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Consultation on the Future of Competition Policy in Canada

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Équiterre

Montréal, March 31st, 2023

The Honourable François-Philippe Champagne, P.C., M.P.
Minister of Innovation, Science and Industry
Government of Canada

Re: Consultation on the future of competition policy in Canada

Dear Minister Champagne:

We are a diverse group of organizations from civil society, academia and the private sector writing to provide our perspective and comments on how to ensure that the Competition Act (the Act) fosters the development of a competitive and green economy. We strongly believe that the Act should ensure that firms willing to reduce their environmental impacts and develop greener products can reap the rewards of their investments and empower environmentally and health-conscious consumers in their decision-making.

In Canada and around the world, companies are increasingly engaging on sustainability and climate change, setting net-zero targets, advertising carbon neutral or eco-friendly products, and disclosing climate-related information to investors and consumers. This trend is partly driven by governmental calls to action but also by consumer demand, as an increasing number of Canadian consumers are ready to pay a premium for products with specific environmental attributes.

This change in consumer behaviour holds the potential to drive green innovation, shift production patterns, and incentivize the production of less polluting, healthier products, which are all necessary to transition towards a cleaner, net-zero economy by 2050. Yet for this to be realized, consumers need to have accurate and reliable information about the environmental quality of the products being advertised to them, including the risks and impacts associated with their consumption.

However, empirical evidence suggests that consumers cannot rely on the information communicated by firms about their environmental credentials – a widespread phenomenon called greenwashing. For example, a 2021 study of 81 early adopters of "science-based" net-zero targets showed that almost half of these firms were short of

meeting one or more of their targets[1]. Similarly, a 2022 report by Net Zero Tracker on the status and trends of net-zero target setting indicated that about two-thirds of corporate pledges did not meet minimum procedural standards for target setting[2].

Greenwashing is a major problem for the Canadian economy, as it distorts stakeholders' decisions. For instance, it can lead consumers to purchase more damaging products instead of greener alternatives, slowing down the transition to more responsible choices. Most importantly, greenwashing prevents leading firms from reaping the rewards of their investments in environmental quality, as consumers, investors and other business supporters may choose to engage with alternative firms that falsely advertise themselves as "green", as well as undermine their faith in environmental claims altogether.

Given the market distortions created by greenwashing, the regulation and monitoring of environmental claims to the general public has become a top priority in many jurisdictions, including in the United Kingdom, France, the European Union, Australia, the United States, and California. In Canada, however, there are currently no statutes, regulations or law enforcement guidelines dedicated to regulating environmental claims to the general public. Furthermore, even if the Act generally prohibits false or misleading advertising by firms, it has severe limitations when it comes to dealing with greenwashing[3].

Fortunately, these limitations could all be addressed by a more ambitious and specific regulatory regime. The ongoing review of the Act would be a unique opportunity for Canada to establish a world-leading regulatory scheme to address greenwashing. Canadian businesses need more predictable legal rules, and we must ensure that they do not suffer from weak or unclear greenwashing standards that prevent them from competing with their international peers in the green economy. A revised regime would foster competition for greener goods and services and ensure a well-functioning marketplace where sustainability leaders can reap the rewards of their investments in environmental quality.

[1] Jannick Giesekam, "Science-Based Targets: On Target?" (February 4, 2021), online: Sustainability 13(4). Available at: https://doi.org/10.3390/su13041657.

[2] Net Zero Tracker, "Net Zero Stocktake 2022" (June 2022), online: Net Zero Tracker. Available at: https://ca1-nzt.edcdn.com/@storage/Net-ZeroStocktake-Report-2022.pdf?v=1655074300.

[3] Additional information about these limitations and recommendations on how to address them are provided in the Appendix.

Canada has already shown leadership by developing innovative guidelines for mandatory climate-related financial disclosures by federally regulated financial institutions and by launching one the first national net-zero guidelines as part of the Net-Zero Challenge. It is now time to bridge the gap and ensure that all stakeholders, including consumers, benefit from the same degree of transparency on environmental risks and impacts. Canada needs competitive markets to drive green innovation, and empower consumers to choose less polluting, more resource-efficient and healthier products.

We look forward to discussing this submission further with you at your earliest convenience.

Sincerely,

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Anjali Helferty, Executive Director | Canadian Association of Physicians for the Environment (CAPE)
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Appendix: Questions and Answers

1. What are the current legal framework's main limitations? How could the Act be amended to address these issues?

Here is a list of the main issues with the Act's current deceptive marketing provisions, as well as recommendations to address them. Additional information about these recommendations can be found in the report "Climate-Washing in Québec and Canada: How to Turn the Tide" published by the *Centre québécois du droit de l'environnement*.[4]

1. The Competition Bureau (Bureau) has no explicit mandate to incorporate environmental considerations in its enforcement actions. The consideration of sustainability does not appear in the Act's purpose clause, and the Bureau has no dedicated expert teams to deal with these issues. Furthermore, while the Bureau currently has an obligation to report every year on its law enforcement activities, the agency is not required to disclose whether it has conducted any investigations relating to greenwashing or other environmental considerations.

   Recommendation: The purpose clause of the Act should be amended to refer to the importance of incorporating environmental, health and climate considerations when enforcing the statute. While these changes would not create new powers for the Bureau, they would require that their existing capabilities be deployed in alignment with Canada's environmental goals and commitments. They may also help interpretation issues that may arise by leaning toward the interpretation which benefits environmental protection the most. The Bureau could also be required to disclose in its annual report how its enforcement actions have contributed to the achievement of Canada's environmental and climate commitments[5].

2. The Act does not set clear and specific substantiation standards for environmental claims. While the Act prohibits false or deceptive marketing, it does not specify how environmental claims must be substantiated. As such, firms do not know precisely which environmental claims will be considered false or misleading under the statute, and which methodologies will be considered sufficient to substantiate them. This creates a major source of legal uncertainty and can reduce firms' incentives to invest in environmental quality and advertise their green credentials.

   Recommendation: Regulations should be adopted under the Act to provide more predictability to firms about its application to environmental claims. This would allow firms to clearly understand which standards must be met to make certain

[4] Available here: https://www.cqde.org/wpcontent/uploads/2022/10/Ecoblanchiment_Rapport_Anglais.pdf

[5] For example, the Bureau could report how many greenwashing investigations were conducted in the past year.

claims, and decrease the legal risks associated with green claims. Section 128 of the Act grants large powers to the Governor in Council to make regulations "necessary for carrying out this Act and for the efficient administration thereof." These regulations should prohibit common deceptive practices (including generic environmental claims and unverifiable future performance claims); identify which standards should be used to substantiate specific claims; regulate the characteristics of voluntary carbon offsets; and leverage existing rules and standards, such as the federal carbon accounting rules[6].

3. The Act does not require firms making environmental claims to publicly disclose information to substantiate these claims. The Act currently requires that firms making performance claims (including claims about the environmental attributes of products) should substantiate such claims with adequate and proper tests. However, the nature, content and results of these tests do not need to be shared with the public under the current rules. This prevents consumers from properly monitoring the validity of firms' environmental claims. As the current regime relies on consumer complaints to the Bureau, the fact that consumers cannot obtain access to test methodologies and test results prevents the proper enforcement of the Act. Furthermore, under the current rules, even if a consumer submits a complaint, the materials will only be revealed *to the Bureau* if the agency decides to initiate an investigation – but not necessarily to the public.

   Recommendation: Firms making environmental claims should be required to publicly disclose standardized information on how they substantiated their environmental claims.

4. The Act does not define important terms, which could limit its applicability to certain categories of environmental claims. The Act applies to claims promoting products or "business interests" that are false or misleading in a "material respect". However, these terms are not defined in the Act, which creates uncertainty around

[6] Voluntary carbon offsets are currently unregulated in Canada, although many Canadian firms rely on them as part of their emissions reduction strategies. New environmental claims regulations should require that voluntary carbon offsets comply with the requirements of the compliance carbon market. The *Canadian Greenhouse Gas Offset Credit System Regulations* established under the *Greenhouse Gas Pollution Pricing Act* set out extensive rules on the recognition of emission reduction and removal projects as accepted offset credits. However, these rules only apply to GHG emissions subject to the provincial and federal carbon pricing mechanisms. Under the current rules, firms relying on voluntary carbon markets to achieve carbon neutrality targets do not need to comply with them. While the certification by the state of all voluntary carbon offsets might be overly burdensome, firms should be obligated to abide by the regulations of the compliance market to substantiate their marketing claims. The *Net-Zero Challenge Technical Guide* issued by the Government of Canada formulates a similar recommendation to participants. Thus, claims based upon *voluntary* carbon market offsets would not be subject to the sanctions provided in the *mandatory* carbon pricing regulations, but monitoring for consumer protection could rely on this already-existing set of rules. Not all groups supporting this letter endorse offsets as an effective climate solution or the usefulness of fostering their use by regulating them.

their application to certain types of environmental claims to the public. For example, a court could interpret that claims to promote the environmental virtues of future industrial projects do not promote "business interests", as they do not relate to existing products advertised to consumers[7]. Similarly, a court could consider that some environmental claims are not sufficiently "material" to impact consumers' decision-making, even if they are false or misleading.

Along the same lines, the Act requires that claims relating to the "performance, efficacy, or length of life of a product" be substantiated using adequate and proper tests. However, a narrow interpretation of these terms could exempt some corporate claims from the Act's substantiation requirements on the basis that they are not closely tied to a product's physical characteristics or functionalities[8].

Recommendation: New definitions should be added to the Act to ensure that the deceptive marketing provisions apply to the widest range of environmental claims possible, including corporate claims that may not be tied to the physical properties or functions of products.

5. The Act only applies to voluntary representations by firms. Firms will typically only advertise the positive environmental attributes of their activities, without revealing the corresponding negative effects. In fact, the Act does not force firms to disclose any "negative" environmental information when advertising their products.

   Recommendation: It should be made mandatory for firms to disclose the environmental risks and impacts associated with the production and use of their products[9]. Similar disclosure rules already exist in respect of the health risks associated with drugs and food products under Canada's *Food and Drugs Act* (1985), and tobacco under the Canada's *Tobacco and Vaping Products Act* (1997).

6. There are no enhanced penalties when a contravention to the Act causes environmental damages, and no specific penalties for climate-related disinformation. The effect of a given deceptive practice on the environment is not included as an aggravating factor when determining the penalties awarded for a breach of the Act's deceptive marketing provisions.

[7] See for example: https://www.cqde.org/en/news/gazoduq-project-the-cqde-files-a-complaint-with-competition-bureau-canada-for-false-or-misleading-information/.

[8] For example, a court could consider that a firm's commitment to reach net-zero emissions by 2050 is not directly linked to the performance, efficacy, or length of life of that firm's current products, exempting it from the Act's substantiation rules. Similar arguments could be made about the environmental impacts of products.

[9] Similar rules also exist for the continuous disclosure of financial information pursuant to provincial securities laws.

Recommendation: The fact that deceptive marketing has caused environmental harm should be an additional aggravating factor. Impacts on particularly sensitive components of the environment such as wetlands or legally protected at-risk species should require higher minimum and maximum penalties.

7. There are very limited private rights of action for consumers, especially outside the Province of Québec. Consumers may only recover damages from firms for violations of the criminal deceptive marketing provision of the Act. However, that provision is typically only used in the most egregious cases, as it requires proving that the false or misleading representation was made "knowingly or recklessly". In the Province of Québec, consumers may seek damages for a violation of the administrative deceptive marketing provision of the Act through section 1457 of the *Civil Code of Québec*. However, this remedy is not available in other Canadian provinces.

   Recommendation: The Act should be amended to provide for private access to the Competition Tribunal for violations of its administrative deceptive marketing provisions, which would accelerate the treatment of greenwashing cases brought by the public. Such amendments would be analogous to the 2022 amendments to the Act, which extended the access of private parties to the Competition Tribunal to abuse of dominance cases[10]. The Act could also be amended to allow consumers to recover damages for violations of the Act's administrative deceptive marketing provisions[11].

8. Funds collected from greenwashing penalties are not allocated to climate mitigation and adaption purposes.

   Recommendation: The funds collected following a violation of the Act relating to environmental claims should be credited to the Environmental Damages Fund

[10] Private remedies should exist in parallel to the current adjudication process (i.e., where the Bureau is responsible for investigation and bringing matters before the Competition Tribunal), as legal proceedings can be a costly, burdensome process for consumers. In this context, it is important to preserve the ability of Canadian residents to apply for deceptive marketing inquiries under the Act (the "six-resident" process). This process has been a key lever for public interest groups to bring potential greenwashing cases to the Bureau's attention. Given the Bureau's great reliance on consumer complaints to detect and launch greenwashing investigations, we were surprised by its recent recommendation to put an end to the "six residents" process. Public interest groups invest significative resources in the gathering and processing of information to facilitate the Bureau's work, and the "six resident" process is a key tool to communicate these findings to the Bureau's agents.

[11] As private access to the Competition Tribunal would not allow plaintiffs to seek compensatory damages for violations of s.74.01 of the Act, consumers may have limited incentives to privately seek remedies before the Competition Tribunal.

(EDF) and made available for Indigenous-led organizations to use for climate mitigation and adaptation in Canada[12].

2. Are there constitutional constraints that could prevent the federal government from implementing these solutions?

No. First, the federal government and the provinces' shared jurisdiction over consumer protection has been clearly established by the courts[13]. While some litigants have challenged federal jurisdiction over consumer protection before the courts, the Supreme Court confirmed its validity in *General Motors of Canada Ltd. v. City National Leasing* while also recognizing the provinces' concomitant authority in these matters[14]. Second, the reforms proposed above are unlikely to raise constitutional challenges under the Canadian *Charter of Rights and Freedoms*. Even if provisions inspired by the recommendations were challenged on freedom of expression grounds under section 2(b) of the *Charter*, they would likely be justified in a free and democratic society under section 1 of the *Charter* if they were drafted with enough specificity[15].

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[12] The EDF is a specified-purpose account administered by Environment and Climate Change Canada to direct funds received from fines, court orders, and voluntary payments to projects relating to nature restoration, environmental quality improvement, research and development, and education and awareness. Fines and penalties are automatically directed to the EDF under fourteen federal legislative clauses, including the *Fisheries Act* and the *Canadian Environmental Protection Act*.

[13] In the absence of explicit jurisdictional attribution over deceptive commercial practices, the distribution of legislative powers provided by the Constitution Act, 1867 has led to the adoption of both federal and provincial consumer protection legislation. On the one hand, the federal Parliament has relied on its powers to legislate on the "Regulation of Trade and Commerce" and "Criminal Law" to adopt the Competition Act, which includes various civil and criminal provisions intended to promote the efficiency of Canadian markets. On the other hand, the provinces have relied on their exclusive jurisdiction over "Property and Civil Rights" to enact provincial consumer protection laws, such as Québec's Consumer Protection Act. See: Louis-Philippe Lampron, "L'encadrement juridique de la publicité écologique fausse ou trompeuse au Canada : une nécessité pour la réalisation du potentiel de la consommation écologique?" (2005), online: R.D.U.S. (35) . Available here: https://canlii.ca/t/2s3h.

[14] As indicated by the Supreme Court of Canada in *General Motors of Canada Ltd. v. City National Leasing*, 1989 CanLII 133 (SCC): "The [predecessor of the Competition Act – the "Act"] is geared to eliminating activities that reduce competition in the market-place and embodies a complex, well integrated scheme of economic regulation to achieve that end. (…) The Act is clearly concerned with the regulation of trade in general, rather than with the regulation of a particular industry or commodity. (…) The Act is of national scope aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises. The provinces jointly or severally would be constitutionally incapable of passing this legislation. Finally, the failure to include one or more provinces or localities would jeopardize successful operation of the legislation in other parts of the country. (…) Competition, however, is not a single matter and the provinces may deal with it in the exercise of their legislative powers in such fields as consumer protection, labour relations and marketing."

[15] We refer the reader to the decisions *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199; *Irwin Toy v Quebec (Attorney General)*, [1989] 1 S.C.R. 927; and *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII), [2007] 2 SCR 610. For a summary of these decisions and their implactions for the regulation of deceptive marketing, see: Barbara Von Tigerstrom & Tristan

3. Has there been developments in other jurisdictions?

Yes. Some jurisdictions have established mandatory disclosure rules, such as France, and California. Under these rules, companies meeting certain criteria have to disclose information set by regulation. For example, in France, the Environment Code was updated last summer to impose disclosure requirements on advertisers making carbon neutrality claims[16]. Under the new rules, advertisers must publicly disclose information about their products and services' GHG emissions, including the quantity of direct and indirect carbon emissions and a description of the carbon offset mechanisms used. Similarly, California requires that firms that advertise consumer goods as not harmful to or beneficial to the natural environment should keep in written form supporting information and documentation, which must be supplied to the public upon request[17].

Other jurisdictions are contemplating banning certain marketing claims unless a recognized certification scheme applies to them. For example, the European Union is currently contemplating an update of its Unfair Commercial Practices directive, which would ban generic environmental marketing claims unless there is an officially recognised eco-labelling scheme applicable to the claim[18]. Examples of generic claims listed in the directive include using the terms "environmentally friendly", "green", "carbon friendly", "carbon neutral", "carbon positive", "climate neutral" and "energy efficient". The European Union also recently released a proposal for a Green Claims directive that would set out how firms shall substantiate and communicate different types of environmental claims[19].

Finally, some jurisdictions have published guidance on how their current legal framework applies to environmental claims (including the United Kingdom[20], Australia[21], and the United States[22]). For instance, the United Kingdom's Competition and Markets Authority recently issued new "green" marketing claims guidelines.

Culham, "Food Labelling for Healthier Eating: Is Front-of-Package Labelling the Answer" (2009) 33:1 Man LJ 89.

[16] Available here: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043956924#:~:text=LOI%20n%C2%B0%202021%2D1104,ses%20effets%20(1)%20%2D%20L%C3%A9gifrance&text=l'Union%20Europ%C3%A9enne-,LOI%20n%C2%B0%202021%2D1104%20du%2022%20ao%C3%BBt%202021%20portant,renforcement%20de%20la%20r%C3%A9silience%20

[17] See CA Bus & Prof Code § 17580(b) (2020).

[18] Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0143&qid=1649327162410.

[19] Available here: https://environment.ec.europa.eu/publications/proposal-directive-green-claims_en.

[20] Available here: https://greenclaims.campaign.gov.uk/.

[21] Available here: https://www.accc.gov.au/system/files/Green%20marketing%20and%20the%20ACL.pdf.

[22] Available here: https://www.ftc.gov/news-events/topics/truth-advertising/green-guides.

4. Is it really the role of competition policy to deal with these matters?

Yes. A competitive and efficient marketplace should allow firms to reap the rewards of their investments in environmental quality and empower consumers to make informed consumption decisions. As such, the monitoring of environmental claims is aligned with the Bureau's current mandate to administer and enforce the Act, and the Bureau has launched several investigations into allegedly deceptive environmental claims over the past years, including in the banking, oil and gas, and forestry sectors[23].

However, the Bureau does need additional powers and duties to properly monitor environmental claims. An expanded role for the Bureau and a revised purpose clause in the Act would be aligned with the recommendations by Canada's Net-Zero Advisory Body, who recently recommended that Canada "direct that all federal agencies, departments, and Crown corporations publicly articulate their role in helping Canada achieve net-zero emissions. The Government of Canada should then empower these organizations to play a more ambitious role by formalizing net-zero objectives in their corporate mandates, changing mandates if required, ensuring that executive compensation is meaningfully and transparently linked to climate mitigation performance, and applying common reporting standards." [emphasis added][24]

5. Will the Bureau have the capacity to implement our proposals?

Currently, the Bureau does not have expert teams dedicated exclusively to the monitoring of environmental claims. As such, the establishment of a group dedicated to this category of claims would facilitate the implementation of our proposals. This would also be consistent with the recommendation by Canada's Net-Zero Advisory Body that all "Federal departments, agencies, and Crown corporations should increase their expertise and capacity related to data, analyses, and interpretations of net-zero modelling activities"[25]. Furthermore, the creation of a new team to deal with emerging policy issues would not be new for the Bureau: a few years ago, the agency created the Digital Enforcement and Intelligence Branch, a team of experts focused on enforcing the Act in the digital economy. A similar expert group could be created to monitor environmental claims by firms. There should also be enhanced collaboration between the Bureau and environmental departments and agencies. Such collaboration and exchange of information is already foreseen in the Act (s.29).

[23] Besides, we note that expanding the Act to address emerging, sector-specific policy issues would not be unusual. For instance, some of the most recent amendments to the Act were aimed at addressing labor and privacy considerations, which were not traditionally within the realm of competition policy.

[24] Available here: First annual report to the Minister of Environment and Climate Change - Compete and succeed in a net-zerofuture - Canada.ca.

[25] Idem.

6. What is so special about greenwashing for it to require a specific legislative regime?

As any form of deceptive marketing, greenwashing impacts social welfare by preventing consumers from making informed decisions, and by preventing innovating firms from reaping the rewards of their investments in environmental quality. However, greenwashing first differs from other forms of deceptive marketing in that it often involves the advertising of highly technical characteristics that cannot be directly verified by individual consumers, which makes them particularly vulnerable to greenwashing. For example, a consumer may not be able to distinguish a carbon neutral banana from a carbon intensive banana, as the two products are likely to have identical physical characteristics.

A second difference is that greenwashing creates distortions that may increase the consumption of polluting goods and generate environmental externalities. If the social costs of these externalities (such as the effects of pollution on health) are not passed on to consumers (e.g., through environmental taxes such as carbon pricing), then greenwashing impacts social welfare through an additional channel.

A third difference is that there is currently a dizzying number of private standards and target-setting methodologies used by firms to communicate their environmental claims. These different initiatives all come with different (and often conflicting) criteria that limit the ability of consumers to adequately distinguish different products and firms. The adoption of regulations under the Act on the substantiation and formulation of environmental claims would reduce the number of standards and methodologies that can be used by firms and bring consistency in environmental claims.

7. The consultation to reform the Act focuses on competition in the digital markets. How does digital marketing contribute to greenwashing?

Digital marketing allows firms to spread their environmental claims on a both wider and more targeted basis than before, which can complexify the task of law enforcement agencies. As noted by Harvard researcher Geoffrey Supran, digital tools allow firms to "[upgrade] their tactics, moving from print advertorials to digital advertorials and microtargeted social media."[26] This means that it will be increasingly difficult for the Bureau to proactively monitor environmental claims, as some ads may only be available in specific areas to consumers with a targeted profile. This changing landscape supports the need for more comprehensive information disclosures to consumers to facilitate the reporting of cases to the Bureau.

[26] Available here: https://news.harvard.edu/gazette/story/2021/09/oil-companies-discourage-climate-action-study-says/.