⁴

The enforcement process may be even more complicated for vague and generic claims, including claims that use words like “green”, “sustainable” or “eco-friendly”. In such cases, it can be difficult to identify the general impression conveyed by a claim, or to connect the claim to specific climate, biodiversity, resource extraction, and pollution indicators. Similar challenges may arise with forward-looking claims, such as sustainability and emission reduction pledges and targets. In such cases, the plaintiff would need to form assumptions about future trajectories of a firm’s performance and the practical achievability of its goals, projections and commitments, which can be particularly challenging if the defendant’s claims do not rely on publicly available and verifiable information.

Paragraph 74.01(1)(b) helps to mitigate the concerns noted above, as it does not require proof that a Commercial Representation was false or misleading in a material respect. However, it only applies to Commercial Representations about the performance, efficacy or length of life of a product, which may exclude certain types of EBCs that relate to an organization and its activities. As noted by the Commissioner of Competition¹²⁵:

The reality is that a significant portion of the greenwashing complaints the Bureau receives do not involve claims about products, but rather more general or forward-looking environmental claims about a business or brand as a whole (e.g. claims about being “net zero” or “carbon neutral by 2030”). These more general claims to promote a business interest can also be false or misleading, and may be captured by our general deceptive market provisions. However, these claims are not reverse onus, and it can be challenging for the Bureau to prove that they are false or misleading in a material respect.

In practice, the line between what constitutes a claim about a product versus an organization and its activities is not always clear cut.¹²⁶ It could be argued that in today’s economy, an organization’s environmental and social credentials are an integral part of its products. As such, a broad interpretation of paragraph 74.01(1)(b) could lead to the conclusion that performance claims with a sufficient connection to a product (e.g., a claim about the environmental performance of an industrial process used to produce a given product) would also fall under the paragraph (b).

Moreover, it could be argued that certain claims, by design, convey the general impression that they have been substantiated, and that a failure to have done so is misleading and breaches paragraph 74.01(1)(a).¹²⁷ This could occur if a representation includes an explicit reference to substantiation (as seen in the *P. V.I.* decision, which explicitly referenced testing by the U.S. government), or due to an implicit expectation. For example, a carbon

neutrality claim might convey the impression that not only is the claim itself true but that it is the result of a thorough carbon accounting exercise.

This approach is currently favoured by the United States Federal Trade Commission under its Advertising Substantiation Policy. While section 5 of the *Federal Trade Commission Act* prohibits “unfair or deceptive acts or practices in or affecting commerce”, it does not formally establish a substantiation requirement. However, the Federal Trade Commission still considers that:¹²⁸

Objective claims for products or services represent explicitly or by implication that the advertiser has a reasonable basis supporting these claims. These representations of substantiation are material to consumers. That is, consumers would be less likely to rely on claims for products and services if they knew the advertiser did not have a reasonable basis for believing them to be true. Therefore, a firm’s failure to possess and rely upon a reasonable basis for objective claims constitutes an unfair and deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act.

However, this approach has not yet been formally endorsed under the Act, creating some uncertainty as to the precise scope of paragraph 74.01(1)(b) with respect to EBCs.

At the other end of the spectrum, when taking a narrower interpretation approach, one could argue that product-level EBCs that lack a sufficient connection to the “performance, efficacy, or length of life of a product” are not subject to paragraph 74.01(1)(b). For example, one could argue that the fact that the greenhouse gas emissions of a product have been offset using voluntary carbon credits is a characteristic that is unrelated to how a product “performs” because it does not influence its functionalities. So far, this narrow interpretation has not been adopted in Canadian case law. In fact, in *P.V.I.*, the respondents had made claims about both fuel efficiency and pollutant emission reductions, and the Tribunal considered that both types of claims were within the scope of paragraph 74.01(1)(b). However, this argument could be raised in the future, adding to the uncertainty regarding the scope of paragraph (b).

4.2.2 Limited ability for private plaintiffs to take legal action

Another key constraint of the pre-existing framework was the limited ability of private plaintiffs to seek remedies under the Act’s deceptive marketing provisions, especially outside of the province of Québec. As noted above, under the pre-existing framework, only the Bureau could apply for a Court Order under section 74.1. Similarly, only federal prosecutors can

initiate criminal proceedings in connection with a violation of subsection 52(1).

Given the limited resources of public authorities, this structure curtailed the capacity of competitors, consumers, and other stakeholders to take legal action when they suspected a breach of the law.

Private parties could still rely on section 9 to request that the Bureau launch an inquiry. However, as discussed in Appendix B, this process does not guarantee that an inquiry will in fact be launched, or that the Commissioner will apply for an order following the completion of an inquiry. Moreover, the inquiry process, which is confidential, is uncertain and it can take years until a case is resolved (see Appendix C).

Section 36 of the Act does allow private plaintiffs to recover damages from firms for violations of the criminal deceptive marketing provision of the Act, but this is only possible upon demonstration that the Act's criminal provisions have been breached (under the high criminal evidentiary burden), or that a person has failed to comply with a Court Order under the statute.

In the province of Québec, the situation is slightly different as a violation of any of the deceptive marketing provisions can constitute a civil fault, triggering liability under the *Civil Code of Québec's* civil liability regime, which can take the form of individual or class actions.¹²⁹ This remedy is not available in other Canadian provinces, as under Canadian common law, there is no tort of statutory breach that goes beyond the available statutory remedies.¹³⁰ While a plaintiff could pursue liability under the torts of fraudulent misrepresentation or negligent misrepresentation, for instance, these are separate from any statutory remedies.¹³¹

4.3 Consultations and parliamentary process

In February 2022¹³², the Minister of Innovation, Science and Industry (“ISED”) announced that he would undertake a review of the Act.¹³³

Between November 2022 and March 2023, ISED conducted a public consultation on the future of Canada's competition policy. The public was invited to provide comments on a list of specific topics, such as the role and functioning of the Act and the role and powers of the Bureau. However, stakeholders could also provide comments on any other topic.¹³⁴ The consultation was accompanied by a discussion paper, which did not reference greenwashing or environmental considerations.¹³⁵

Over 130 responses to the consultation were filed by academic experts, practitioners in competition law, civil society groups, business representatives and other organizations, as well as more than 400 contributions from the general public.¹³⁶ In September 2023, ISED released a “What We Heard” report summarizing the results of the consultation.¹³⁷ The report noted that several of the responses received mentioned the need for stronger rules about deceptive or unverifiable environmental claims.¹³⁸

To address the situation, stakeholders proposed a wide range of suggestions for reform, including the adoption of environmental standards and regulations dedicated to greenwashing, a requirement to publicly substantiate environmental claims and disclose climate risks, more stringent penalties for deceptive green claims, the prohibition of generic environmental claims and the publication of revised and enhanced environmental marketing guidelines by the Bureau.¹³⁹

On November 21, 2023, the federal government released its annual fall budgetary update, the *Fall Economic Statement*.¹⁴⁰ The statement included an announcement about a wide range of amendments to the Act, including a prohibition of “misleading “greenwashing” claims” and a broadening of the ability of private parties to bring cases before the Tribunal. Then, in December 2023, a first version of Bill C-59 was introduced in the House of Commons. The bill proposed significant changes to the Act’s deceptive marketing framework, as well as amendments in areas such as merger control, anti-competitive collaborations, and the right to repair.¹⁴¹ Additionally, the bill proposed a variety of tax measures, including investment tax credits for clean technology and carbon capture, utilization, and storage (CCUS) investments.¹⁴²

Two sections of Bill C-59 had significant implications for the regulation of greenwashing. First, section 236 proposed to amend subsection 74.01(1) of the Act to introduce a requirement for any “representation to the public in the form of a statement, warranty or guarantee of a product’s benefits for protecting the environment or mitigating the environmental and ecological effects of climate change” to be “based on an adequate and proper test, the proof of which lies on the person making the representation”.¹⁴³ Second, section 254 proposed to amend section 103.1 of the Act to allow private plaintiffs to file civil deceptive marketing lawsuits before the Tribunal, allowing them to bypass the Bureau. Additional information on the actual wording and implications of these amendments is provided in section 5 of this article.

After its first and second readings in the House of Commons, Bill C-59 was sent to the Standing Committee on Finance of the House of Commons (“FINA”) for study. During FINA’s study, ISED representatives were invited to provide more detail on the reasoning underlying section 236. As explained by the ISED officials, the section was intended to leverage the mechanism that already existed at paragraph 74.01(1)(b) and apply it to claims about a product’s environmental benefits.¹⁴⁴

There was already a mechanism in the Competition Act that required evidence to make a claim about a product in the context of a transaction (...). The government took this pre-existing tool and decided to apply it to claims about a product’s environmental benefits, such as saying that a product is greener.

However, several civil society groups testifying before FINA noted that section 236’s focus on product-level claims failed to address common forms of greenwashing, such as deceptive environmental claims about organizations and their activities.¹⁴⁵ Along the same lines, the Bureau indicated that while it supported “the initial steps made in Clause 236(1)”, it recommended “studying whether the reverse onus approach to greenwashing claims could eventually be expanded to require that all environmental claims made to promote a product or business interest be supported by adequate and proper substantiation.”¹⁴⁶

ISED officials justified the narrow scope of their proposed wording by arguing that claims about firms and their activities were more difficult to test and not closely related to an actual transaction between consumers and firms.¹⁴⁷ As noted by one representative:

However, broad environmental claims that are not specific to the actual transaction—which is the heart of the constitutional underpinning of the act itself and the enforcement powers of the bureau—would not necessarily be subject to that because that’s not the hardwiring of the act. The Act is about that transaction and the potential for deception for a consumer in that transaction.¹⁴⁸

Officials also argued that climate-related disclosure requirements at the firm level would be better suited to address firm-level greenwashing, especially given the Bureau’s limited technical expertise with respect to environmental matters.¹⁴⁹

In response to these points, some groups emphasized that stakeholders frequently rely on information about an organization’s environmental performance and activities when making investment, consumption, and

employment decisions, and that claims about such characteristics should benefit from the same degree of legal protection as product claims.¹⁵⁰

In addition, some witnesses noted that the initial wording of section 236 could exclude certain EBCs, such as those on the “restoration” of the environment (as opposed to its “protection”), or on the mitigation of the “causes” of climate change (as opposed to its “effects”) and proposed to expand it on those grounds.¹⁵¹

Other than these comments, the new deceptive marketing rules attracted little attention from witnesses invited to testify before FINA. For example, when invited to testify on Bill C-59, a representative from the Pathways Alliance, an industry group representing Canadian oil and gas firms, focused his comments on the portions of Bill C-59 relating to investment tax credits for carbon capture and storage projects, with no reference to the new PSR or to greenwashing.¹⁵²

On April 30, FINA adopted a revised version of section 236 of Bill C-59, expanding the scope of the PSRs to cover a wider range of EBCs, including a requirement that EBCs about a business or business activity be substantiated in accordance with an IRM. (This revised version is described in more detail section 5 of this article.) After being sent back to the House of Commons, the amended text passed the third reading and ultimately obtained unanimous support from all federal political parties, after which it was sent to the Senate for study.¹⁵³

It was at this point that C-59 started to attract more attention, mainly directed towards the requirement to substantiate EBCs about businesses and their activities.¹⁵⁴ For example, on May 3, 2024, the Canadian Chamber of Commerce issued a statement arguing that the expanded wording had been adopted by the House of Commons “without warning and without consultation”, using “closed-door committee meetings to avoid accountability”. According to the organization, the changes would put Canada “out of step with international best practices and raise regulatory compliance costs, including on SMEs, and will likely reduce rather than increase competition.”¹⁵⁵ On May 30, 2024, the Alberta Minister of Environment publicly criticized the expanded amendments as “a gag order on businesses and industry” and indicated that the Alberta government was looking at “every legal option available” to respond to the amendments, including a potential constitutional challenge.¹⁵⁶

During the Standing Senate Committee on National Finance’s (“NFFN”) study of C-59, several senators mentioned that they were receiving a high

volume of emails, phone calls and letters from businesses concerned with the expanded wording.¹⁵⁷ An ISED representative also indicated having heard from concerned industry stakeholders about the implementation of the expanded amendments and noted that the amendments would be followed by Bureau guidance.¹⁵⁸

In response to these concerns, on May 31, 2024, Bureau officials submitted a letter to the Chair of NFFN responding to some of the industry's concerns, notably indicating that the Bureau respected the House of Commons' decision to expand the scope of section 236¹⁵⁹:

A substantiation requirement protects competition by ensuring that consumers can trust the statements that are made about businesses and business activities. It safeguards honest and reputable manufacturers and merchants who compete with those making claims about the environmental impacts of production. Increasingly, consumers make purchasing decisions based on the environmental impacts of production, and as such, the harm from unsubstantiated claims in relation to businesses and business activities is just as serious a harm to competition as the harm in respect of unsubstantiated claims in respect of individual products. These amendments will strengthen our ability to police deceptive greenwashing claims.

The agency also committed to providing enforcement guidance to businesses and reminded the committee that the Tribunal would be able to act as a gatekeeper against frivolous litigation by private parties.

One Senator still proposed to replace the concept of “adequate and proper substantiation in accordance with internationally recognized methodology” by “proper substantiation”, with the intent of removing the “ambiguity and uncertainty” associated with this new legal concept.¹⁶⁰ However, these amendments were rejected (though they would resurface in 2025 in the Revision Proposal), and the revised version of Bill C-59 was ultimately adopted by the Senate without any changes. However, in its report, the NFFN noted the importance that meaningful consultation be conducted by the Bureau to set guidelines on the new requirements, and that the concept of IRM should allow the reliance on “federal and other Canadian best practices, such as those set out by Environment and Climate Change Canada.”¹⁶¹ On June 20, 2024, Bill C-59 received royal assent and the Greenwashing Rules entered into force. A year later, on June 20, 2025, the Private Access Rule came into force.

On November 4, 2025, the government released its 2025 Budget, announcing its intention to amend the New Rules.¹⁶² As noted earlier, the

government justified this decision by arguing that the rules were “creating investment uncertainty and having the opposite of the desired effect with some parties slowing or reversing efforts to protect the environment.” This statement cited no evidence regarding trends in sustainability disclosures or performance, but it likely refers to statements by some companies that the New Rules had led them to remove sustainability claims from the public domain, as further discussed in part 6 of this article.

5. Content and implications of the 2024 and 2025 amendments

Bill C-59 introduced two types of greenwashing-related changes to the Act. First, two new paragraphs were added to subsection 74.01(1) to introduce PSRs for EBCs. These new requirements entered into force on June 20, 2024. Second, a new private access to the Tribunal is available for civil deceptive marketing cases, including greenwashing cases. This right of action entered into force on June 20, 2025.

Following the adoption of Bill C-59, several stakeholders, especially organizations from the oil and gas sector, expressed concerns regarding the changes. In response to these concerns, the Bureau ran a series of consultations and published two guidance documents during the second half of 2024 and the first months of 2025. These concerns, as well as the process and results of these consultations, are described in more detail in part 6.

The Bureau published its first guidance document, the Deceptive Marketing Practices Digest Volume 7 (the “**Digest**”), on July 22, 2024.¹⁶³ The Digest provides an overview of the main types of greenwashing complaints received by the Bureau, namely claims about the composition of products, their production process, their disposal after use, comparison claims, vague claims (including the deceptive use of imagery) and claims about the future. The Digest also provides a few high-level tips to businesses on how to avoid greenwashing, such as “be truthful, and not false or misleading”, “ensure claims are properly and adequately tested”, “be specific about what is being compared” in comparative claims, “avoid exaggeration”, favour “clear and specific” claims instead of vague ones and “avoid aspirational claims about the future”.¹⁶⁴ This high-level document is not legally binding and was meant to serve as interim guidance until the adoption of more detailed guidelines.¹⁶⁵

The Bureau published a draft of its second guidance document, the Guidelines, in December, 2024, a final version of which was released in June 2025.¹⁶⁶ This document incorporates several of the Digest’s recommendations and

reiterates its compliance tips.¹⁶⁷ In addition, it provides the Bureau's interpretation of the application of the Act's pre-existing deceptive marketing provisions and the Greenwashing Rules to greenwashing. Like the Digest, this document is not legally binding, and private plaintiffs and the courts may disagree with its content. Moreover, it will likely be updated if the Revision Proposal is adopted. However, it can serve as a reference for future interpretations of the Act's new provisions and offers valuable insight into the Bureau's enforcement approach and priorities.¹⁶⁸ We will explore its contents in more detail in the following part.

5.1 New prior substantiation requirements for environmental benefits claims

5.1.1 General comments

The first greenwashing-related change adopted in Bill C-59 is the introduction of paragraphs 74.01(1)(b.1) and (b.2), the Greenwashing Rules: new PSRs for Commercial Representations about benefits "for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change". The mechanism of the new paragraphs closely mirrors that under 74.01(1)(b): the burden of proof is reversed, shifting the onus to the defendant. The direct implication is that firms must now substantiate their EBCs; it is not enough for them to be merely true and not misleading. This also means that categories of EBCs that cannot be substantiated, such as vague or generic claims, as well as forward-looking claims not based on a realistic plan, pathway, assumptions, and interim targets, will no longer be permitted.

As noted previously, under a broad interpretation of the pre-existing framework, these changes are arguably not a major shift. Indeed, several EBCs were already subject to paragraph (b) and will continue to be. Moreover, unsubstantiated EBCs may still be considered misleading under paragraph (a) if they convey a general impression of being substantiated. However, the amendments clarify any remaining uncertainty regarding the need to substantiate EBCs, even under a narrower interpretation of paragraphs (a) and (b).

A breach of the Greenwashing Rules leads to the same remedies as a breach of paragraph 74.01(1)(b) (with the exception that under the Revision Proposal, breaches of paragraph (b.2) would no longer trigger a private right of action). As such, a breach of paragraphs 74.01(1)(b.1) or (b.2) cannot give rise to compensatory damages. This applies to applications brought both by the Bureau and by private plaintiffs under section 103.1,

representing a significant limitation on the incentives for private parties to initiate large-scale, class action-type proceedings.

Like the rest of subsection 74.01(1), the new PSRs apply to all sectors of the economy, irrespective of the size or country of incorporation of a firm. In addition, they require the consideration of the general impression conveyed by a representation (s.74.03(5))—not proof of deception (s.74.01(3.2), that a person was deceived, that a member of the public targeted by a representation was in Canada or that the representation was made in a publicly accessible space (s. 74.03(4)). Moreover, as was the case for paragraph (b), Commercial Representations do not have to be material to be subject to the Greenwashing Rules.

The concept of “benefit”, which appears in both paragraphs 74.01(1)(b.1) and (b.2), is not defined in the Act. According to the Cambridge Dictionary, it means “a helpful or good effect, or something intended to help”.¹⁶⁹ The Bureau adopts a similar definition in the Guidelines, where it refers to benefits as “any specific advantages or favourable attributes”. One can therefore assume that the Greenwashing Rules are limited to claims that are perceived by stakeholders as providing some form of advantage or positive image.

Some environmental claims may be excluded from this scope. For example, a firm may disclose that a product poses environmental risks or report on the negative impacts of its activities on ecosystems. A firm may also disclose information in a neutral manner, without explicitly framing it as a benefit. In both cases, information may be provided to highlight a comparative advantage (for example, acknowledging that a product has some negative impacts but is less harmful than alternatives). However, there may be cases where this is not the case (e.g., a company might disclose its level of exposure to risks of flooding or forest fires, or issue warnings that a product should not be composted because it contains plastic, or that a cleaning wipe should not be flushed down the toilet because it is not degradable in the sewage system). In our view, these latter claims are not EBCs unless they can reasonably be linked to an implicit claim of superiority, usefulness, or profitability.

A related consideration is the disclosure of information to comply with a regulatory requirement, such as the greenhouse gas emissions disclosure requirements for major emitters under the *Canadian Environmental Protection Act*.¹⁷⁰ Such disclosure regimes may be highly specific and not allow any margin for promotional information, making the disclosed information unlikely to qualify as a Commercial Representation. In our view, disclosure

intended solely to meet a regulatory requirement is likely to be exempt from the Act's deceptive provisions.¹⁷¹ In its Guidelines, the Bureau indicates its alignment with this approach in the context of securities law disclosure:¹⁷²

In Canada, the provinces and territories are responsible for the regulation of securities. These regulations can include evolving frameworks for the voluntary and mandatory communication of certain environmental information to current and prospective securities investors. The Bureau does not concern itself with these representations. However, if the business reuses any of the environmental claims for the purposes of promoting a product or business interest outside of the sale of securities, the Bureau will apply the Act as appropriate.

5.1.2 Product-level requirements

With respect to product-level claims, the new paragraph 74.01(1)(b.1) states that product-level EBCs “in the form of a statement, warranty or guarantee” must be based on an “adequate and proper test”. The Guidelines provide the Bureau's own interpretation of the terms contained in paragraph (b.1), most of which are not defined in the Act.¹⁷³ Moreover, the Bureau indicates that it will generally assume that the courts' interpretation of the concept of “adequate and proper test” under paragraph (b) will also apply to paragraph (b.1). The government does not propose to amend the wording of this paragraph under the Revision Proposal.

However, in our view, the particularities of the environmental context must be considered when assessing whether a substantiation method is adequate and proper. Certain product-level EBCs do not lend themselves well to empirical verification, such as laboratory testing or randomized controlled trials. For example, evaluating whether a product can be labeled as recyclable might depend on the availability of a waste collection system. Similarly, certain environmental impact assessment methods, such as life-cycle analysis, often rely on secondary data drawn from industry averages, which may not be specific to the product in question.¹⁷⁴ As long as they do not involve methodological arbitrage, these methods are widely recognized as appropriate for evaluating the environmental footprint of a product and restricting their use as adequate and proper testing methods for environmental benefit claims would significantly limit firms' ability to make such claims. To reflect these considerations, we believe the Tribunal should adopt a broad and flexible interpretation of the concept of “test” for environmental benefit claims, considering the type of corroborative evidence that can reasonably be obtained to substantiate a claim.

Additionally, the concept of testing should account for the unique aspects of environmental impact assessment. For example, it should consider the importance of reflecting all significant environmental impacts over the entire life cycle of a product and the value chain of the company marketing it. Accordingly, companies should substantiate their claims with primary data where it exists or can be reasonably obtained. Where this is not possible, companies should use credible secondary data that is representative of reality. For example, a company should not be able to make methodological choices that artificially “reduce” its negative environmental impacts. The test results should demonstrate that the promoted benefit is not exaggerated and goes beyond minor elements that are not representative of significant environmental impacts over a product’s entire life cycle.¹⁷⁵

5.1.3 Requirements about businesses and business activities

5.1.3.1 Substantiation rules introduced in Bill C-59

With respect to claims about businesses and business activities, paragraph 74.01(1)(b.2) adopted in 2024 indicates that a Commercial Representation “with respect to the benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change” must be “based on adequate and proper substantiation in accordance with internationally recognized methodology”.

As noted above, the terms “adequate and proper” already appeared in paragraph (b) of subsection 74.01(1), so principles established in case law under this paragraph are likely to apply *mutatis mutandis* to paragraph (b.2) (see section 3.2 of this article for a summary of these principles). This is the approach favoured by the Bureau in its Guidelines.

However, the concept of IRM is not defined in the Act and, unless the Revision Proposal is adopted, it will need to be interpreted by the courts. The IRM evidentiary standard is new in Canadian competition law, but other jurisdictions have referred to similar concepts. For example, in its draft *Green Claims Directive*, the European Commission proposes to require traders to “carry out an assessment to substantiate” their environmental claims before communicating them.¹⁷⁶ This assessment shall, among other things, “rely on widely recognised scientific evidence, use accurate information and take into account relevant international standards” (emphasis added), and take into account “all environmental aspects or environmental impacts which are significant to assessing the environmental performance”.¹⁷⁷

A contextual interpretation of paragraph 74.01(1)(b.2) as it currently stands (i.e., prior to the Revision Proposal) suggests the existence of three cumulative criteria: a claim must be substantiated; this substantiation must be both adequate and proper; and substantiation must follow an IRM.¹⁷⁸ In our view, this requirement should be understood in light of the legislative amendments' objectives: promoting the quality, comparability, and veracity of environmental claims.

To understand the meaning of this new requirement, it is important to examine each of its components. According to the Cambridge Dictionary, a "methodology" is "a system of ways of doing, teaching, or studying something".¹⁷⁹ The Bureau's Guidelines propose a similar definition, describing a methodology as "a procedure used to determine something", which may or may not be part of a standard.¹⁸⁰

The phrase "internationally recognized methodology" implies that the methodology must be recognized at the international level. According to the Cambridge Dictionary, international means "involving more than one country", whereas "recognized" means "generally accepted" as having "a particular position or quality".¹⁸¹ In the Guidelines, the Bureau indicates that it "will likely consider a methodology to be internationally recognized if it is recognized in two or more countries."

In our view, the wording chosen by the legislator does not require a methodology to be adopted, issued or used internationally or to originate from an international entity to be internationally recognized. In other words, the law requires the recognition to be international, but not the methodology itself. Therefore, in our view, an "adequate and proper" method developed and used regionally or nationally could be used if it is recognized in more than one country.

This view is aligned with the Bureau's indication that when examining Commercial Representations, it will start "with the assumption that methodologies required or recommended by government programs in Canada for the substantiation of environmental claims are consistent with internationally recognized methodologies."¹⁸²

Paragraph 74.01(1)(b.2) does not indicate *who* must recognize a methodology internationally. However, it is our understanding that this recognition must also be "adequate and proper", and a court could draw inspiration from the case law under paragraph (b) to define what qualifies as an "adequate and proper" recognition and who is entitled to provide it.

In that respect, the Guidelines provide some useful details on the Bureau's interpretation of the new evidentiary standard:

In the Bureau's view, businesses should choose substantiation that is suitable, appropriate and relevant to the claim, and sufficiently rigorous to establish the claim in question. Often, this will require substantiation that is scientific in nature. Third party verification will be required in circumstances where it is called for by the internationally recognized methodology relied upon for adequate and proper substantiation.

The Bureau is also of the view that paragraph 74.01(1)(b.2) does not necessarily require a methodology to be the best possible methodology, recognized by governments, reflected in one or more standards, or set by organizations that are not part of industry. Moreover, the Bureau considers that more than one methodology may be suitable to substantiate a claim, and that a methodology must be appropriate for the Canadian context. In addition, the Bureau notes that the Act does not expressly require the disclosure of substantiation materials and that firms are subject to the same requirements irrespective of their size. Finally, claims that cannot be substantiated (e.g., because no appropriate methodologies exist) should be avoided.

The Guidelines and paragraph (b.2) do not specify *when* a methodology must obtain recognition. Case law has interpreted the substantiation requirement established under paragraph (b) to mean that adequate and proper substantiation must be undertaken prior to the time when a representation is made. However, even if the test itself must be conducted *ex ante*, the demonstration that it was "adequate and proper" is usually done *ex post*, once a legal challenge occurs.

From our perspective, the same approach should be applied under paragraph (b.2), as the concept of IRM is an evidentiary standard, and not a certification standard. As such, if the substantiation methodology used *ex ante* was sufficient at the time when the representation was made, the proof that it was internationally recognized may be done *ex post*. In practice, proof of recognition could range from public endorsement by international organizations seen as credible in the field to expert witness testimonies confirming that a given method was internationally considered as appropriate for supporting the claim at issue at the time when the claim was made.

5.1.3.2 Substantiation rules proposed in Bill C-15

Under the Revision Proposal, the substantiation standard for claims about businesses and their activities would be amended such that they would be

required to be “based on adequate and proper substantiation”, dropping the novel, undefined IRM standard. This revision would result in a substantiation requirement that is closer to the one found at paragraphs (b) and (b.1), with the difference being that the amended paragraph (b.2) uses the term “substantiation” instead of “testing”.

In our view, the choice of this concept acknowledges that environmental claims about a company or its activities do not lend themselves well to traditional testing methods, such as laboratory testing or randomized controlled trials. Indeed, EBCs about a business activity or an organization will typically take the form of reporting on indicators of environmental impact, such as the quantity of greenhouse gas emitted, the value of investments in renewable energy, the adoption of emissions reduction targets or the rate of consumption of a given natural resource. This information may need to be collected, processed and aggregated before being communicated publicly, but it may not be amenable to testing, especially when it involves secondary data. Instead, the term “substantiation” (like the term “methodology”) offers a more flexible and encompassing approach, accommodating the unique nature of these claims.¹⁸³ The Bureau appears to recognize this in its Guidelines, which indicate that “substantiation involves having evidence to show that a claim is true”, which may “not necessarily” be the same as testing.¹⁸⁴

Given the similarity between the text of the Revision Proposal and paragraph (b), it is likely that the courts would draw parallels with the principles established by cases under that pre-existing provision, providing more predictability to firms than the IRM expression. We also suggest that the principles that we formulate in part 5.1.2 of this article regarding the unique aspects of environmental impact assessment also matter for the interpretation of an amended paragraph (b.2).

It should be noted that the Revision Proposal includes language similar to that used by some of Canada’s trading partners in their own greenwashing rules. For example, in 2024, India’s Central Consumer Protection Authority adopted greenwashing guidelines stating that all environmental claims shall “be supported by accessible verifiable evidence based on independent studies or third-party certifications”, and that certain claims listed in the guidelines (such as “compostable” or “climate-positive”) shall be “supported by disclosure about credible certification, reliable scientific evidence, internal verifiable evidence, certificates from statutory or independent third-party verification”.¹⁸⁵

Another example is Switzerland's *Federal Act on Unfair Competition* which, since January 1, 2025, explicitly prohibits firms from making "claims about themselves, their goods, works or services relating to the environmental impact that they cause that cannot be substantiated on the basis of objective and verifiable criteria" (article 3(1)(x)).¹⁸⁶

Similarly, the U.S. Federal Trade Commission's *Green Guides*, which provide the agency's interpretation of how section 5 of the *Federal Trade Commission Act* applies to environmental claims, indicate that marketing claims must be supported by a reasonable basis, which:

In the context of environmental marketing claims, (...) often requires competent and reliable scientific evidence. Such evidence consists of tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results. Such evidence should be sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that each of the marketing claims is true. (emphasis added)

There also some similarities between these requirements and the concept of scientific "general acceptance" adopted by North American courts to evaluate the admissibility of expert testimonies at trials.¹⁸⁷

Given the above-described overlaps between other jurisdictions' standards and the amended standard in the proposed new wording of paragraph (b.2), if the Revision Proposal is adopted and the IRM standard is removed, the new standard's interpretation should continue to be informed by other jurisdictions.

5.1.4 Choosing which evidentiary standard to apply

It may not always be obvious which of the Greenwashing Rules to apply in respect of a given EBC. For example, the claim that a product is "produced using carbon-neutral farming methods" pertains to both the environmental characteristics of the product and the company's activities. In practice, this distinction may not be significant, as a methodology that meets the requirements of paragraph (b.1) is likely to also satisfy the requirements of paragraph (b.2).

However, to avoid any uncertainty, we propose the following interpretative approach. When a claim explicitly references a specific product, it should first be considered to be about the environmental benefits of the

product and must therefore be substantiated according to paragraph (b.1). Examples of such claims include statements like “Our product is carbon neutral” on packaging, “Biodegradable packaging” in a product advertisement, “Produced using sustainable practices” in an advertising leaflet, or “Manufactured using a process that consumes 10% less water than the previous model” on a web page dedicated to a specific product.

Second, when a claim does not explicitly reference a specific product, it should be considered to be about the company’s activities and substantiated according to paragraph (b.2). Examples of these claims include statements such as “Our activities are eco-friendly”, “Made by a 100% circular company” or “Our company announces today the construction of a new LEED-certified head office.”

Finally, in cases where a statement includes specific references to both a product and a company’s activities and performance, the differentiated substantiation standards should be used for each component of the claim.

5.1.5 Due diligence defense

Another concept that will require legal interpretation is the application of the Act’s due diligence defense to the Greenwashing Rules. As noted previously, case law under the Act and other statutes can be informative to understand the scope of the defence. However, there is limited technical guidance available for companies to ensure they have taken all reasonable measures with respect to specific types of claims.

The Bureau has a long history of issuing guidance documents compliance programs and measures, and it should do the same with respect to the due diligence defence in the context of the Greenwashing Rules.¹⁸⁸ Such guidance would provide more predictability and transparency to stakeholders and foster adequate compliance practices. These guidelines should draw from the criteria established in case law (see section 3.4 of this article), be specific and avoid a “tick-the-box” exercise. In addition, they should indicate that to benefit from the due diligence defense, a company must be able demonstrate that it has assessed the compliance of each of its claims with the Bureau’s environmental marketing guidelines and that this assessment concluded that its claims were compliant. A company should be able to demonstrate the implementation of training programs for employees responsible for environmental communications with the public. It should also be able to demonstrate the implementation of internal measures for monitoring, auditing, and correcting non-conforming representations. Finally, a company should have designated a person or committee

responsible for compliance. In our perspective, these key pillars are necessary to ensure that a company has sound compliance practices.

5.2 New private access right to the Competition Tribunal

The second amendment to the Act adopted in Bill C-59 that is relevant to the enforcement of greenwashing cases is the extension of the right of private plaintiffs to apply for an order to the Tribunal under section 74.1. The 2024 amendments allowed private plaintiffs to bring these suits for alleged breaches of all paragraphs of section 74.01(1). However, the Revision Proposal would exclude breaches of paragraph (b.2) from the right of private action, while leaving the rest of the Private Access Rule unchanged. It is unclear why the government believes this paragraph deserves a distinct treatment than the rest of section 74.01(1), but it could be to address the concerns expressed by certain corporate actors about perceived legal risks.

As noted above, the Commissioner used to be the only person authorized to file such applications, which limited the ability of private parties such as civil society groups, consumers, investors and competitors to take direct legal action against persons engaging in potential breaches. The Private Access Rule is part of a long series of reforms designed to facilitate private access to the Tribunal.¹⁸⁹

Since the Private Access Rule entered into force in June 2025, a plaintiff wishing to file an application under section 74.1 will first need to apply for leave to the Tribunal and file an affidavit setting out the facts supporting the application. According to subsection 103.1(6.1), the Tribunal may only grant leave if “it is satisfied that it is in the public interest to do so”.¹⁹⁰ This requirement is meant to ensure that no frivolous litigation is brought under the Private Access Rule. As of December 2025, no applications have been filed by private plaintiffs under the new regime.

The commissioner must be notified when an application for leave is submitted to the Tribunal and must certify whether the matter is currently under inquiry. No application for leave will be granted in matters that are subject to an inquiry by the Commissioner or where such an inquiry has been discontinued because of a settlement entered into between a person and the Commissioner (ss. 103.1(3) and (4)). Once the allegedly deceptive practices have ceased, persons have one year to apply for leave, after which they are barred from doing so (s. 103.1(8)).

Before the Tribunal decides on leave, the Commissioner may make written representations to the Tribunal. In a 2005 information bulletin on

private access to the Tribunal, the Bureau indicated that it will “generally not make written representations at this stage” unless a “particular case has importance beyond the immediate parties” or when it “could result in valuable jurisprudence”.¹⁹¹

If the Tribunal agrees to grant leave, the Bureau may choose to intervene in the case at any stage of the proceedings (s. 103.2). On June 20, 2025, the Bureau issued a draft “Bulletin on Private Access to the Competition Tribunal”, which indicates that the agency may intervene when it considers that it is “in the public interest”, because of a case’s potential economic and legal impacts, the uniqueness of the Bureau’s perspective and the strength of the case.¹⁹²

The Private Access Rule mark the first instance of the concept of “public interest” being used in the context of an application for leave under the Act. However, references to the “public interest” already appeared in several provisions of the statute. For example, under paragraph 94(b), certain mergers certified to be “in the public interest” by the Minister of Finance cannot be challenged under section 92 of the Act. Similarly, section 10.1 allows the Commissioner to conduct market or industry inquiries if he or she considers that “it is in the public interest to do so”.¹⁹³

The concept of “public interest” is not defined in the Act, but its meaning has been widely discussed in the context of the attribution of legal costs.¹⁹⁴ For example, in *Hughes v Liquor Control Board of Ontario*¹⁹⁵, the Ontario Superior Court of Justice indicated that:

To be a “matter of public interest,” the action must have some specific, special significance for, or interest to, the community at large beyond the interests of the parties to the litigation. A matter of public interest is something more than a matter that might interest the public, and it may not be possible for a court to provide a precise and comprehensive definition of the concept. A public interest litigant is usually a litigant that advocates a matter of public importance but with little or nothing personally to gain financially from participating in the litigation.

There have also been several court decisions on public interest standing in legal challenges relying on the Charter. In 2012, the Supreme Court of Canada summarized the principles applicable to legal standing in such cases in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*.¹⁹⁶ In its decision, the Court identified three factors to determine whether to grant public interest standing:

[2] (...) The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court. (...)

The Court also noted that these three elements must be “assessed and weighted cumulatively” and “applied in a flexible and generous manner” that aligns with the purposes of standing limitations, which are meant to “ensure that courts do not become hopelessly overburdened with marginal or redundant cases” and ensure that they “have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government”.¹⁹⁷

These jurisprudential principles can be used to interpret the concept of public interest in the context of applications for leave under the Private Access Rule, notably to understand why frivolous litigation should be prevented. Greenwashing cases have an inherent public interest dimension, as greenwashing may not only deceive specific audiences but also undermine public trust in all green claims, hindering the development of well-functioning markets for goods differentiated on the basis of environmental quality.¹⁹⁸ Additionally, greenwashing can lead to increased environmental damage by substituting less harmful goods with more harmful ones, resulting in social costs that affect society at large.¹⁹⁹ However, there may be cases brought by private parties that do not involve genuine instances of greenwashing, and where granting leave would be an inefficient use of judicial resources. It is therefore logical to ensure a balanced trade-off between, on the one hand, the public interest in preventing and sanctioning greenwashing, and, on the other hand, preserving judicial resources and avoiding legal costs and undue reputational consequences for defendants.

That said, there are limits to the similarities that can be drawn between case law on public interest standing in the context of Charter and attribution of legal costs cases and the Act’s public interest leave rule. Unlike Charter cases, greenwashing cases may not raise novel legal questions or fundamental societal issues; they often serve as substitutes for enforcement. In fact, the rationale behind the Private Access Rule is to preserve the Bureau’s resources for cases where enforcement by private plaintiffs is impossible or unlikely. Over recent years, the growing number of greenwashing complaints has required the Bureau to invest significant resources into investigating environmental claims, but the pace at which enforcement outcomes have been realized has been slow.²⁰⁰ The Private Access Rule will

likely expedite the resolution of these cases, providing quicker outcomes for plaintiffs and greater access to justice.

In deceptive marketing cases, the stakeholders suffering harm are not limited to competitors, suppliers, or customers affected in their business, but include all members of the public, such as consumers, investors, citizens, and workers in positions of information asymmetry and vulnerable to deception. As a result, a broader leave test is appropriate to ensure that this broad range of stakeholders can bring cases forward even if they are not impacted in a business sense. Some of these stakeholders may have a business or financial interest in seeking compensation (notably the restitution of earnings, which is only possible for violations of paragraph 74.01(1)(a)) or in ending a practice (e.g., a competitor prevented from entering a green market due to greenwashing, or a group of consumers wanting to avoid being deceived). In fact, competitors may be well placed to identify cases of greenwashing given their market expertise and access to commercial information. However, this may often not be the case (e.g., a case brought by an environmental non-profit). The wider leave requirements under the Private Access Rule align with academic research, which highlights the key role that intermediaries, such as civil society groups, play in detecting and seeking sanctions against greenwashing.²⁰¹

6. Responses to the amendments

In this part of the paper, we identify and discuss the most important and recurring criticisms of and challenges to the New Rules raised by stakeholders since June 2024, and explore how some of these considerations may be addressed by the Revision Proposal.

Responses to the 2024 amendments were communicated in three main forums.

First, in June 2024 and throughout the summer that followed, several stakeholders made public comments about the New Rules in media interviews, press releases and editorial letters. These initial responses were mixed. Environmental organizations that had urged the federal government to implement stricter anti-greenwashing rules were encouraged to see positive movement in that direction, although some expressed that the rules did not go far enough.²⁰² But many stakeholders, including business groups and industry representatives, expressed deep concerns with the New Rules.²⁰³ Some organizations, such as the Royal Bank of Canada²⁰⁴, Cenovus²⁰⁵ and Irving Oil²⁰⁶, have explicitly attributed the reduction in their sustainability

disclosures and/or the withdrawal of certain sustainability commitments to the adoption of the New Rules.

Second, in the context of these responses, the Bureau launched a series of public consultations on the new Greenwashing Rules to inform its future enforcement guidance on EBCs.²⁰⁷ A first public consultation ran from July 22, 2024, to September 27, 2024. The responses to the consultation were published on the Bureau's website in the weeks that followed,²⁰⁸ and the agency published its draft environmental claims guidelines on December 23, 2024. As noted earlier, this consultation was followed by a second consultation on the Bureau's draft Guidelines, which ran from December 23, 2024, to February 28, 2025. Both consultations have been used by stakeholders to express their concerns about the New Rules. The final Guidelines were released on June 5, 2025.

Third, after the months-long initial reaction died down, and with the Bureau's first consultation closed, on December 4, 2024, the plaintiffs Alberta Enterprise Group and Independent Contractors and Businesses Association (together, the "**Plaintiffs**") filed a Statement of Claim with the Alberta Court of King's Bench challenging the New Rules.²⁰⁹

While this paper does not purport to provide a comprehensive summary of the arguments and facts put forward by the Plaintiffs and the critical voices discussed above, we summarize and discuss the essential arguments below. Note that while the Plaintiffs challenged the New Rules on the basis that they violate their freedom of expression under s. 2(b) of the Charter, we do not directly address the merits of their constitutional arguments given that at the time of publication of this article, the government had not filed a substantive response to the Plaintiffs and because the IRM concept that is central to this challenge may soon be removed from the Act.

6.1 The Greenwashing Rules were unnecessary

As discussed in detail in part 4 of this article, Parliament chose to enact the New Rules for many reasons, not least because there is international and Canadian evidence showing that greenwashing is rampant, and consumers are becoming cynical about companies' EBCs. However, opponents of the New Rules have argued that the rules are unnecessary and redundant for several reasons.²¹⁰

Critics argue that new Greenwashing Rules are unnecessary because publicly spreading misleading or false EBCs is already prohibited under the Act.²¹¹ Indeed, misleading and false statements—including those about

(some) environmental attributes—were already prohibited under the previously existing deceptive marketing rules under paragraphs 74.01(1)(a) and (b) of the Act. As discussed in part 3.4. of this article, subsection 74.01(1) has been successfully enforced in several instances of greenwashing, leading to sanctions or consent agreements.

However, the pre-existing deceptive marketing rules were an imperfect tool to enforce against greenwashing.²¹² Among the difficulties posed by enforcing paragraphs 74.01(1)(a) and (b) in the instances of greenwashing are the high burden of proving material deception under paragraph (a) in a context of information asymmetry, the exclusive focus of the PSR under paragraph (b) on claims of performance, efficacy or length of life of a product, and the lack of a substantiation requirement for EBCs about a business or business activity.

In *Canada (Competition Bureau) v Chatr Wireless Inc.*, 2013 ONSC 5315 (“*Chatr*”), which considered the constitutional validity of paragraph (b), the Ontario Superior Court concluded that a false claim ban (paragraph (a)) and a substantiation requirement (paragraph (b)) were not redundant, given the distinctive effect that PSRs can have on overconfident firms:

[513] Professor Corts [an expert witness] pointed out that ... The firm that is overconfident about the truth of the performance claim will discount a false claims penalty dramatically because it does not believe the claim is false. Such a firm would not discount a substantiation requirement or the penalty for the lack of substantiation because they know that they are subject to that penalty whether the untested claim is true or false.

The Plaintiffs also argue that the Bureau’s investigative powers under the deceptive marketing rules are already so vast that it did not require additional rules to satisfactorily investigate instances of greenwashing.²¹³

While the Bureau has significant investigative powers where it suspects that a company is violating the Act’s deceptive marketing rules (discussed in part 3.4.), the Commissioner does not have endless resources. Introducing additional reverse onus substantiation rules, and the Private Access Rule, reduces the burden on the Bureau to use its limited resources to investigate every company about which it may have an as-of-yet unsubstantiated suspicion relating to greenwashing. The New Rules reduce enforcement costs for the Bureau and allow it to focus its resources on the biggest transgressors.

Finally, the Plaintiffs claim that prior to the amendments, there were already a wide range of rules within and outside of the Act that prevented

deceptive EBCs.²¹⁴ They refer to “numerous other legal regimes—such as provincial consumer protection legislation” which they say already adequately prohibit and deter greenwashing.²¹⁵ They also rely on “a range of other less formal regimes in place”, such as the role of the Canadian Standards Association and Ad Standards—a Canadian private self-regulatory body that monitors misleading advertising—to say that there exist regimes “that police or provide best practice guidance in relation to environmental claims and advertising”.²¹⁶

There are significant overlaps between the Act’s deceptive marketing rules and analogous rules in provincial consumer protection laws,²¹⁷ but they have distinct approaches because of their differing purposes. As the Plaintiffs acknowledge in the Statement of Claim, consumer protection law is designed to, as stated, protect consumers, whereas the Act is designed to protect market efficiency.²¹⁸ These distinct (though sometimes overlapping) purposes can lead to differences in the way misleading advertising rules are written and implemented. For instance, some provincial consumer protection laws do not account for deceptive marketing practices in misrepresentations about *businesses* or their activities, focusing solely on prosecuting misrepresentations relating to products or services.²¹⁹ Consumer protection statutes are also intended to address representations made to consumers rather than the public at large (including investors and competitors). Moreover, provincial consumer protection laws, by definition, vary from province to province, whereas the Act provides a Canada-wide standard.

The Plaintiffs also point to securities law. It is true that a reporting issuer (a firm that seeks to distribute its securities to the public) must periodically disclose material information about its business and internal affairs to securities regulators as per *National Instrument 51-102—Continuous Disclosure Obligations*.²²⁰ Like the Act’s deceptive marketing provisions, these requirements aim to reduce the information asymmetry that exists between investors and the firms in which they wish to invest, targeting information that is likely to influence investors’ investment decisions.²²¹ In certain circumstances, this will involve the disclosure of certain environmental issues deemed to be material. For example, firms may be required to disclose the material impacts of environmental regulations on their capital expenditures and competitive position. Additionally, issuers must report material risk factors facing their business, which can include environmental risks such as changing climate patterns or the impact of stringent carbon pricing regulations. These requirements have been used on a few occasions by civil society groups to file greenwashing complaints against reporting issuers.²²²

In October 2021, the Canadian Securities Administrators (the “CSA”)—the umbrella organization that links Canada’s provincial securities agencies—issued a draft *National Instrument 51-107—Disclosure of Climate-related Matters*.²²³ This initiative aimed to standardize issuers’ disclosure of climate-related information to provide consistent, comparable, and decision-useful information to investors. If adopted, this instrument could require reporting issuers to disclose their greenhouse gas emissions using the GHG Protocol methodology or an equivalent approach. Issuers could also be required to disclose specific material information about climate-related risks and opportunities, their processes for managing these risks and the targets used for such management. The final scope and timeline of adoption of this instrument remains uncertain, as the CSA announced that it was suspending its work on climate-related disclosures on April 23, 2025.²²⁴ A similar disclosure regime for large private federally incorporated firms has also been announced, although no details or timeline have been communicated.²²⁵

Despite these existing (and proposed) securities rules, climate-related disclosure requirements are not sufficient to prevent all forms of firm-level greenwashing. One significant shortcoming is the limited scope of these disclosures. Climate-related disclosure regimes primarily focus on material climate-related risks, opportunities and governance, but do not typically address a company’s overall environmental impact. Moreover, these regimes are often focused on climate matters, excluding other critical environmental aspects such as biodiversity, pollution and resource extraction.²²⁶

Another important shortcoming of these measures is that they do not cover all types of entities that may make EBCs about their organization and business activities. For example, even if all the disclosure regimes currently proposed at the federal and provincial level were adopted, some entities, such as privately-owned, provincially incorporated firms, would still not be covered by any mandatory climate-related disclosure regime. Appendix D illustrates these gaps.

Another issue is the ineffectiveness of these measures against specific forms of greenwashing. For example, generic EBCs that are vague and unsubstantiated often escape scrutiny under these disclosure requirements. Furthermore, they do not specifically address the use of dubious environmental certification schemes that lack credibility, and this lack of transparency can mislead stakeholders about a company’s true environmental performance.

Finally, Ad Standards and the Canadian Standards Association do not represent an adequate policing regime for greenwashing claims. Ad Standards publishes the *Canadian Code of Advertising Standards*, but adherence to this code is entirely voluntary. Indeed, if Ad Standards deems a company to have violated the code and be engaging in misleading advertising, it has no enforcement “teeth”; its practice of posting a summary of its decision with regards to code compliance on its website may lead to reputational damage for the company concerned, but Ad Standards cannot do more than “name and shame”.²²⁷ Similarly, the Canadian Standards Association has developed non-binding environmental claims standards, which “are accepted in many industries as best practices guides and are adopted by many international organizations.”²²⁸ While the role that Ad Standards and the Canadian Standards Association play in the standard-setting and self-regulation space should not be downplayed, they do not make the Greenwashing Rules redundant.

Greenwashing is not an easy enforcement problem. While elements of this problem are addressed by provincial statutes and non-binding standards, these mechanisms are not specifically designed to address greenwashing and therefore fall short in the face of this problem’s intricacies. Given this, the Greenwashing Rules cannot in good faith be said to be redundant.

6.2 The New Rules will lead to “green hushing”

Opponents have argued that the New Rules will reduce firms’ incentives to communicate information about their environmental performance. Critics say this will lead companies to “green hush”, self-censoring their own EBCs even when they believe them to be true.

Opponents say that green hushing will take place for at least two reasons. Generally, they expect that new evidentiary requirements will increase the cost of making EBCs, which could lead firms to consider that the benefits of making a claim are no longer worth the substantiation costs. Second, the new evidentiary standards are considered uncertain, which may lead companies to be overly cautious about EBCs to avoid any perceived legal risk. The government explicitly relied on this perception in the 2025 Budget to justify the Revision Proposal.

Regarding the first reason, there is currently no published empirical evidence about the costs of complying with the new PSRs. There may also be benefits to complying with the PSRs. If the Greenwashing Rules have a positive impact on the public’s likelihood to believe EBCs and consumers or investors become less skeptical, it may become *less* costly to make credible

EBCs than it was prior to the adoption of the Greenwashing Rules. In addition, many companies may notice little difference in cost because they were already relying on adequate and proper substantiation methods or IRMs, as appropriate. More investigation is required to ascertain whether the costs of complying with the PSRs outweigh the gains.

Regarding the second element, there is undoubtedly uncertainty about how the Bureau and the Tribunal (or a court) will interpret and enforce paragraph (b.2), given the new legal concept of IRM, as discussed in part 5. However, this is the case when any new legal concept is defined.²²⁹ Moreover, the adoption of the Revision Proposal, which relies on language that is closer to paragraph 74.01(1)(b)—which has been already interpreted by courts—would help reduce this uncertainty.

In addition, as discussed in part 3.4. of this article, the perceived legal risks associated with the New Rules (which will allegedly lead to green hushing) can be mitigated. Businesses who can demonstrate that they have exercised due diligence to prevent any violation of the Act from occurring can only be ordered to cease the deceptive practice and cannot be otherwise sanctioned under the Act. In our view, the due diligence defence significantly reduces the risk that a company acting in good faith will be sanctioned, but its existence has largely gone unacknowledged by opponents. In addition, section 124.1 of the Act allows any person to apply to the Bureau for a written opinion of the applicability of the Act to a practice. While there are limitations to this mechanism, it provides an opportunity for the Bureau to mitigate the perceived risks arising from the New Rules by adopting a more transparent enforcement approach.²³⁰

Those raising these concerns often refer to the high maximum penalties that may be imposed if a person is found to have violated the Act's deceptive marketing rules, which may reach up to 3% of a corporation's annual worldwide gross revenues in the most extreme cases (see footnote 114 for the details). However, these high financial penalties are unlikely to be imposed on companies which are taking steps to meet the Act's requirements, given that there is a list of aggravating and mitigating factors the Tribunal must consider when imposing a penalty, contained in subsection 74.1(5). For example, the Tribunal must consider the materiality of any representation, its effect on competition, the defendant's history of compliance under the Act, and the reach of the conduct within the relevant geographic market.

The Plaintiffs suggest that the fact that some businesses have taken statements off their websites is evidence of this green hushing chilling effect.²³¹

For example, following the introduction of the Greenwashing Rules, the Canadian Association of Petroleum Producers, among others, removed environmental content from their website, and alleged that the New Rules “effectively silence” climate discussion, impeding companies from speaking to Canadians about their projects’ green credentials.²³² However, there is currently no empirical evidence demonstrating that the Greenwashing Rules have caused a systemic chilling effect on companies’ expressions or reduced their environmental efforts. In fact, a recent survey of ESG disclosures of constituents of Canadian S&P/TSX Composite Index companies showed that in 2024 these companies continued to make a high number of sustainability reports, despite the introduction of Bill C-59.²³³ While this is by no means conclusive evidence of the effect of the Greenwashing Rules on companies Canada-wide, it is an example that supports a counternarrative to that of purported green hushing and reduced transparency.

Any companies which did remove statements from their public-facing websites and materials, may have had many reasons for this not born of a chilling effect allegedly caused by the New Rules, ranging from political posturing to the correction of problematic practices and precautionary responses to the anti-ESG movement taking place in the United States. If statements that were false, misleading or unsubstantiated are removed, this may be a sign that the amendments are having the intended effect. One must know more about the nature of the statements, the evidence backing them, and indeed their misleading or potentially deceptive nature, before one can draw the conclusion that taking down the statements was due to a chilling effect.

Moreover, a systematic assessment of the representations made by companies prior to and following the introduction of the Greenwashing Rules, and the external factors that may have incentivized firms to change their sustainability disclosure practices (e.g., the anti-ESG movement in the United States) is necessary to identify a causal effect of the rules on companies’ expressions. It is not enough to anecdotally rely on the actions of a select number of companies to conclude that the Greenwashing Rules are having a green hushing or chilling effect. In addition, it can take several months to adapt to new regulation and develop a compliance culture, such that preliminary reactions may not be indicative of long term behaviour.

Before moving from this discussion, some opponents have expressed concerns that some technologies are so new and innovative that they do not yet have a myriad of IRMs associated with them—which will mean companies cannot make statements about them.²³⁴ The Revision Proposal, which

would remove the concept of IRM from the law, would partly solve this concern.

However, even in the absence of the Revision Proposal, in our view, this concern is not based on a close reading of the wording of paragraph (b.2). The requirement that representations be based on adequate and proper substantiation in accordance with IRM does not necessarily require a substantiation methodology that is specifically made for that kind of product or activity—it must only be adequate and proper. The Bureau has responded to this issue in its guidelines:²³⁵

At its simplest, a methodology is a procedure used to determine something, such as whether a new green technology actually has the claimed effect. If there is not one methodology for testing the exact claim, the advertiser may be able to rely on two or more internationally recognized methodologies that together can create substantiation for the claim, or that are used for substantiating similar claims. Of course, if the business concludes that there is no way to substantiate its claim, it should avoid making that claim, and instead make claims that it can back up. If an internationally recognized methodology is subsequently developed that is directly relevant to the claim, the business would be wise to substantiate the claim using that new methodology, so as to ensure continued compliance with the law.

If technology is so new that no dedicated IRMs have been developed for its substantiation, companies may rely on generic substantiation methodologies, such as ISO 14063:2020.²³⁶ Being transparent about any limitations of new technology will also help companies avoid violating the law. Finally, if technologies are indeed so new and untested that claims cannot be adequately and properly substantiated, this is the kind of representation that the Greenwashing Rules were designed to deter companies from making. These statements would also breach the amended rules under the Revision Proposal. These features are not new and already existed under 74.01(1)(b).

The Greenwashing Rules, taken in their context, do not pose this risk. As these authors have expressed elsewhere, it is opponents' overstatements of the risks of representations being captured by the Greenwashing Rules, as well as their continued failure to highlight the factors that mitigate those risks, that threatens to cause a chilling—or "green hushing"—effect.²³⁷

6.3 The Greenwashing Rules unfairly target businesses while allowing non-profit entities to make environmental claims

Some stakeholders have claimed that the Greenwashing Rules target businesses but not civil society groups, making their impact lopsided and

contributing to their unconstitutionality.²³⁸ The Plaintiffs, for example, argue that this is politically motivated, to target certain industries.²³⁹

... the actual and anticipated effect of the Impugned Provisions is to prohibit or deter the dissemination and receipt of information and ideas, in relation to one particular policy area (i.e. the environment), and only with respect to those speakers (i.e. members of the business community) whose views and statements are likely to run contrary to a particular political agenda.

Some business and corporate respondents to the Bureau's first consultation see the New Rules as an attempt by the federal government to control expression, particularly in the energy sector.²⁴⁰ For instance, the First Nations LNG Alliance said "We take it as given that the amendments are directed primarily at restricting communication about Canada's foundational energy industries."²⁴¹ Several respondents ask that the amendments be applied 'equally' to all types of organizations, including activist groups.²⁴²

The Act's purpose, as discussed, is the protection of the market for a number of ancillary purposes. As discussed previously, subsection 74.01(1) is concerned with Commercial Representations. Environmental groups, non-profit entities, and government agencies are not targeted under the Act's deceptive marketing rules as long as they are not advancing commercial interests.

In addition, there is no evidence that the New Rules were designed to silence business on environmental issues or any specific industry. If and to the extent that the Greenwashing Rules limit companies' ability to make primarily political statements regarding the environment and environmental policy, this is an unintended and deleterious effect of the rules and not a systematic policy to silence companies. In addition, the Greenwashing Rules apply equally to all businesses, regardless of their industry, who make claims about the environmental benefits or impacts of their products or activities, for the purpose of promoting products or business interests. It is possible that some industries (e.g., the oil and gas industry) rely on EBCs more than others; if this is the case, however, their EBCs are appropriately captured by paragraphs (b.1) and (b.2) in order to prevent the negative impacts of greenwashing on consumers, competitors, and the market.

6.4 The Private Access Rule will lead to a flood of politically motivated and/or frivolous lawsuits

In the context of the Bureau's first public consultation, many business respondents expressed concerns about frivolous lawsuits under the Private

Access Rule.²⁴³ While most of the Plaintiffs constitutional arguments and critiques of the New Rules are focused on the Greenwashing Rules (and paragraph (b.2) in particular), the Plaintiffs purport to also challenge the Private Access Rule on the basis that it infringes their freedom of expression. They argue that the Private Access Rule will lead to a flood of frivolous and politically motivated claims by environmental groups and individuals, further exacerbating the alleged chilling effect created by the New Rules.²⁴⁴

As of December 2025, no deceptive marketing lawsuits have yet been filed using the Private Access Rule. At least three greenwashing complaints have been submitted to the Bureau, including one relating to the substantiation of claims about renewable natural gas and another about the emissions reduction benefits of a green hydrogen project.²⁴⁵ However, none of these complaints have led to enforcement action so far.

In our view, there are several reasons why the risk of a wave of (frivolous) deceptive marketing litigation is overstated. First, as previously discussed, complainants may only bring claims before the Tribunal under the Private Access Rule if the Tribunal grants them leave to do so, which is conditional upon a public interest determination. While the content of the “public interest” leave standard under subsection 103.1(6.1) has yet to be judicially considered (as it is not yet law), the Tribunal already plays a robust gate-keeper role.²⁴⁶

Another reason is that plaintiffs cannot claim compensation for damages for a breach of the Greenwashing Rules, which can significantly limit their incentives to take legal action.

In addition, as previously discussed, private plaintiffs in Quebec have had the ability to bring a claim of civil fault for a breach of subsection 74.01(1) since its introduction, but the existence of this remedy has not led to a flood of claims to these authors’ knowledge. This is likely due in part to the cost of bringing and supporting a claim before the Tribunal.

Moreover, plaintiffs will likely be deterred from bringing baseless or unsupported claims due to the possibility of having to pay the costs of the defendant company and their inability to recover damages from defendants (contrary to class actions).²⁴⁷

The floodgates argument is not a new argument. Indeed, in the Supreme Court of Canada’s decision in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*²⁴⁸, where the Court

was tasked with determining who should receive public interest standing, Cromwell J., writing for the Court, commented the following:

[28] These concerns about a multiplicity of suits and litigation by “busybodies” have long been acknowledged. But it has also been recognized that they may be overstated. Few people, after all, bring cases to court in which they have no interest and which serve no proper purpose. (...) Courts can screen claims for merit at an early stage, can intervene to prevent abuse and have the power to award costs, all of which may provide more appropriate means to address the dangers of a multiplicity of suits or litigation brought by mere busybodies: ... [citations omitted]

6.5 The New Rules impose disproportionate impacts for SMEs

Finally, stakeholders are concerned that the rules impose disproportionate burdens on SMEs and individuals.²⁴⁹

While this is undoubtedly true, it is not a new burden. Indeed, in *Imperial Brush*, the Tribunal noted that an adequate and proper test “must be performed regardless of the size of the seller’s organization or the anticipated volume of sales.”²⁵⁰ The Bureau has reiterated this approach in the Guidelines, despite several firms calling for a proportionate enforcement approach for SMEs.²⁵¹

While unfortunate, the fact that the Greenwashing Rules impose disproportionately greater burdens on SMEs and individuals is not unique to the regulation of EBCs. This type of barrier-to-entry exists in many other regulated areas and industries. For instance, in the medical technology and drug development sector, SMEs are disadvantaged compared to large companies who can afford to undertake lengthy studies to have their products approved. Yet one would be shocked to learn that SMEs developing new drugs were not required to adhere to the stringent standards of their larger counterparts. In a similar way, the legislator has expressed its intention to protect the market from misleading and deceptive environmental marketing practices, no matter if they come from SMEs or larger corporations.

7. How do we move forward?

In this article, we aimed to provide a definition of greenwashing, summarize the legal framework that existed prior to June 2024, explain the context and implications of the New Rules introduced in Bill C-59, and explore the main arguments raised against them. In sum, while we acknowledge the merits of some of the concerns raised by critics, we believe that the legal risks created by the amendments have been greatly exaggerated, which itself

may have artificially amplified any negative effect that the New Rules might have otherwise had.

The concerns raised by critics have been acknowledged by the government, which has announced its intention in the 2025 Budget to replace the requirement to substantiate firm-level EBCs using an IRM by “adequate and proper substantiation”, a broader concept, and to eliminate the Private Access Rule for violations of paragraph 74.01(1)(b.2).

As we conclude this article, we would like to discuss the Revision Proposal, and address some suggestions that support a strengthening—and not a weakening—of Canada’s anti-greenwashing regulatory framework. These considerations fall into three main categories: (i) suggestions to ensure that the Revision Proposal preserves the requirement to substantiate firm-level EBCs and the Private Access Rule; (ii) suggestions for complementary measures to expand the coverage of Canada’s anti-greenwashing toolkit; and (iii) suggestions for the Bureau to ameliorate its enforcement approach.

First, regarding the Revision Proposal, we suggest that the government not abandon the requirement to substantiate firm-level environmental claims. In today’s economy, the public needs information about the activities of a business as a whole in order to evaluate its environmental performance and the quality of its products; this information should benefit from the same degree of scrutiny as product-specific claims. That said, we acknowledge the perception of uncertainty associated with the concept of IRM, and the removal of this concept from the Act could be beneficial if accompanied by clear and robust guidance.

To remove any remaining uncertainty, the government should identify methodologies and procedures that will be considered “adequate and proper substantiation” under the Act, providing more legal certainty to companies. The recognition of these identified substantiation methods should be codified through regulations adopted under section 128 of the Act. These regulations should formally recognize the methodologies and testing procedures published or promoted by government entities, such as the government’s *Net-Zero Challenge Technical Guide* for net-zero pledges.²⁵²

However, we submit that repealing the ability to bring private claims for breaches of paragraph (b.2) would be premature, as it has not yet been tested in practice and the Act includes multiple safeguards that have, to date, shown no evidence of inadequacy.

Second, even if the Greenwashing Rules were maintained in their current state, there are several areas where Canada's greenwashing regulatory framework could be expanded. From a substantive perspective, to make fully informed decisions, stakeholders in a position of information asymmetry need environmental claims to be not only truthful, non-misleading, and substantiated—as required under the Act—but also comprehensive, clear, comparable, and verifiable. The Greenwashing Rules do not ensure that all these characteristics are met.

A first subpoint is that the Act applies only to information that companies voluntarily communicate. Firms may choose to remain silent about the environmental footprint of their organization, activities, and products, preventing stakeholders from recognizing environmental considerations and integrating them into their decisions. While the Act may not be the appropriate tool to mandate the disclosure of sustainability information in a standardized format, this shortcoming of the Greenwashing Rules reinforces the need for complementary information disclosure regimes, both at the product and organizational levels.

A second subpoint is that even when firms choose to disclose information voluntarily, the Act does not guarantee that such information will be comprehensive. To be comprehensive, information must cover all material environmental impacts (including biodiversity, resource extraction, pollution, and climate) over the product lifecycle and the organization's entire value chain. However, in promotional communications, firms tend to primarily disclose positive information and omit information that conveys a negative image of their performance. For example, a firm may advertise that a product is made from recycled materials, a claim that is both truthful and substantiated, but still withhold the fact that the product has a significant carbon footprint—a tactic known as “cherry-picking” or “selective disclosure.” In some cases, selective disclosures will be covered under the Act's prohibition of misleading claims, but it does not clearly prohibit claims that fail to provide comprehensive information about an organization or product's environmental footprint.

A third subpoint is that the Act does not ensure that voluntarily disclosed information is provided in a format that is practically useful for stakeholders and allows for comparisons across substitutes. For example, one firm may release information on its absolute greenhouse gas emissions, while another may disclose this information on an intensity basis. Although both disclosures may be truthful and substantiated, stakeholders may find it difficult to use them to make decisions. Again, the provision of information

in a format that conveys a misleading impression may be prohibited under paragraph 74.01(1)(a). Moreover, the Guidelines establish some high-level principles that may contribute to a certain standardization of environmental communication practices. However, the lack of mandatory standards on the communication of environmental performance of products, businesses, and activities means that information shared by firms will not be systematically comparable and practically useful. To address this shortcoming, regulations could be adopted under section 128 of the Act to formally endorse specific communication practices and standards about each main category of EBC, as is the case in France for carbon neutrality claims.²⁵³

A fourth subpoint relates to the verifiability of claims. The Act does not explicitly require firms to disclose the nature, content, and results of their tests and substantiation actions. For example, when faced with a carbon neutrality claim on a product package at the supermarket, consumers may find it challenging to know whether to trust the information communicated to them. Information asymmetry makes it difficult for stakeholders to identify potential greenwashing cases that would breach the Act's provisions. While stakeholders may file an application for leave under the Private Access Rule or for a Bureau inquiry, they must still have a reason to do so. The new enforcement regime relies on complaints to the Bureau and private lawsuits, while not empowering the public with the means to identify potential legal breaches. During the C-59 parliamentary process, several stakeholders recommended expanding the scope of the amendments to require companies to publicly disclose, either upon request or systematically, their substantiation materials, as is the case in California and France.²⁵⁴ We believe that such an amendment (either within the Act or other legislation) remains necessary to ensure the verifiability of EBCs.

Third, from an enforcement perspective, there are several measures that the government and/or the Bureau could implement to improve the effectiveness of the Act's new anti-greenwashing framework. One measure would be for the Bureau to be more transparent regarding its enforcement actions. The Bureau currently makes very little information public on the substantiation methods that it considers to be adequate and proper, the status of Bureau inquiries and the number of greenwashing investigations conducted each year. In contrast, some jurisdictions provided detailed information about their enforcement activities, including enforcement statistics and case studies specific to greenwashing.²⁵⁵ The Competition Bureau should follow suit by being more transparent about its interpretation of the Act's evidentiary requirements, and publicly report the number of greenwashing investigations conducted annually and the reasoning behind its

decisions not to launch inquiries after receiving complaints under section 9 of the Act (with the applicants' consent) and not to seek Court Orders after completing inquiries. Greater transparency would enhance legal predictability for businesses and foster a clearer understanding of the enforcement landscape. While enforcement guidelines are helpful, it is undeniable that seeing the Bureau's actual enforcement actions is more so.

Finally, the Bureau should proactively monitor the marketplace for non-compliant claims. Regulatory enforcement should not rely solely or even primarily on public complaints, as information asymmetry makes it difficult for stakeholders to detect many instances of greenwashing. To strengthen its enforcement capabilities, the Bureau could leverage digital tools, such as AI-driven greenwashing detection software, to identify potential misleading environmental claims more efficiently. Proactive monitoring would help ensure that enforcement actions address not just the most obvious cases of greenwashing but also those that might otherwise go unnoticed.

APPENDIX A—SUMMARY OF MAIN GREENWASHING TACTICS IDENTIFIED IN THE LITERATURE²⁵⁶

#	Practice	Type(s)	Example
1	Insufficient substantiation	C	Promoting a product as emitting 50% fewer toxic particles into the air than the industry average, without having conducted tests to validate this information.
2	Vague and general statements	C/B	Using terms like “green” or “eco-responsible” to qualify a product’s environmental impact, without proof of a neutral environmental impact over the entire life cycle and supply chain.
3	Misleading comparisons	C/B	Stating that a process is the “lowest carbon in the industry”, without specifying the basis for this comparison and without having any evidence to back it up.
4	Use of misleading certifications and ecolabels	C/B	Using a logo that gives the impression that a product meets higher-than-average environmental performance standards when this is not the case, or when this information has not been independently verified.
5	Speculative forward-looking statements	C/B	Promoting an organization’s GHG emissions reduction objectives without a credible plan to achieve them.
6	Selective declarations	C/B	Providing favorable indications of a project’s GHG emissions without mentioning its negative impacts on biodiversity, even though these negative environmental impacts are proportionally significant.
7	Use of misleading images, colors and symbols	C/B	Put images of trees on the packaging of a product whose production causes deforestation.
8	Promotion of negligible benefits	C/B	Indicate that the use of a product generates 5% less GHGs than the previous model, while 95% of the GHGs associated with this product are emitted during its production.
9	Communication of purely false information	C/A	Indicate that a product is recyclable when it is not in any region of Canada.
10	Misleading qualifiers and explanations	B	Prominently indicate on a delivery truck that the product it contains is carbon neutral and explain on the company’s website that the product actually emits only a smaller quantity of GHGs than other product lines offered by the company.
11	Promotion of ordinary or legally required features	B	To indicate that refrigeration equipment does not use hydrochlorofluorocarbons, even though such equipment is prohibited by law.
12	Use of jargon	B	Indicating the quantity of a toxic substance present in a product without providing a comprehensible explanation of the meaning of this information.

APPENDIX B—INQUIRY PROCESS

An inquiry may²⁵⁷ be initiated by the Bureau whenever the agency has “reasons to believe” that “a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or VIII”, that “grounds exist for the making of an order under Part VII.1 or VIII” (including subsection 74.01(1)) or that “an offence under Part VI or VII has been or is about to be committed” (including s. 52(1)). This can result, for instance, from the voluntary communication of information by a competitor, consumers, or civil society groups to the agency.²⁵⁸ The Bureau is required to keep any information that is voluntarily provided to it confidential unless the information has been made public, or the person has authorized the Bureau to communicate it (s. 29). An inquiry may also be the consequence of proactive monitoring of the marketplace by the Bureau²⁵⁹ or result from a market or industry inquiry conducted under section 10.1.

In addition, an inquiry may be initiated following the filing of an “application for an inquiry”, also known as a “six residents’ complaint”, under section 9 of the Act. Such applications can only be filed by a group of “six persons resident in Canada who are not less than eighteen years of age” and who consider that a Breach has occurred (or, in the case of Part VI or VII, has or is about to occur) (s. 9(1)). An application for an inquiry must be accompanied by an affidavit providing the contact information of the applicants, a statement of the evidence supporting their opinion, and the nature of the alleged Breach as well as the “grounds alleged to exist for the making of an order” or the “alleged offence” (s. 9(2)).

The Bureau has considerable discretion regarding the decision to launch an inquiry. It is only required to do so where the Commissioner “considers” it “necessary to inquire into [a matter] with the view of determining the facts” (s. 10(1)) or where the Minister of Industry calls upon the Bureau to do so.²⁶⁰ In *Empire Company Limited v Canada (Attorney General)*, the Federal Court confirmed that the Commissioner may refuse to initiate an inquiry when factual determination is not required; the decision to launch an inquiry is “simply a procedural step that gives the Commissioner access to the formal investigative powers described in subsection 11(1)” with the goal of determining the facts at issue.²⁶¹ The Commissioner’s broad discretion with respect to inquiries was also confirmed by the Federal Court of Appeal in *Charette v Commissioner of Competition*.²⁶²

Once the Commissioner decides to initiate an inquiry, he or she has broad information gathering powers. For example, the Commissioner may apply

for a court order for oral examination and production of documents (s. 11) and apply for search warrants (s. 15).

Inquiries must be conducted in private (s. 10(3)). Applicants under section 9 and the person whose conduct is being inquired may request in writing to be informed of the progress of the inquiry. However, in practice, applicants have limited control and visibility over the execution and status of an inquiry after it is launched, as the Commissioner is bound by strict confidentiality requirements with respect to enforcement activities (s. 29). Moreover, given that the Act does not prescribe a limit for the length of inquiries, applicants may end up waiting several months (if not years) before the Bureau concludes an inquiry and decides whether to take enforcement action.²⁶³

Under subsection 22(1), the Commissioner may discontinue an inquiry at any stage if he or she “is of the opinion that the matter being inquired into does not justify further inquiry”. Upon discontinuation of an inquiry, the Commissioner must report to the Minister of Industry on the information gathered and the rationale for the inquiry’s discontinuation. Section 9 applicants must be informed when an inquiry is discontinued (s. 22(3)). They may request the Minister of Industry to review the Commissioner’s discontinuation decision (s. 22(4)). If the Minister considers that the circumstances warrant it, he or she may instruct the Commissioner to make further inquiry. However, the Minister has no obligation to conduct this review or to instruct the Commissioner to continue gathering facts. Moreover, this process offers no guarantee that the Bureau will seek an application for an order.

The Commissioner’s discretionary power to discontinue an inquiry is not unlimited, as it can be subject to judicial review. For example, in *Cinémas Guzzo Inc. v Canada (Attorney General)*²⁶⁴, the Federal Court noted that a discretionary decision by the Commissioner to discontinue an inquiry based on irrelevant considerations may be reviewed judicially.²⁶⁵ However, as indicated by the Federal Court of Appeal in the appeal of that decision, “[t]he Commissioner enjoys a high degree of latitude in conducting an inquiry and [...] has broad discretion under subsection 22(4) to discontinue one”.²⁶⁶

APPENDIX C—SUMMARY OF PUBLIC DECEPTIVE MARKETING MATTERS RELATING TO ENVIRONMENTAL CLAIMS OVER THE PAST DECADE

#	File	File type	Dates ²⁶⁷	Status ²⁶⁸	Claims at issue
3	Shell	Complaint to the Bureau	November 2021–December 2023	Inquiry closed following end of marketing campaign	Advertising campaign regarding carbon offsets program
4	Manufacturers of wet wipes	Complaint to the Bureau	May 2019 – February 2022	Inquiry closed after Bureau unable to rule on allegations	Claims regarding the degradability of wipes in sewage systems.
5	Sustainable Forestry Initiative	Complaint to the Bureau	November 2022	Under investigation	Sustainable forest certification scheme
6	Canadian Standards Association (CSA)	Complaint to the Bureau	July 2021	Unknown	Sustainable forest management certification scheme
7	Pathways Alliance	Complaint to the Bureau	March 2023	Under investigation	Claims about the oil sands industry’s transition to carbon neutrality
8	Symbio Infrastructure	Complaint to the Bureau	June 2021	Unknown	Claims about a “carbon-neutral” pipeline project that would “reduce greenhouse gas emissions on a global scale”
9	Royal Bank of Canada	Complaint to the Bureau	June 2022	Under investigation	Commitment to carbon neutrality by 2050
10	Canadian Natural Gas Association	Complaint to the Bureau	September 2022	Under investigation	Presenting natural gas as a “clean”, “sustainable” and “affordable” energy source
11	Enbridge	Complaint to the Bureau	June 2023 –	Under investigation	“Advantageous” cost of natural gas for consumers
12	Lululemon	Complaint to the Bureau	February 2024	Under investigation	Representation of products as preventing environmental damage and helping to restore the health of the planet.

12	Canada Nuclear Association	Complaint to the Bureau	November 2024	Unknown	Representation of nuclear energy as “clean” and “non-emitting”.
13	Énergir	Complaint to the Bureau	January 2025	Inquiry opened in August 2025	Claims about the supply of “renewable natural gas” to consumers.
14	David Suzuki Foundation	Complaint to the Bureau	August 2025	Unknown	Picture portraying a fracking site
15	Everwind	Complaint to the Bureau	July 2025	Unknown	Claims about the environmental benefits of a green hydrogen project
16	Enbridge	Complaint to the Bureau	Unknown	Inquiry opened in November 2025	Claims about the supply of “renewable natural gas” to consumers.

APPENDIX D—OVERVIEW OF CANADIAN CLIMATE-RELATED DISCLOSURE REGIMES

Institution Category	Mandatory disclosure standard	Status
Federally-regulated financial institutions	<i>Office of the Superintendent of Financial Institutions’</i> Guideline B-15	Partially in effect—phased implementation over the next two years
Provincially regulated financial institutions	Various provincial prudential guidelines, such as the <i>Autorité des marchés financiers’</i> Climate Risk Management Guideline	Partially in effect—phased implementation over the next two years
Certain federal Crown corporations	2022 federal Budget announcement requiring disclosures aligned with TCFD standards	In effect
Reporting issuers	Mandatory continuous disclosure obligations in respect of material information as per <i>CSA Staff Notice 51-333 – Environmental Reporting</i> and <i>CSA Staff Notice 51-358—Reporting of Climate Change-related Risks</i> ; draft <i>National Instrument 51-107</i>	Mandatory continuous disclosure requirements already in effect
Work on NI 51-107 suspended—Next steps unclear as of October 31, 2025		
Large private companies incorporated under federal law	2023 <i>Fall Economic Statement</i> announcement considering potential mandatory climate-related disclosure requirements—proposal seems to be stalled according to Budget 2025 update	Not in effect—Next steps unclear as of February 15, 2026
Provincial Crown corporations, private companies incorporated under provincial law, small and medium-sized companies incorporated under federal law and private non-financial entities organized under a non-corporate structure	None.	N/A

ENDNOTES

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¹ *Competition Act*, RSC 1985, c C-34.

² *Ibid* at para 74.01(1)(b.1), 74.01(1)(b.2).

³ *Ibid.*

⁴ These amendments modified section 103.1 of the Act. See section 254 of the *Fall Economic Statement Implementation Act*, 2023, SC 2024, c 15.

⁵ *Ibid.* This requirement will appear at subsection 103.1(6.1) of the amended Act.

⁶ *Ibid.*

⁷ We discuss these considerations in detail in Part 4 of this article.

⁸ *Ibid.*

⁹ *Alberta Enterprise Group and Independent Contractors and Businesses Association v Canada (Attorney General)*, Statement of Claim (4 December 2024), ABKB Calgary [SC].

¹⁰ Competition Bureau of Canada, "Environmental claims and the *Competition Act*" (2025), online: <competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/publications/environmental-claims-and-competition-act>.

¹¹ See for example: Sonya Savage & Heather Exner-Pirot, "Canada's Greenwashing Amendment: A failure of process and policy" (2025), online: *MacDonald-Laurier Institute* <macdonaldlaurier.ca/wp-content/uploads/2025/02/20250210_Bill-C-59-Greenwashing-amendment-SavageExner-Pirot-FINAL.pdf>; John Pecman, "Greenwashing Provision Has No Place in New Competition Act" (2025), online: *C.D. Howe Institute* <cdhowe.org/publication/greenwashing-provision-has-no-place-in-new-competition-act/>.

¹² Government of Canada, *Notice of Ways and Means Motion to introduce a bill entitled An Act to implement certain provisions of the budget tabled in Parliament on November 4, 2025* (2025), online: <www.parl.ca/DocumentViewer/en/45-1/bill/C-15/first-reading>, s. 597.

¹³ *Ibid.*

¹⁴ Government of Canada, *Canada strong budget 2025*, (2025), online: <budget.canada.ca/2025/report-rapport/pdf/budget-2025.pdf> at 113.

¹⁵ Thomas P. Lyon & Wren A. Montgomery, "The Means and End of Greenwash" (2015) 28:2 *Organization & Environment* 223, online: <doi.org/10.1177/1086026615575332>.

¹⁶ *Ibid.*

¹⁷ Peter Seele & Lucia Gatti, "Greenwashing Revisited: In Search of a Typology and Accusation-Based Definition Incorporating Legitimacy Strategies" (2017) 26:2 *Bus Strat & Env* 239, online: <doi.org/10.1002/bse.1912>.

¹⁸ Michael R. Darby & Edi Karni, "Free Competition and the Optimal Amount

of Fraud” (1973) 16:1 *J L & Econ* 67, online: <doi.org/10.1086/466756>. Such characteristics must be distinguished from search characteristics, which can be observed by incurring reasonable search costs, and experience characteristics, which can be observed by using a good.

¹⁹ Stephen F. Hamilton & David Zilberman, “Green markets, eco-certification, and equilibrium fraud” (2006) 52:3 *Journal of Environmental Economics and Management* 627, online: <doi.org/10.1016/j.jeem.2006.05.002>.

²⁰ John M. Church, “A Market Solution to Green Marketing: Some Lessons from the Economics of Information” (1994) 79:2 *Minn L Rev* 245.

²¹ Julien O. Beaulieu, A. Wren Montgomery & Thomas P. Lyon, “Deny or Greenwash?” in Elena Bruni & Lianne M. Lefsrud, eds, *Organized Science Denial: An Action Plan for Solutions* (Oxford: Oxford University Press, 2025) ch 3.

²² A. Wren Montgomery, Thomas P. Lyon & Julian Barg, “No End in Sight? A Greenwash Review and Research Agenda” (2024) 37:2 *Organization & Environment* 221, online: <doi.org/10.1177/10860266231168905>.

²³ Seele & Gatti, *supra* note 17; Riccardo Torelli, Federica Balluchi & Arianna Lazzini, “Greenwashing and environmental communication: Effects on stakeholders’ perceptions” (2020) 29:2 *Bus Strat & Env* 407, online: <doi.org/10.1002/bse.2373>.

²⁴ Lucia Gatti, Peter Seele & Lars Rademacher, “Grey zone in—greenwash out: A review of greenwashing research and implications for the voluntary-mandatory transition of CSR” (2019) 4:1 *Intl J Corporate Soc Resp* 1, online: <doi.org/10.1186/s40991-019-0044-9>.

²⁵ Barbara Shecter, “Competition Bureau opens investigation into RBC over climate claims”, *Financial Post* (12 October 2022) online: <financialpost.com/fp-finance/banking/competition-bureau-opens-investigation-into-rbc-over-climate-claims>.

²⁶ For example: Joe Bongiorno, “Stop funding fossil fuels, protesters tell RBC at Montreal rally” (6 April 2024) *CBC News*, online: <www.cbc.ca/news/canada/montreal/rbc-protests-montreal-canada-fossil-fuels-1.7165996>; Alex Robinson, “Are the ESG departments of Canada’s Big Five banks a ‘\$2-trillion placebo’ for an ailing planet?” (12 January 2024) *Corporate knights*, online: <www.corporateknights.com/category-finance/esg-canadas-big-five-banks-sustainable-finance/>. As of December 2025, the Bureau has not taken any legal action against the bank in relation to this complaint.

²⁷ Centre international de référence sur le cycle de vie des produits, procédés et services, *Analyse du cycle de vie des sacs d’emplettes au québec*, Rapport technique final (2017) online: <www.recyc-quebec.gouv.qc.ca/sites/default/files/documents/acv-sacs-emplettes-rapport-complet.pdf>.

²⁸ Olivia O’Malley, “Quebec Superior Court authorizes class action lawsuit over reusable plastic bags” (24 May 2024) *CTV News*, online: <www.ctvnews.ca/montreal/article/quebec-superior-court-authorizes-class-action-lawsuit-over-reusable-plastic-bags/>.

²⁹ As of December 2025, the case is still ongoing.

- ³⁰ Florian Baumann & Alexander Rasch, “Exposing false advertising” (2020) 53:3 *Can J Econ* 1211, online: <doi.org/10.1111/caje.12457>.
- ³¹ Maurice E. Stucke, “How Do (and Should) Competition Authorities Treat a Dominant Firm’s Deception?” (2010) 63:57 *SMU L Rev* 1069, online: <ssrn.com/abstract=1395076>.
- ³² Edward Glaeser & Gergely Ujhelyi, “Regulating misinformation” (2010) 94:3-4 *Journal of Public Economics* 247-257, DOI: doi.org/10.1016/j.jpubeco.2010.01.001, online: NBER <www.nber.org/papers/w12784.pdf>.
- ³³ Other distinguishing factors include the complexity of certain environmental claims, which sometimes require some knowledge of environmental sciences to be properly understood; and the high number private environmental certification schemes, which can contribute to consumer confusion.
- ³⁴ Deloitte Canada, *Creating value from sustainable products. How business purpose and brand trust can make the difference* (22 January 2024) online: <www.deloitte.com/ca/en/Industries/consumer/research/creating-value-for-sustainable-products.html>.
- ³⁵ Hendy Mustiko Aji & Bayu Sutikno, “The Extended Consequence of Greenwashing: Perceived Consumer Skepticism” (2015) 10:4 *International Journal of Business and Information* 433; Yousuf Farooq & Hendro Wicakson, “Advancing on the analysis of causes and consequences of green skepticism” (2021) 320 *Journal of Cleaner Production*, online: <doi.org/10.1016/j.jclepro.2021.128927>.
- ³⁶ Célia Santos, Arnaldo Coelho & Alzira Marques, “The greenwashing effects on corporate reputation and brand hate, through environmental performance and green perceived risk” (2024) 16:3 *Asia-Pacific Journal of Business Administration* 655, online: <www.emerald.com/apjba/article-abstract/16/3/655/1215123/The-greenwashing-effects-on-corporate-reputation?redirectedFrom=fulltext>.
- ³⁷ Stucke, *supra* note 31.
- ³⁸ *Ibid.*
- ³⁹ Noémi Nemes, Stephen J. Scanlan, Pete Smith, Tone Smith, Melissa Aronczyk, Stephanie Hill, Simon L. Lewis, A. Wren Montgomery, Francesco N. Tubiello & Doreen Stabinsky, “An Integrated Framework to Assess Greenwashing” (2022) 14:8 *Sustainability* 4431, online: <doi.org/10.3390/su14084431>.
- ⁴⁰ Competition Bureau, *The Deceptive Marketing Practices Digest — Volume 7* (2024) online: <competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/deceptive-marketing-practices-digest-volume-7>.
- ⁴¹ Nemes et al., *supra* note 39.
- ⁴² *Ibid.*
- ⁴³ Montgomery et al., *supra* note 22.
- ⁴⁴ For a detailed analysis of the legal framework that existed prior to the amendments, we recommend: Andrée-Anne Perras-Fortin & Samuel Ross, “L’écoblanchiment et les représentations environnementales à l’ère du virage vert” in *Développements récents en matière de propriété intellectuelle et en droit du divertissement (Colloque)* (Montréal, 2023) (Montréal: Éditions Yvon Blais, 2023); Antonio Di Domenico, Huy Do & Robin Spillette, “Greenwashing: What Is It and

Why It Matters” (2022) 35:1 *Canadian Competition Law Review*, online: <cclr.cba.org/index.php/cclr/article/view/844>.

⁴⁵ The objectives of the statute are set out at section 1.1: “The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.”

⁴⁶ *Canada (Commissioner of Competition) v Premier Career Management Group Corp*, 2009 FCA 295 [Premier Career] at para 63. See also *Canada (Commissioner of Competition) v Cineplex Inc* [Cineplex], 2024 Comp Trib 5 at para 233.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, at para 61; cited in *Cineplex*, *supra* note 46 at para 227.

⁴⁹ *Commissioner of Competition v Sears Canada Inc.*, 2005 CACT 2 [Sears] at para 82, cited in *Cineplex*, *supra* note 46 at para 230.

⁵⁰ *Premier Career*, *supra* note 46 at para 63. See also *Cineplex*, *supra* note 46 at para 56.

⁵¹ *Premier Career*, *supra* note 46, at para 61. In other words, honest advertising is seen as a condition to the “proper functioning of the market in order to preserve product choice and quality” (para 63). See also para 62: “When a firm is permitted to make misleading representations to the public, putative consumers may be more likely to choose the inferior products of that firm over the superior products of an honest firm. When consumer information is distorted in this manner, firms are encouraged to be deceitful about their goods or services, rather than to produce or provide higher quality goods or services, at a lower price. Therefore, as the appellant contends, when a firm feeds misinformation to potential consumers, the proper functioning of the market is necessarily harmed, and the Act is rightly engaged, given its stated goals.” This implicit presumption of harm is similar to the presumption of harm derived from section 272 of the Québec *Consumer Protection Act*.

⁵² Jennifer Quaid, “AI and Competition Law”, in *Artificial Intelligence and the Law in Canada* (Florian Martin-Bariteau & Teresa Scassa, eds.) (Toronto: LexisNexis Canada, 2021).

⁵³ The Act defines the term “business” to include the activities of “manufacturing, producing, transporting, acquiring, supplying, storing and otherwise selling articles”, “acquiring, supplying and otherwise selling services”, as well as “the raising of funds for charitable or other non-profit purposes.” Moreover, a business may be conducted by a public entity. Under subsection 2(1), the Act does not apply to corporations that are agents of Her Majesty in right of Canada or a province so long as they do not carry on business in competition with other persons.

⁵⁴ *Premier Career*, *supra* note 46. In the case at issue, referrals were communicated during private interviews at the offices of a career counselling

company. One at a time, the referrals were communicated repeatedly to members of the public who had initially been solicited through advertisements. In its decision, the Court concluded that the concept of “public” depended on the circumstances, and that communication to the public could take place in a private place to one individual at a time. According to the Court: “The important question to ask in determining whether a representation was made to the public is “to whom were the representations made?” In this case, the representations were made to a significant section of the public who had been invited by advertising to attend at the offices of the respondent. The fact that representations were made in private does not dictate that they were not made to the public. All the circumstances of the communication must be looked at. If, as in this case, the communications reach a significant portion of the public, they are made “to the public”. The “public” referred to can be a “subset of the public”. The Court also cited *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, in which the Supreme Court stated that “[t]ransmitting a single copy to a single person by facsimile does not amount to communicating the work to the public. That said, the repeated transmission of a copy of the same work to numerous recipients could constitute communication to the public and infringe copyright.”

⁵⁵ *Canada (Commissioner of Competition) v Canada Tax Reviews Inc.*, 2021 FC 921, at paras 83-85.

⁵⁶ *Premier Career*, *supra* note 46 at para 55.

⁵⁷ *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21 [Rizzo].

⁵⁸ Keith Brouhle, Charles Griffiths & Ann Wolverton, “Evaluating the role of EPA policy levers: An examination of a voluntary program and regulatory threat in the metal-finishing industry” (2009) 57:2 *Journal of Environmental Economics and Management* 166, online: <doi.org/10.1016/j.jeem.2008.07.006>; Seele & Gatti, *supra* note 17.

⁵⁹ Even under the consumer protection law, the focus is not on specific consumers, but on the protection of the public in general. As noted by the Supreme Court in *Richard v Time Inc.*, 2012 CSC 8 [Richard] at para 139, in respect of deceptive marketing proceedings under consumer protection law: “Thus, the purpose of such proceedings is not to protect the private interests of one or more consumers, but to protect the public in general from business practices that may be misleading.”

⁶⁰ Greenpeace Canada, “Application for Inquiry into false and misleading representations made by the Pathways Alliance about their climate action and the climate impact of their business” (2023), online: *Climate Case Chart* <<https://www.greenpeace.org/static/planet4-canada-stateless/2023/03/8c835b91-amended-competition-bureau-submission-for-pathways-alliance-ad-campaign.pdf>>. Greenpeace is demanding that Pathways retract these statements, issue a public correction, and pay a significant fine to organizations working on the rehabilitation and cleanup of oil sands production sites.

⁶¹ *Ibid.*

⁶² *Ibid.*, at 35.

⁶³ From our perspective, there is a difference between information *to the public*, where the focus is on the intended audience, and information that is *made in a place to which the public had access* (see, for example, paras 52(1.1)(c) and 74.01(4)(c)), *publicly available* (see, for example, s. 10.1(3)) or that has been *made public* (see, for example, s. 29(2)), where the focus is on the accessibility of information. This is also consistent with the Court's comment that "The important question to ask in determining whether a representation was made to the public is 'to whom were the representations made?'"

⁶⁴ Section 52 is a pure subjective *mens rea* offence. This contrasts with the infraction of fraudulent telemarketing that can be found at section 52.21, which does not require proof of the intent to deceive. There is therefore some use of strict liability in the Act's criminal deceptive marketing regime.

⁶⁵ Kernaghan Webb, "Addressing Misleading Advertising in the Canadian Telecommunications Industry: A Complex, Evolving Story" (2013) 26:1 *Canadian Competition Law Review* 78, at 86, online: <ccr.cba.org/index.php/ccr/article/view/659>.

⁶⁶ For examples of actual cases of fraudulent representations prosecuted under section 52, see: *R. c. Dragan*, 2017 QCCQ 9618 or *R. v 1806369 Alberta Limited*, 2021 ONCJ 179.

⁶⁷ The decision related to section 218 of the Québec *Consumer Protection Act*, which indicates that "To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account." In its decision, the Supreme Court noted that the goal of the Québec *Consumer Protection Act* is to protect consumers, and that the deceptive marketing rules contributed to this objective by both preventing consumers from being misled and remedying the harm caused by the distribution of deceptive ads (para 50). Given this dual purpose, the Court concluded that the concept of "general impression" should be analyzed abstractedly instead of focusing on the personal characteristics of the consumer bringing legal action. In addition, the Court noted the importance of considering the "first impression" given by both the text of a representation and its entire context, "including the way the text is displayed to the consumer" and the layout of an ad, "rather than merely of portions of its content" (paras 55-57). The Court therefore rejected the Court of Appeal's approach in that case, which involved "dissecting" a representation to "isolate and connect parts of sentences" (paras 59). Moreover, in light of the statute's objective to protect vulnerable consumers from deceptive advertising practices, the Court ruled that the general impression was "the impression of a commercial representation on a credulous and inexperienced consumer" (para 70).

⁶⁸ In *Canada (Competition Bureau) v Chatr Wireless Inc.*, 2013 ONSC 5315 [Chatr], the Ontario Superior Court of Justice applied these concepts to the Act's deceptive marketing provisions. While the Court noted that the Act and the Québec *Consumer Protection Act* had different purposes, the Court used the concept of credulous and inexperienced consumer set by the Supreme Court as a starting point of its interpretation of the concept of "general impression"

(paras 127-128). The Court agreed that the case at issue involved a mass media advertising campaign directed at consumers (para 129) and agreed that the consumers were credulous in the context (para 130). The Court noted that the audience of the claims was different here (current and potential consumers of wireless services) than in *Richard* (the public generally, not a particular segment). However, the Court noted that consumers might have extensive experience with the services advertised, and that their inexperience was limited to the technical information shared in the ads (para 131). The Federal Court has also relied on this conception in *Energizer Brands LLC v Gillette Company*, 2023 FC 804, and in *Canada (Commissioner of Competition) v Canada Tax Reviews Inc* 2021 FC 921.⁶⁹ Note that other provisions deal with more specific practices, like drip pricing (74.01(1.1)) and claims about ordinary selling prices (74.01(2)).

⁷⁰ *Cineplex*, *supra* note 46 at para 234, citing *Commissioner of Competition v Gestion Lebski inc.*, 2006 CACT 32 [Gestion], at paras 53, 152, 191; *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, at para 66; *Toronto Real Estate Board v Canada (Commissioner of Competition)*, 2017 FCA 236, at paras 48, 87; *FH v McDougall*, 2008 SCC 53, at paras 45-46, 49.

⁷¹ *Competition Act*, *supra* note 1 at ss 74.011(4).

⁷² *Webb*, *supra* note 65.

⁷³ Competition Bureau of Canada, “Additional information about the *Competition Act*”, 2024, online: <competition-bureau.canada.ca/deceptive-marketing-practices/types-deceptive-marketing-practices/additional-information-about-competition-act>.

⁷⁴ *P.V.I. International Inc. v Commissioner of Competition*, 2004 FCA 197 [P.V.I.].

⁷⁵ *Sears*, *supra* note 49 at para 333 cited by *Canada (Commissioner of Competition) v Yellow Page Marketing B.V.*, 2012 ONSC 927 at para 34. Note this test was first articulated in *R. v Kenitex Canada Ltd.*, (1980), 51 CPR (2d) 103 [Yellow Page].

⁷⁶ *Sears*, *supra* note 49 at paras 333-336 citing *R. v Tege Investment Ltd.* (1978), 51 C.P.R. (2d) 216; *R. v Kellys on Seymour Ltd.* (1969), 60 CPR 24; cited by *Yellow Page*, *supra* note 75 at para 34.

⁷⁷ *P.V.I.*, *supra* note 74, at para 45.

⁷⁸ *Ibid.*

⁷⁹ *The Commissioner of Competition v Imperial Brush Co. Ltd. And Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group)*, 2008 Comp. Trib. 02 [Imperial Brush].

⁸⁰ *Ibid* at para 77.

⁸¹ For example, under the *Food and Drugs Act* and the *Safe Food for Canadians Regulations*, functional and disease-reduction claims for food products must be substantiated scientifically under subsection 5(1) of the *Food and Drugs Act*. This requirement is derived from subsection 5(1) of the *Food and Drugs Act*, RSC 1985, c F-27, which prohibits misleading claims regarding food products. As described by Health Canada, the ministry “has a list of accepted health claims, as well as the criteria a food product must meet in order to use them. Manufacturers must submit some of the claims to Health Canada for approval

before they can be used. Others can be submitted voluntarily. Some companies use health claims that aren't in the *Food and Drug Regulations* or on Health Canada's list of accepted claims. These companies must provide scientific evidence to support their claims upon request by the Canadian Food Inspection Agency." See: Health Canada, "Nutrition labelling: Nutrition claims" (2024), *Government of Canada*, online: <www.canada.ca/en/health-canada/services/food-nutrition/nutrition-labelling/nutrition-claims.html>; Health Canada, "Health Claims Assessments" (2017), *Government of Canada*, online: <www.canada.ca/en/health-canada/services/food-nutrition/food-labelling/health-claims/assessments.html>. In 2009, Health Canada issued a guidance document that provides extensive details about the evidentiary requirements that claimants must meet in order to substantiate their health claims. See: Health Canada, "Guidance Document for Preparing a Submission for Food Health Claims" (2009), *Government of Canada*, online: <www.canada.ca/en/health-canada/services/food-nutrition/legislation-guidelines/guidance-documents/guidance-document-preparing-submission-food-health-claims-2009-1.html>. Outside of the health domain, *National Instrument 81-102*, which has been incorporated in provincial securities law nationally, requires that certain sales communications by investment funds be backed by specific performance data. See: Canadian Securities Administrators, "National Instrument 81-102—Investment Funds" (2024), online: *British Columbia Securities Commission* <www.bsc.bc.ca/-/media/PWS/New-Resources/Securities-Law/Instruments-and-Policies/Policy-8/81102-NI-August-30-2024.pdf?dt=20240828160306>.

⁸² *Imperial Brush*, *supra* note 79; *Chatr*, *supra* note 68. In the first case, an advertiser of manufactured stove and fireplace maintenance products made claims that the products helped reduce the quantity of harmful creosote deposits in fireplaces and wood stoves and helped prevent chimney fires. In the second case, the company claimed that its Chatr service, a mobile phone brand, had fewer dropped calls than new wireless entrants.

⁸³ *Imperial Brush*, *supra* note 79 at para 152. Quoting the *Concise Oxford English Dictionary*.

⁸⁴ *Ibid.*, at paras 122, 128; *Chatr*, *supra* note 68 at para 295.

⁸⁵ *Chatr*, *supra* note 68 at para 295; *Imperial Brush*, *supra* note 79 at paras 125-128.

⁸⁶ *Ibid.*

⁸⁷ *Imperial Brush*, *supra* note 79 at paras 125,128; *Chatr*, *supra* note 68 at para 293.

⁸⁸ *Imperial Brush*, *supra* note 79 at para 122; *Chatr*, *supra* note 68 at paras 322, 295.

⁸⁹ Other federal and provincial regulatory regimes may lead to greenwashing litigation. For example, provincial securities laws prohibit deceptive claims by reporting issuers and investment fund managers as part of their information disclosure obligations. While these rules are not specific to environmental claims, they have been invoked in the context of complaints to the authorities and enforcement measures by securities regulators. See: Ontario Securities

Commission, “OSC announces allegations against Purpose Investments Inc. and Mr. Som Seif” (2025), online: <www.osc.ca/en/news-events/news/osc-announces-allegations-against-purpose-investments-inc-and-mr-som-seif?_cf_chl_tk=XO9gNsbFW1u57KFqFEcqHh806vBhabPkGvSBkyLXsqk-1758807705-1.0.1.1-nHBxha9VroN77xt1TzOPSn5e_vDipZeLho6CpmpwX7Q>;

Investors for Paris Compliance, “Greenwashing complaint filed with Alberta Securities Regulator” (2025), online: <www.investorsforparis.com/greenwashing-complaint-filed-with-alberta-securities-regulator/>.

⁹⁰ In a 2022 bulletin, the Bureau indicated that it will generally prioritize civil enforcement in deceptive marketing cases unless there is “clear and compelling evidence suggesting that the accused knowingly or recklessly made a false or misleading representation to the public” and the Bureau is “satisfied that criminal prosecution would be in the public interest.” To make this public interest determination, the Bureau may consider a range of factors, including the seriousness of the alleged offence, the existence of a compliance program, the proportionality of the consequences of prosecution or conviction. See: Competition Bureau of Canada, “Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the *Competition Act*” (2022), online: <competition-bureau.canada.ca/misleading-representations-and-deceptive-marketing-practices-choice-criminal-or-civil-track-under/>.

⁹¹ *Ibid.*

⁹² See, for example, the federal government’s *Ineligibility and Suspension Policy*, which lists section 52 of the Act as a ground for supplier ineligibility or suspension. Ineligibility is not automatic and must be determined by the Registrar, but it is a risk associated with criminal convictions. Interestingly, being convicted of an offence that resulted in being listed on the Environmental Offenders Registry is also a ground for ineligibility of suspension. See: Government of Canada, “Ineligibility and Suspension Policy” (2024), online: <www.canada.ca/en/public-services-procurement/services/standards-oversight/supplier-integrity-compliance/policy-directives/ineligibility-suspension-policy.html>.

⁹³ *Energizer Brands, LLC v Gillette Company*, 2023 FC 804.

⁹⁴ A range of injunctive remedies are also possible—we do not discuss them here.

⁹⁵ As set out in paragraph 74.1(1)(c), the maximum amount of an AMP is: (i) in the case of an individual, the greater of (A) \$750,000 and, for each subsequent order, \$1,000,000, and (B) three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined, or (ii) in the case of a corporation, the greater of (A) \$10,000,000 and, for each subsequent order, \$15,000,000, and (B) three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of the corporation’s annual worldwide gross revenues. At the time of writing, there is currently a pending constitutional challenge regarding the legality of the administrative monetary penalties set out under the Act. The plaintiffs argue that given their significant maximum size, the penalties constitute a penal sanction, which commands greater procedural rights, as guaranteed by the Charter. See: Competition Tribunal, “Google Canada and Google LLC—Notice

of constitutional question” (2025), online: <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521349/index.do>. For a detailed discussion of AMPs and the applicable constitutional constraints, see: Todd L. Archibald & Kenneth E. Jull, *Profiting from Risk Management and Compliance* (Toronto: Carswell, 2019), § 6:1, ch 6 “The Growth and Validity of Administrative Monetary Penalties,” I “Introduction and Overview”.

⁹⁶ Restitution of payments is only possible for violations of 74.01(1)(a).

⁹⁷ Competition Bureau of Canada, “Specific areas of enforcement by the Bureau” (2024), online: <competition-bureau.canada.ca/en/how-we-foster-competition/compliance-and-enforcement/specific-areas-enforcement-bureau>. Note that this defense is not available for violations of subsection 52(1).

⁹⁸ *Canada (Commissioner of Competition) v Chatr Wireless Inc*, 2014 ONSC 1146.

⁹⁹ *Ibid*, at para 27.

¹⁰⁰ *Commissioner of Competition v Gestion Lebski Inc.*, 2006 CACT 32 at paras 272-280.

¹⁰¹ Courts have generally held that due diligence requires the existence of an adequate and proactive prevention system established before the alleged act occurred. Such a system must specifically address the prohibited conduct at issue, rather than reflect a general commitment to acting reasonably. For additional information, see: Archibald & Jull, *supra* note 95.

¹⁰² *R. v Commander Business Furniture Inc.*, [1992] O.J. No. 2904.

¹⁰³ *R. v Woolworth Canada Inc.*, [2000] O.J. No. 238.

¹⁰⁴ The other factors include: legislative or regulatory compliance; industry standards; efforts made to address the problem; over what period of time and promptness of response; matters beyond the control of the defendant; skill level expected of the defendant; complexities involved; preventative systems; and economic considerations.

¹⁰⁵ Archibald & Jull, *supra* note 95.

¹⁰⁶ *Competition Act*, *supra* note 1 at ss 74.12(2).

¹⁰⁷ *P.V.I.*, *supra* note 74.

¹⁰⁸ *Ibid*. The Federal Court of Appeal summarized the Tribunal’s decision: “On the basis of these findings, the Tribunal made orders under paragraphs 74.1(1)(a) and (b) of the Act prohibiting the appellants from repeating these misrepresentations with respect to the gasoline, and imposing administrative monetary penalties of \$75,000 in the case of the corporate appellant and \$25,000 in the case of each of the individual appellants.” (para 4).

¹⁰⁹ *The Commissioner of Competition v Volkswagen Group Canada Inc. et al* (19 Dec 2016), CT-2016-017, online: <decisions.ct-tc.gc.ca/ct-tc/cdo/en/462826/1/document.do>; see also Competition Bureau of Canada, “Volkswagen and Audi to pay up to \$2.1 billion to consumers and \$15 million penalty for environmental marketing claims” (19 December 2016), online: Government of Canada <canada.ca/en/competition-bureau/news/2016/12/volkswagen-audi-pay-up-2-1-billion-consumers-15-million-penalty-environmental-marketing-claims.html>.

¹¹⁰ *The Commissioner of Competition v Volkswagen Group Canada Inc. et al* (12

Jan 2018), CT-2018-003, online: <decisions.ct-tc.gc.ca/ct-tc/cdo/en/462826/1/document.do>.

¹¹¹ Perras-Fortin & Ross, *supra* note 44.

¹¹² Environmental Law Centre of the University of Victoria, “Competition Bureau Investigation into Coffee Pods Recyclability Claims” (10 May 2022), online: <elc.uvic.ca/coffee-pods-investigation/>.

¹¹³ *Commissioner of Competition and Keurig Canada Inc.*, Consent Agreement, Competition Tribunal, CT-2022-001 (2022), online: <decisions.ct-tc.gc.ca/ct-tc/cdo/en/518827/1/document.do>.

¹¹⁴ Another example is Lululemon’s 2007 decision to comply with a decision by the Bureau and remove all misleading claims about the health benefits of a line of clothing made from algae. The Bureau cited the *Textile Labelling Act*, which prohibits making false or misleading claims about a garment. See: CBC News, “Lululemon to remove claims from seaweed clothing line” (16 November 2007), online: <www.cbc.ca/news/business/lululemon-to-remove-claims-from-seaweed-clothing-line-1.655660>.

¹¹⁵ According to the Bureau, the representations conveyed the false or misleading general impression that their products met certain energy efficiency standards. EcoSmart Spas, Dynasty Spas and the individual Brent Marshall agreed to cease making misleading statements, pay an administrative monetary penalty of \$130,000, post corrective notices in all stores and on their websites, and implement a corporate compliance program. See: The Commissioner of competition and Dynasty Spas, Consent Agreement, CT-2010-006 (2011), online: <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463511/index.do?q=dynasty>.

¹¹⁶ The Commissioner of Competition and Hyundai Auto Canada Corp., Consent Agreement, CT-2013-004 (2013), online: <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463251/index.do>.

¹¹⁷ The Commissioner of Competition and Kia Canada Inc., Consent Agreement, CT-2013-005 (2013), online: <decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463257/index.do>.

¹¹⁸ *Ibid.* Hyundai and Kia agreed to compensate affected consumers for the costs incurred due to the discrepancy between the advertised and corrected fuel consumption ratings of their vehicles for the entire duration of ownership. Additionally, they were required to provide an additional 15% in compensation and distribute the payments via personalized prepaid credit cards, which were to be reissued upon request for as long as consumers retained ownership of the affected vehicle.

¹¹⁹ There may be additional complaints that have not been disclosed publicly.

¹²⁰ Actis Law Group, “Earth Rated Certified Compostable Bags Deceptive Claims National Class Action” (2024), online: <actislaw.org/class-actions/earth-rated-certified-compostable-bags-deceptive-claims-national-class-action>

¹²¹ Actis Law Group, “Charmin Toilet Paper, Puffs Tissues, and Bounty Paper Towels Deceptive Environmental Claims Class Action” (2025), online: <actislaw.org/class-actions/charmin-toilet-paper-puffs-tissues-and-bounty-paper-towels-deceptive-environmental-claims-class-action>

¹²² Competition Bureau of Canada, *supra* note 10. The Bureau also noted that the “*Consumer Packaging and Labelling Act, the Textile Labelling Act, and the Precious Metals Marking Act*, also prohibit certain types of deceptive representations, and may be relevant to environmental claims.”

¹²³ *Ibid.* As noted by the Bureau in the Guidelines, the “business that made the claim has no obligation under this provision to prove that there was a basis for the environmental claim, or to prove that the claim is not false or misleading in a material respect.”

¹²⁴ This was reiterated by the Commissioner in his testimony before FINA: “I can indicate at a high level that these investigations into business-wide claims or brand-wide claims are extremely difficult investigations for the Bureau. Obviously, we’re not environmental experts; we’re competition law experts. These investigations are incredibly resource-intensive.” See: Standing Committee on Finance, “Meeting No. 138”, 44th Parliament, 1st Sess. (15 April 2024), online: Parliament of Canada: <www.ourcommons.ca/documentviewer/en/44-1/FINA/meeting-138/evidence>.

¹²⁵ Matthew Boswell, Letter to the Chair and members of the House of Commons Standing Committee on Finance and the Senate Standing Committee on National Finance (1 March, 2024), online: <sencanada.ca/Content/Sen/Committee/441/NFFN/briefs/SM-C-59_CompetitionBureauofCND_e.pdf>.

¹²⁶ *Ibid.* Notably, there is already a similar reverse onus provision of the Act dealing with product performance claims (para 74.01(1)(b)). That provision prohibits making a claim about “the performance, efficacy or length of life of a product that is not based on an adequate and proper test” and would likely capture some of the same claims captured under this new provision.

¹²⁷ Note that this possibility is expressly covered at subsection 74.03. As noted in *Imperial Brush*, *supra* note 79 at para 221: “A representation that a product will perform in a specific way is designed to convince the purchaser that there is some objective basis upon which the purchaser can rely.”

¹²⁸ U.S. Federal Trade Commission, “FTC Policy Statement Regarding Advertising Substantiation” (23 November 1984), online: <www.ftc.gov/legal-library/browse/ftc-policy-statement-regarding-advertising-substantiation>.

¹²⁹ JurisClasseur Québec, “Droit de la consommation et de la concurrence» (14 December 2014), online: <store.lexisnexis.ca/fr/categories/product/jurisclasseur-quebec-droit-de-laconsommation-et-de-la-concurrence-skusku-cad-6498/details>, JDCC 2.2 and 3.2. See also *Fédération des chambres immobilières du Québec v DuProprio inc.*, 2016 QCCS 1633. Section 36 of the Act expressly contemplates the possibility of private remedies in the case of a breach of the statute’s criminal provisions, including subsection 52(1).

¹³⁰ *The Queen (Can.) v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at 225. Most recently confirmed in the context of the *Competition Act* in *Toyota Jidosha Kabushiki Kaisha (Toyota Motor Corporation) v Marrand Auto Inc.*, 2024 FC 1776 at para 18.

¹³¹ See for example *McKinsey & Company, Inc. United States v British Columbia*, 2024 BCCA 277.

¹³² Government of Canada, “Competition policy” (2023), online: <ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy>.

¹³³ Prime Minister of Canada, “Minister of Innovation, Science and Industry Mandate Letter” (16 December 2021), online: <www.pm.gc.ca/en/mandate-letters/2021/12/16/minister-innovation-science-and-industry-mandate-letter>.

¹³⁴ Government of Canada, “Making Competition Work for Canadians: A consultation on the future of competition policy in Canada” (2023), online: <ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/making-competition-work-canadians-consultation-future-competition-policy-canada>.

¹³⁵ Government of Canada, “The Future of Competition Policy in Canada” (2025), online: <ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada#VII>.

¹³⁶ Government of Canada, “Future of Canada’s Competition Policy Consultation—What We Heard Report” (2024), online: <ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada/future-canadas-competition-policy-consultation-what-we-heard-report#s82>.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.* As noted in the report, “Stakeholders felt that under the present regime there is a massive lack of enforcement, allowing companies to profit from sustainability related claims that are not backed by sufficient evidence, misleading well-intentioned consumers into thinking their choices help the environment and disadvantaging companies who are more scrupulous about their publicity, or who truly have undertaken pro-sustainability measures.” For examples of submissions making these points, see the responses of Ecojustice & the Canadian Association of Physicians for the Environment; E2 Management Corporation; TELUS; GNAR Inc—Sustainable Home Design; the Canadian Jewellers Association; the Centre québécois du droit de l’environnement and the University of Victoria’s Environmental Law Centre.

¹³⁹ *Ibid.*

¹⁴⁰ Government of Canada, “2023 Fall Economic Statement” (2023), online: <www.budget.canada.ca/fes-eea/2023/home-accueil-en.html>.

¹⁴¹ Dentons, “Bill C-59’s third wave of changes to the Competition Act passed” (28 June 2024), online: <www.dentons.com/en/insights/articles/2024/june/28/bill-c-59s-third-wave-of-changes-to-the-competition-act-passed>.

¹⁴² Doane Grant Thornton, “What does Bill C-59 mean for you or your business?” (21 June 2024), online: <www.doanegrantthornton.ca/insights/what-does-bill-c-59-mean-for-you-or-your-business/>.

¹⁴³ In recent draft environmental guidelines, the Bureau defines the concept of representation as “Any marketing and/or promotional material, including online and in-store advertisements, direct mail, social media messages, promotional

emails, and endorsements, among other things.” See: Competition Bureau of Canada, *supra* note 10.

¹⁴⁴ Standing Committee on Finance, “Meeting No. 132”, 44th Parliament, 1st Sess. (19 March 2024), online: Parliament of Canada: <www.ourcommons.ca/DocumentViewer/en/44-1/FINA/meeting-132/evidence>.

¹⁴⁵ See for example the FINA testimonies by representatives of the CQDE (meeting 134); Option consommateurs (meeting 134); the Canadian Association of Physicians for the Environment (meeting 136); and the Commissioner (meeting 138). The references to these meetings are as follows: Standing Committee on Finance, “Meeting No. 134”, 44th Parliament, 1st Sess. (9 April 2024), online: Parliament of Canada: <www.ourcommons.ca/DocumentViewer/en/44-1/FINA/meeting-134/evidence>; Standing Committee on Finance, “Meeting No. 136”, 44th Parliament, 1st Sess. (11 April 2024), online: Parliament of Canada: <www.ourcommons.ca/DocumentViewer/en/44-1/FINA/meeting-136/evidence>; Standing Committee on Finance, “Meeting No. 138”, 44th Parliament, 1st Sess. (18 April 2024), online: Parliament of Canada: <www.ourcommons.ca/documentviewer/en/44-1/FINA/meeting-138/evidence>.

¹⁴⁶ Boswell, *supra* note 123. Note that the Commissioner did not recommend the direct adoption of such amendments, but their study (as opposed to other items where he recommended direct amendments).

¹⁴⁷ Standing Committee on Finance, *supra* note 142. As indicated by the officials: “When they move away from that and make a broader claim, like when companies say they’re green, there’s no longer a pre-existing mechanism in the Competition Act. For example, if companies make blanket statements that they are fair or that they treat their employees well, there’s no mechanism that requires them to already have proof of that. Such assertions are only subject to the general prohibition against breach of trust. The reason the government stopped there was that the Competition Act already had a mechanism that worked. However, more general statements stray from the scope of that mechanism. (...) If a company says it’s greener, what should it test to prove that?”

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ Canadian Association of Physicians for the Environment, Centre québécois du droit de l’environnement and Ecojustice, “Briefing Note: addressing greenwashing through the *Competition Act*” (28 May 2024), online: <sencanada.ca/Content/Sen/Committee/441/NFFN/briefs/SM-C-59_Brief_ECOJ-CAPE-QELC_e.pdf>.

¹⁵¹ Standing Committee on Finance, *supra* note 143, meetings 134, 136.

¹⁵² *Ibid.*, meeting 134.

¹⁵³ Parliament of Canada, “Fall Economic Statement Implementation Act, 2023” (Undated), online: *LEGISinfo*: <www.parl.ca/legisinfo/en/bill/44-1/c-59>.

¹⁵⁴ Arguably, the changes caught the business and legal community by surprise. See for example: Jameson Berkow, “Beyond greenwashing: The other unknowns of Bill C-59 could slow the recovery of deal-making” (22 July 2024), online: <www.theglobeandmail.com/business/article-beyond-greenwashing-the-other-unknowns-of-bill-c-59-could-slow-the/>.

¹⁵⁵ Canadian Chamber of Commerce, “Canadian Chamber statement regarding the House of Commons Standing Committee on Finance’s clause-by-clause study of Bill C-59” (3 May 2024), online: <chamber.ca/news/canadian-chamber-statement-regarding-the-house-of-commons-standing-committee-on-finances-clause-by-clause-study-of-bill-c-59/>.

¹⁵⁶ Don Braid, “Ottawa tries to muzzle oil and gas companies with huge fines for praising their climate efforts” (30 May 2024), online: <calgaryherald.com/news/braid-federal-government-oil-and-gas-fines>.

¹⁵⁷ Standing Senate Committee on National Finance, “Evidence” 44th Parliament, 1st Sess. (11 June 2024), online: <sencanada.ca/en/Content/Sen/Committee/441/NFFN/111EV-56849-E>. As noted by one senator: “The comments and emails that I’ve received, they aren’t just people writing in saying, “I don’t like that phrase.” These are organizations or people that are sending in quite lengthy explanations as to why they are very uncomfortable with that phrase in the amendment. So yes, I think there’s an issue there for stakeholders.” Another Senator: “We have letters, phone calls, urgent requests for meetings, appeals from all manner of industries, other organizations, premiers, et cetera, to say the Senate needs to do its job here because the House of Commons did not do its job — and neither did the Competition Bureau; they weren’t holding consultations on this particular item.”

¹⁵⁸ *Ibid.* Regarding the consultation, the representative noted that “In regard to consultation, the government did undertake significant consultations resulting in nearly 500 inputs from Canadians and companies over the course of about six months, with a number of national round tables undertaken across the country as well. The specific change undertaken by the committee in the House to adjust the greenwashing provisions on business activities was not an element that was specifically tested to a significant degree in that consultation.”

¹⁵⁹ Anthony Durocher & Bradley Callaghan, Letter to the Honourable Pamela Wallin (31 May 2024), online: <sencanada.ca/Content/Sen/Committee/441/BANC/briefs/BANC_Follow-up_CompetitionBureau_e.pdf>.

¹⁶⁰ Standing Senate Committee on National Finance, “Evidence” 44th Parliament, 1st Sess. (12 June 2024), online: <sencanada.ca/en/Content/Sen/Committee/441/NFFN/113EV-56858-E>.

¹⁶¹ Standing Senate Committee on National Finance, “Report of the Committee” 17th Report (Bill C-59) (13 June 2024), online: <sencanada.ca/en/committees/NFFN/Report/133052/44-1>.

¹⁶² *Supra*, note 12.

¹⁶³ Competition Bureau of Canada, “The Deceptive Marketing Practices Digest—Volume 7” (22 July 2024), online: <competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/deceptive-marketing-practices-digest-volume-7>.

¹⁶⁴ *Ibid.* For that last category of claims, the Bureau specified that forward-looking claims should be “factual rather than aspirational”. For instance, businesses should ensure that they have a “concrete, realistic and verifiable plan in place to

accomplish the objective, with interim targets” and “meaningful steps underway to accomplish the plan”.

¹⁶⁵ *Ibid.*

¹⁶⁶ Competition Bureau of Canada, *supra* note 10. The document was published for consultation, which ended on February 28, 2025.

¹⁶⁷ *Ibid.* There are also some additional comments about these tips. For example, with respect to forward-looking claims, the Bureau indicates that “There is a wealth of information available to businesses regarding internationally recognized methodologies related to common claims such as those related to net-zero,” and that “There are a number of different standards to help businesses learn how to meet the challenge of reaching net-zero. Many can offer adequate and proper substantiation in accordance with methodologies that are internationally recognized for supporting such claims,” suggesting that net-zero claims are substantiable under the Act. The Guidelines also give the following example: “To illustrate the scope of paragraph 74.01(1)(b.1), the Bureau gives the example of a Canadian business claiming in marketing materials that it is on its way to achieve net-zero greenhouse gas emissions by 2050. If this firm has “failed to take steps to substantiate its claim in accordance with internationally recognized methodology, and did not develop a concrete plan to identify and mitigate its greenhouse gas emissions”, the Bureau will likely consider there to be a breach of the substantiation requirements.”

¹⁶⁸ For example, the guidelines indicate that the Bureau will not take enforcement action against claims that were made prior to the entry into force of the amendments under the new PSR; and acknowledges the existence of the due diligence defense.

¹⁶⁹ Cambridge Dictionary, “Benefit” (2025), online: <dictionary.cambridge.org/dictionary/english/benefit>.

¹⁷⁰ *Canadian Environmental Protection Act*, 1999, SC 1999, c 33.

¹⁷¹ Our reasoning is similar to the reasoning underlying the regulated conduct defence recognized at paragraph 45(7) of the Act for criminal competitor collaborations. For additional information on the regulated conduct defence, see: Competition Bureau of Canada, “Regulated Conduct” (27 September 2010), online: competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/publications/regulated-conduct.

¹⁷² Competition Bureau of Canada, *supra* note 10.

¹⁷³ *Ibid.*

¹⁷⁴ See for example: Greenhouse Gas Protocol, “Corporate Standard” (2004), online: <ghgprotocol.org/corporate-standard>.

¹⁷⁵ The European Commission’s proposal for substantiation requirements for environmental claims can be helpful to determine what “adequate and proper” substantiation should be in the environmental context. For example, article 3 of the proposal indicates that the “assessment” that traders must conduct to substantiate their claims must “demonstrate that environmental impacts, environmental aspects or environmental performance that are subject to the claim are significant from a life-cycle perspective”; and “demonstrate that the claim is

not equivalent to requirements imposed by law on products within the product group, or traders within the sector”. The proposal also addresses the use of carbon offsets and the use of primary and secondary data for substantiation purposes. See: European Commission, *Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive)*, COM/2023/166 final (2023), online: EUR-Lex <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0166>.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ We follow a contextual interpretation that considers the “grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament,” as formulated in *Rizzo*, *supra* note 57 at para 21.

¹⁷⁹ Cambridge Dictionary, “Methodology” (2025), online: <dictionary.cambridge.org/dictionary/english/methodology>.

¹⁸⁰ Competition Bureau of Canada, *supra* note 10.

¹⁸¹ Cambridge Dictionary, “International” (2025), online: <dictionary.cambridge.org/dictionary/english/international>.

¹⁸² Competition Bureau of Canada, *supra* note 10.

¹⁸³ As noted by the Bureau, EBCs about a business or business activity may not “While these more general claims may not be amenable to ‘testing’ like product performance claims, business should at least be able to substantiate them if challenged.”. Along the same lines, an ISED official indicated during his testimony before the Senate that “testing is turning into something more general, providing evidence. If a company claims to be a green company, then we are getting away from the product and something that can be tested in a lab and moving toward something more generic. We went from using the word “test” to using the word “evidence.”” See: Standing Senate Committee on National Finance, *supra* note 155.

¹⁸⁴ The Guidelines also indicate that “While substantiation does not necessarily involve testing in a lab, businesses should ensure that the methodology selected is suitable for the claim, having regard to all the relevant circumstances.” And the concept of methodology as “A procedure used to determine something.” See: Competition Bureau of Canada, *supra* note 10.

¹⁸⁵ Central Consumer Protection Authority, “The Guidelines for Prevention and Regulation of Greenwashing or Misleading Environmental Claims” (2024), online: <fr.scribd.com/document/782587363/Greenwashing-Guidelines-CCPA>.

¹⁸⁶ *Unfair Competition Act*, 19 December 1986, SR 241 (entered into force 1 March 1988), AS 1988 223 (Status as of 1 January 2025).

¹⁸⁷ In 1994, the U.S. Supreme Court in 1994 in *Daubert v Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) noted that trial judges “must make a preliminary assessment of whether the testimony’s underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error

rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate.” (emphasis added). For a discussion on the treatment of this decision in Canadian law, see: Graham D. Glancy & John M. W. Bradford, “The Admissibility of Expert Evidence in Canada” (2007) 35:3 *Journal of the American Academy of Psychiatry and the Law Online* 350-356, online: <jaapl.org/content/35/3/350>.

¹⁸⁸ For example : Competition Bureau of Canada, “Guidance on the core principles of a credible and effective compliance program” (2024), online: <competition-bureau.canada.ca/sites/default/files/documents/Guidance-core-principles-credible-and-effective-compliance-program-en.pdf>.

¹⁸⁹ Osler, “The dramatic expansion of private enforcement of Canada’s competition laws” (28 June 2024), online: <www.osler.com/en/insights/reports/the-dramatic-expansion-of-private-enforcement-of-canadas-competition-laws/>.

¹⁹⁰ Similar wording can be found in other federal statutes, such as subsection 21(2) *Industrial Design Act*, RSC 1985, c I-9 ; subsection 40(3) of the *Nuclear Safety and Control Act*, SC 1997, c 9, or subsection 78(2) of the *Patent Act*, RSC 1985, c P-4.

¹⁹¹ Competition Bureau of Canada, “Information Bulletin on Private Access to the Competition Tribunal” (4 April 2005), online: <competition-bureau.canada.ca/en/information-bulletin-private-access-competition-tribunal>.

¹⁹² Competition Bureau of Canada, “Bulletin on Private Access to the Competition Tribunal” (20 June 2025), online: <competition-bureau.canada.ca/en/how-we-foster-competition/consultations/bulletin-private-access-competition-tribunal>.

¹⁹³ References also appear at sections 21 (appointment of counsel for inquiries); 33, 74.111 and 100 (consideration of interim injunctions and interim orders *ex parte*). The concept of public interest has also been mentioned by the Tribunal in *The Commissioner of Competition v Parkland Industries Ltd*, 2015 CACT 4, in relation to the Bureau’s enforcement actions: “The Commissioner has no private interest in the present proceedings before the Tribunal. It is the public interest in maintaining and encouraging competition in Canada that he argues will be irreparably harmed in the absence of an interim order.”

¹⁹⁴ Under section 31 the Ontario *Class Proceedings Act*, 1992, SO 1992, c 6, a court may consider the fact that a case involved “a matter of public interest” when exercising its discretion with respect to costs.

¹⁹⁵ *Hughes v Liquor Control Board of Ontario*, 2018 ONSC 4862 at para 72.

¹⁹⁶ *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45. This case involved a legal challenge of provisions of the *Criminal Code* on prostitution services by a former sex worker and an organization representing sex workers.

¹⁹⁷ *Ibid.* As noted by the Court, “At the root of the law of standing is the need to strike a balance “between ensuring access to the courts and preserving judicial resources””.

¹⁹⁸ Aji & Sutikno, *supra* note 35.

¹⁹⁹ Glaeser & Ujhelyi, *supra* note 32.

²⁰⁰ See Appendix D for more details on the timeline of ongoing and recently resolved greenwashing investigations. For example, in both the wet wipes and Shell cases, more than two years elapsed between the filing of the complaint and the conclusion of the Bureau's investigation, which ultimately declined to take any enforcement action in both instances.

²⁰¹ Montgomery, Lyon & Barg, *supra* note 22.

²⁰² E.g. Canadian Association of Physicians for the Environment, "Environmental and health groups welcome new rules to clamp down on greenwashing, as oil sands' Pathways Alliance moves to shut down communications" (20 June 2024), online: <cape.ca/press_release/environmental-and-health-groups-welcome-new-rules-to-clamp-down-on-greenwashing-as-oil-sands-pathways-alliance-moves-to-shut-down-communications/>. Greenpeace Canada, "We all want truth in advertising" (31 July 2024), online: <www.greenpeace.org/canada/en/story/66919/we-all-want-truth-in-advertising/>.

²⁰³ E.g., Kevin Krausert, "Ottawa's anti-greenwashing bill will cripple cleantech innovation" (20 June 2024), online: <www.theglobeandmail.com/business/commentary/article-ottawas-anti-greenwashing-bill-will-cripple-clean-tech-innovation/>; George Addy, "Opinion: Greenwashing justice means guilty (of something) until proven innocent" (21 August 2024) online: <financialpost.com/opinion/greenwashing-justice-guilty-until-proven-innocent>.

²⁰⁴ Jesse Snyder, "RBC drops \$500B sustainable finance program, citing anti-greenwashing law" (30 April 2025), online: <thelogic.co/briefing/rbc-drops-500b-sustainable-finance-program-citing-anti-greenwashing-law/>.

²⁰⁵ Cenovus, "Sustainability reporting" (2025), online: <www.cenovus.com/Sustainability/Reporting>.

²⁰⁶ Irving Oil, "June 2024" (2024), online: <www.irvingoil.com/en-CA/irving-values/sustainability-report-esg>.

²⁰⁷ Competition Bureau of Canada, "Public consultation on *Competition Act's* new greenwashing provisions," online: <competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/public-consultation-competition-acts-new-greenwashing-provisions>.

²⁰⁸ Competition Bureau of Canada, "Written responses to the consultation on the *Competition Act's* new greenwashing provisions," online: <competition-bureau.canada.ca/how-we-foster-competition/consultations/written-responses-consultation-competition-acts-new-green-washing-provisions>. 208 responses were submitted by different stakeholders, including for-profit organizations, professional associations, non-profit organizations, government organizations, and individual citizens. We analyzed the responses to this consultation to determine the main opinions, comments and criticisms of respondents regarding the New Rules.

²⁰⁹ SC, *supra* note 9.

²¹⁰ For example, the Canadian Association of Petroleum Producers' response to the Bureau's consultation expressed that the amendments should be repealed, saying: "The effect of this legislation is to silence the energy industry, and those

that support it, in an effort to clear the field of debate and promote the voices of those most opposed to Canada's energy industry. Implementing a vague law with exceptionally high penalties, with no consultation, and which has an outsized impact on the country's largest industries is both anti-democratic and anti-business." Competition Bureau of Canada, *supra* note 215.

²¹¹ SC, *supra* note 9 at para 17.

²¹² See section 4.2. of this article for a full discussion on this point.

²¹³ SC, *supra* note 9 at para 120.

²¹⁴ *Ibid* at para 72.

²¹⁵ *Ibid* at para 74.

²¹⁶ *Ibid* at para 130.

²¹⁷ E.g. *Finkel v Coast Capital Savings Credit Union*, 2017 BCCA 361 at para 82; *Lin v Airbnb, Inc.*, 2019 FC 1563 at para 57.

²¹⁸ SC, *supra* note 9 at paras 99-102. *Premier Career*, *supra* note 46 at paras 60–63.

²¹⁹ For example, the British Columbia *Business Practices and Consumer Protection Act*, SBC 2004, c 2, sets out a list of representations at section 4 that a supplier could make that would constitute a deceptive act or practice. These representations must occur in relation to a "consumer transaction", defined to mean "(a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a)" (s. 1(1)).

²²⁰ Canadian Securities Administrators, "National Instrument 51-102—Continuous Disclosure Obligations" (2023), online: www.bcsc.bc.ca/-/media/PWS/New-Resources/Securities-Law/Instruments-and-Policies/Policy-5/51102-NI-July-25-2023.pdf?dt=20230720164040.

²²¹ Julien O. Beaulieu, "Greenwashing in the Financial Sector: Time for Transparency and Accountability" (Montréal: Centre québécois du droit de l'environnement, 2025), online: CQDE <cqde.org/wp-content/uploads/2025/04/final_report_financial_greenwashing_cqde.pdf>.

²²² Investors for Paris Compliance, "Greenwashing complaint filed with Alberta Securities Regulator" (20 August 2025), online: <www.investorsforparis.com/greenwashing-complaint-filed-with-alberta-securities-regulator/>; Investors for Paris Compliance, "Securities complaint asks for investigation into sustainable finance disclosures of Canadian banks" (9 January 2024), online: <www.investorsforparis.com/esg-securities-complaint/>; Greenpeace Canada, "Alberta Securities Commission reviewing Greenpeace complaint of inadequate disclosure of climate risk by Kinder Morgan" (9 April 2028), online: <www.greenpeace.org/canada/en/press-release/285/press-release-alberta-securities-commission-reviewing-greenpeace-complaint-of-inadequate-disclosure-of-climate-risk-by-kinder-morgan/>.

²²³ Canadian Securities Administrators, "Climate-related Disclosure Update and CSA Notice and Request for Comment—Proposed National Instrument 51-107 *Disclosure of Climate-related Matters*" (18 October 2021), online: <www.bcsc.

bc.ca/-/media/PWS/New-Resources/Securities-Law/Instruments-and-Policies/Policy-5/51107-CSA-Notice-and-Request-for-Comment-October-18-2021.pdf?dt=20211015220317>.

²²⁴ Canadian Securities Administrators, “CSA updates market on approach to climate-related and diversity-related disclosure projects” (23 April 2025), online: <www.securities-administrators.ca/news/csa-updates-market-on-approach-to-climate-related-and-diversity-related-disclosure-projects/?utm_medium=email&utm_campaign=NR_23042025_ESG-update&utm_source=Envoke-General-Updates&utm_term=CSA-News-Release-%2F-ACVM-Communiqu%C3%A9-de-presse>.

²²⁵ Government of Canada, “2024 Fall Economic Statement” (2024), online: <www.budget.canada.ca/update-miseajour/2024/report-rapport/FES-EEA-2024-en.pdf>.

²²⁶ Securities regulators have a limited ability to take legal action against claims that do not appear in mandatory disclosures, and investors willing to seek compensation for deceptive environmental marketing claims from a reporting issuer face significant evidentiary hurdles. For a discussion of these issues, see: Beaulieu, *supra* note 219.

²²⁷ Spillette, Do & Di Domenico, *supra* note 44 at 90.

²²⁸ *Ibid* at 97.

²²⁹ Indeed, this was the case for the meaning of “adequate and proper test” prior to it being defined by the Tribunal and courts under paragraph (b) and its predecessor.

²³⁰ These limitations include the Bureau’s policy to refuse to provide a written opinion in certain circumstances and on certain topics, and the service standards and filing fees. See: Competition Bureau of Canada, “Competition Bureau Fee and Service Standards Handbook for Written Opinions” (7 April 2020), online: <competition-bureau.canada.ca/en/competition-bureau-fee-and-service-standards-handbook-written-opinions>.

²³¹ SC, *supra* note 9 at para 91.

²³² Canadian Association of Petroleum Producers, “A serious concern for all Canadians: CAPP submission on amendments to the Competition Act” (5 September 2024), online: <www.capp.ca/en/media/a-serious-concern-for-all-canadians-capp-submission-on-amendments-to-the-competition-act/>.

²³³ Millani, “Perception vs. Reality: Behind the Headlines of Canadian ESG Disclosure Trends” (18 November 2025), online: *Millani* <www.millani.ca/_files/ugd/66e92b_2bfce6c250144174a2e2b28a0a383654.pdf>.

²³⁴ Savage & Exner-Pirot, *supra* note 11.

²³⁵ Competition Bureau of Canada, *supra* note 10.

²³⁶ This ISO standard provides guidelines for environmental communication, regardless of a company’s size or industry. See: International Organization for Standardization, “Environmental management—Environmental communication—Guidelines and examples,” ISO 14063:2020 (2020), online: <www.iso.org/standard/72888.html>.

²³⁷ Iris Fairley-Beam & Julien O. Beaulieu, “Canada’s new anti-greenwashing rules

are not as bad as oil and gas industry says” (25 September 2024), online: www.corporateknights.com/category-climate/canadas-new-anti-greenwashing-rules-are-not-as-bad-as-oil-and-gas-industry-says/.

²³⁸ SC, *supra* note 9 at paras 30, 94.

²³⁹ *Ibid* at para 215.

²⁴⁰ e.g., According to Enserva’s consultation response, “The amendments restrict open discussion and transparency around industries’ efforts to reduce emissions, particularly impacting the energy sector.” Competition Bureau of Canada, *supra* note 215.

²⁴¹ *Ibid* at submission by the First Nations LNG Alliance.

²⁴² For instance, respondents Athabasca Oil Corporation, First Nations LNG Alliance and Mining Association Canada. *Ibid*.

²⁴³ For example, Capital Power, Imperial Oil, and NEI Investments note that the amendments could lead to an increase in frivolous and vexatious complaints, which would increase legal costs and administrative burdens for businesses. See: Competition Bureau of Canada, *supra* note 215.

²⁴⁴ SC, *supra* note 9 at paras 85, 227.

²⁴⁵ Mathieu Carbasse, “Énergir bientôt visé par une plainte pour écoblanchiment”, *Le Devoir* (23 January 2025) online: <www.ledevoir.com/economie/835414/energir-bientot-vise-plainte-ecoblanchiment>; Kristen Overmyer, “Complaint Against EverWind Fuels, Inc. for Making Unsubstantiated and False, Green Claims Promoting Ammonia Production from Nova Scotia Renewable Energy”, *Get Green Right* (13 August 2025), online: <static1.squarespace.com/static/668847818902ca73a0ab9fdc/t/68adccbd07fadd36fff61919/1756220605868/EverWind_GreenWashing_Complaint.pdf>. A third complaint was filed against an environmental non-profit by a fossil fuel lobbyist and seven other Canadian residents. According to the complaint, the non-profit would have misleadingly represented a picture from Wyoming as portraying a British Columbia fracking site in a report and on its website. Since the website included a link to raise fund for the non-profit, the complaint alleged that the representations were made for commercial purposes. See: Taylor Noakes, “Oil Advocate Behind Anti-Suzuki Complaint a Nameless ‘BC Resident’ in National Post Story” (15 July 2025), online: <www.desmog.com/2025/07/15/oil-advocate-behind-anti-suzuki-complaint-a-nameless-bc-resident-in-national-post-story/>.

²⁴⁶ For example, in its recent decision in *JAMP Pharma Corporation v Janssen Inc.*, 2024 Comp Trib 8, the Tribunal refused to grant leave to a party to bring an application for a private abuse of dominance action, determining that the party did not meet the necessary requirements for leave. While this decision was made under a different leave rule, it demonstrates that the Tribunal continues to play an active role in denying leave where appropriate. See: Emrys Davis, Emily Kettel & Christina Skinner, “Competition Tribunal Issues First-of-Its-Kind Decision in Private Abuse of Dominance Case Against Major Pharma Manufacturer” (24 January 2025), online: <www.bennettjones.com/Blogs-Section/Competition-Tribunal-Issues-First-of-its-Kind-Decision-in-Private-Abuse-of-Dominance-Case>.

²⁴⁷ The Bureau was required to pay nearly \$13 million in costs after its failed challenge of the Rogers and Shaw merger. See: *Canada (Commissioner of Competition) v Rogers Communications Inc and Shaw Communications Inc*, 2023 Comp Trib 03 at paras 87-89.

²⁴⁸ *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.

²⁴⁹ SC, *supra* note 9 at para 194. For example, the Canadian Credit Union Association recommends “including the principle of proportionality in the new guidance to ensure that small and medium-sized businesses are not discouraged from reporting. This will ensure fairness and address materiality concerns”. Competition Bureau of Canada, *supra* note 215.

²⁵⁰ *Imperial Brush*, *supra* note 79 at para 128.

²⁵¹ Competition Bureau of Canada, *supra* note 10.

²⁵² Government of Canada “Net-Zero Challenge Technical Guide” (October 2025), online: <www.canada.ca/en/services/environment/weather/climatechange/climate-plan/net-zero-emissions-2050/challenge/technical-guide.html>.

This could be addressed by the Bureau in new, more detailed environmental marketing guidelines, which should incorporate expertise from other government departments and agencies on assessing environmental impacts. However, Bureau guidelines are not legally binding and concerns would remain about potential private lawsuits.

²⁵³ See article D.229-106 of the *Code de l’environnement* (France).

²⁵⁴ *Ibid*; *Business and Professions Code* (California), sections 17580 and 17581.

²⁵⁵ See e.g. Direction générale de la concurrence, de la consommation et de la repression des fraudes, “Bilan d’activité 2023—Perspectives 2024” (2024), online: <www.economie.gouv.fr/files/files/directions_services/dgccrf/dgccrf/rapports_activite/2023/bilan_activite%2023%20-%20DGCCRF_2023.pdf?v=1714735626>;

Australian Securities & Investments Commission, “ASIC’s interventions on greenwashing misconduct: 2023-2024” (August 2024), online: <download.asic.gov.au/media/lbygvudn/rep791-published-23-august-2024.pdf>.

²⁵⁶ Inspired and adapted from Nemes *et al.*, *supra* note 39.

²⁵⁷ We say “may” because the Bureau has some discretion regarding the decision to initiate an inquiry, as discussed further below.

²⁵⁸ For example, stakeholders may submit an informal complaint by filling out an online form on the Bureau’s website detailing an alleged violation of the Act. See: Competition Bureau of Canada, “Complaint form” (2025), online: <competition-bureau.canada.ca/en/contact-competition-bureau-canada/complaint-form>.

²⁵⁹ Competition Bureau of Canada, “2024-2025 Annual Plan—Onwards and upwards: Strengthening competition for Canadians” (30 April 2024), online: <competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/2024-2025-annual-plan-onwards-and-upwards-strengthening-competition-canadians>.

²⁶⁰ An inquiry may be initiated whenever the Minister of Industry requires the Bureau to inquire whether a Breach has occurred (or, in the case of Part VI or VII, has or is about to occur). See paragraph 10(1)(c) of the Act.

²⁶¹ *Empire Company Limited v Canada (Attorney General)*, 2024 FC 810 [“Empire”]. Appeal dismissed in *Empire Company Limited v Canada (Attorney General)*, 2025 FCA 34. This case involves an application for judicial review by firms challenging the Commissioner’s decision to initiate an inquiry against them.

²⁶² *Charette v Commissioner of Competition*, 2003 FCA 426. In this case, the appellant had repeatedly submitted information about an alleged violation of the Act to the Bureau, without filing a formal application for an inquiry under section 9. After investigating the matter, the agency concluded that the claims did not warrant a formal inquiry under s.10(1)(b). Following the Bureau’s refusal to open an inquiry, the appellant filed a section 9 application based on the exact same facts that had been submitted to the Bureau previously. The agency refused to open an inquiry, arguing that the Bureau had already investigated the case. The appellant filed an application for *mandamus* to force the opening of an inquiry. In its decision, the Federal Court of Appeal ruled that “the Commissioner is not required to initiate a formal inquiry under paragraph 10(1)(a) into complaints that he has already thoroughly investigated and found not to warrant a formal inquiry under paragraph 10(1)(b)” and that “the purpose behind section 10 of the Act is for the Commissioner to gather information to determine whether there are grounds to either bring a civil case before the Competition Tribunal or present evidence to the Attorney General of Canada that a criminal case should be prosecuted”. The “purposeful” approach adopted by the Court suggests that a court would likely be reluctant to force the Bureau to open an inquiry if the Bureau considers that it does not need to open one to acquire additional evidence.

²⁶³ In *Ashley v Canada (Commissioner of Competition)*, 2006 FC 459, the plaintiffs applied for an order of *mandamus* to force to Bureau to complete an inquiry under s.10, without success.

²⁶⁴ *Cinémas Guzzo Inc. v Canada (Attorney General)*, 2005 FC 691. Decision maintained by the Federal Court of Appeal in *Cinémas Guzzo Inc. v Canada (Attorney General)*, 2006 FCA 160. Application for leave to appeal rejected by the Supreme Court: *Cinémas Guzzo Inc. c. Procureur Général du Canada*, 2006 CanLII 39438.

²⁶⁵ *Cinémas Guzzo Inc. v Canada (Attorney General)*, 2005 FC 691.

²⁶⁶ Similar comments were made by the Federal Court in *Empire*, *supra* note 259: “Ultimately, the Commissioner may decide to discontinue the inquiry, without ever having taken any action that might affect anyone’s legal rights, impose legal obligations on anyone, or cause anyone prejudicial effects: Act, subsection 22(1). This is particularly so given that all inquiries under section 10 of the Act are required to be conducted in private (...).”

²⁶⁷ When no public information exists about the discontinuance of an inquiry, we only provide the date of the filing of the complaint.

²⁶⁸ Based on the latest public communications of the civil society groups who filed the complaints. This may not reflect the status of these complaints.