BUSINESS COUNCIL OF ALBERTA

Competition Bureau
ATTN: Commissioner Matthew Boswell
Deceptive Marketing Practices Directorate
50 Victoria Street
Gatineau, QC, K1A 0C9

September 27, 2024

Dear Commissioner Boswell,

We are pleased to contribute to the Competition Bureau's (hereafter, "the Bureau") public consultation process on the recently added greenwashing provisions in the *Competition Act* (hereafter, "the *Act*").

The Business Council of Alberta ("BCA") is a non-partisan, non-profit organization composed of the chief executives and leading entrepreneurs of Alberta's largest enterprises. We are dedicated to building a better and more prosperous Alberta within a strong Canada.

BCA and its members strongly support the ideals of accuracy and transparency, and our members work tirelessly to uphold these values in all that they do – including when making public statements about environmental benefits of products, services, and business activities.

However, BCA has serious reservations about the new deceptive marketing practices provisions added to the *Act* through Bill C-59. Frankly, last-minute amendments to an omnibus budget implementation bill are not the proper vehicle for ensuring that legislation is properly considered and debated with all affected stakeholders. Moreover, shifting the task of interpreting and enforcing these poorly worded and vague amendments onto the Competition Bureau is entirely unfair to the Bureau. We sympathize with the Bureau for the unenviable task at hand.

We believe that these new provisions are ill-defined, poorly constructed, and lack consideration of the unintended consequences that will likely result. Furthermore, these efforts are being undertaken while securities regulators and standard-setting bodies like the Canadian Sustainability Standards Board are undergoing parallel processes to establish their own rules and guidelines for communicating environmental claims. How these separate initiatives will layer and interact is creating additional uncertainty for businesses.

That said, the law is the law. Despite our overarching reservations, the Bureau's consultation process is underway. Accordingly, our official submission (see "Appendix" attached to this letter) outlines our macro concerns with the legislation and provides comments for the Bureau's consideration within its public consultation framework. In addition, since some of our comments go beyond the Bureau's consultation and mandate scope, we have copied all relevant ministries, officials, and parliamentarians on this note. None of this should be construed as support for the new provisions of the *Act*.

In our view, it is outside of the Bureau's core competency to be the arbiter of the appropriate "internationally recognized methodologies" that should apply to any specific environmental representation. As such, we believe that the Bureau should provide a framework for "adequate and proper" substantiation of "internationally recognized methodologies" where existing federal and provincial rules and requirements, as well as ongoing efforts to release new standards such as those produced by securities regulators and groups like the Canadian Sustainability Standards Board (CSSB) and the Canadian Standards Association Group (CSA), are deemed to be in full compliance with enforcement under the new provisions of the *Act*, and are, in fact, given preference over other international methodologies.

That said, our chief recommendation, superseding any technical guidance we provide to the Bureau in this consultation process, is that crafting the Bureau's framework should be methodical, involve meaningful and iterative consultation with industry, and provide businesses adequate time to adjust to changes and to apply them to past public communications as necessary. As such, enforcement should not occur until all the following consultative steps take place:

- The Bureau, after consulting with Canadian securities regulators and standard-setting bodies like the CSA and others, develops a framework for "internationally recognized methodologies" that recognizes current Canadian standards that businesses are using for securities compliance and regulatory reporting;
- Meaningful engagement with industry is conducted prior to the publication of this draft guidance;
- Draft guidance is provided to businesses on how to comply with the new amendments to the *Act* and how the amendments will be implemented and adjudicated;
- Industry is provided another period of feedback on this draft guidance;
- Amendments are made to the guidance in consideration of industry feedback; and
- A 6–12-month period is given for companies to amend their work/material in response to the final guidance.

As a final note, even if these steps are taken, they would still not eliminate the uncertainty businesses now face. The impacts of these provisions may not become fully clear until they've been tested by the Competition Tribunal ("the Tribunal"). This process could take years and does not help businesses communicate about their environmental performance in the interim, nor does it provide comfort that, even with more robust guidance, this law will be interpreted such that businesses' concerns are reflected.

Thank you for the opportunity to provide input in this process. We would welcome the opportunity to meet and discuss the material in this submission.

Sincerely,

**Adam Legge**
President

CC: Hon. François-Philippe Champagne, P.C., M.P., Minister of Innovation, Science and Industry
Hon. Chrystia Freeland, P.C., M.P., Deputy Prime Minister and Minister of Finance
John Hannaford, Clerk of the Privy Council and Secretary to the Cabinet
Francis Bilodeau, Acting Deputy Minister, Innovation, Science and Economic Development
Chris Forbes, Deputy Minister, Department of Finance
Samir Chhabra, Director General, Marketplace Framework Policy, Innovation, Science and Economic Development
Martin Simard, Senior Director, Corporate, Insolvency and Competition Policy, Innovation, Science and Economic Development
Ian Foucher, Chief of Staff, Ministry of Innovation, Science and Economic Development
Andrew Bevan, Chief of Staff to the Deputy Prime Minister and Minister of Finance
Bud Sambasivam, Director of Policy, Office of the Minister of Finance

BUSINESS COUNCIL OF ALBERTA

# **Appendix:** Official submission of the Business Council of Alberta in response to the public consultation on the *Competition Act*'s new greenwashing provisions

On 20 June 2024, clauses 74.01 (1) (b.1) and (b.2) were added to the *Competition Act*'s (hereafter, "the *Act*") deceptive marketing practices provisions, requiring businesses to substantiate certain claims regarding a product or business activity's environmental benefits. The Competition Bureau (the "Bureau") is undergoing a public consultation process to help inform the guidance it will provide concerning enforcement of these provisions.

To that end, we provide commentary on the questions raised by the Bureau's public consultation. This commentary, including the guidance and parameters we suggest to the Bureau, is not to be construed as support for the introduction or workability of these new provisions.

Furthermore, businesses' concerns with changes to the *Act* are not limited to those raised by the Bureau's consultation questions. Other changes to the *Act*—namely, the creation of new rights of private access to the Competition Tribunal (the "Tribunal") based on a "public interest" leave test—also interact with the new deceptive marketing practices provisions and create significant business uncertainty and a host of unintended consequences. Though not within the Bureau's legislated authority, these concerns permeate the broader discussion and must be highlighted.

Moreover, these must all be considered within the broader context of the business community's overarching macro concerns with the *Act* as drafted. We turn first to this important context.

## Macro Concerns:

While the Business Council of Alberta ("BCA") has numerous macro concerns with the new provisions and their enforcement, the following concerns include those that are not covered under one of the Bureau's public consultation questions:

***Lack of Clarity around Scope:*** *Aside from a broad desire for truthful environmental claims, the breadth of application is unclear*

These new provisions were added to an omnibus Budget implementation bill at the eleventh hour. Accordingly, Canada's elected officials chose not to, or did not have the opportunity to, consider the full breadth of the possible interpretations, applications or consequences of these new provisions. There was neither a lengthy study in Committee, nor was there any public consultation with the impacted business community.

As such, BCA recognizes that the Bureau has been put in the unenviable position of interpreting how to enforce expanded deceptive marketing practices provisions that rely on undefined terms—and, in doing so, must formulate policy positions on a breadth of matters that BCA is not convinced elected officials have themselves fully considered. Since the business community does not have a clear indication of whether and how the government is considering the full breadth and scope of the possible impacts of the new provisions, we don't have a foundation from which to provide comments on this public consultation.

That said, the clear policy intent of the provisions is to discourage companies from making blatant environmental misrepresentations to the benefit of the business. This seems simple, but the breadth and scope of the new provisions open up well-meaning companies to frivolous and vexatious claims because the meaning, purpose, and scope of terms such as "internationally recognized methodology" are not clear. There are more unanswered questions about these new provisions than there is policy substance from which to provide constructive feedback.

***Uneven Standards:*** *Businesses face a higher bar for truth telling than governments and non-profits*

Alberta businesses agree with the value of providing accurate and transparent information to the public. Truthful and accurate reporting, however, is seemingly not a value that governments want to enforce on themselves to the same extent, nor are non-governmental organizations (NGO) held to the same standard as businesses.

Governments at all levels regularly spend public finances on products, businesses, or other activities meant to produce environmental benefits, and happily communicate publicly about the benefits of these projects. Despite that these claims are often unsubstantiated and often miss their aspirational targets (or the environmental benefits fail to materialize at all), governments tend to have no problem publishing their unsubstantiated claims for their electoral benefit. They are not held to account for the accuracy of their claims to nearly the same extent as businesses.

While NGOs are captured in the *Act*'s definition of a "business" insofar as their activities are meant to "[raise] funds for charitable or other non-profit purposes," many engage in activities that call into question businesses' environmental claims or make their own environmental claims that can avoid the requirement of being adequately and properly substantiated. This creates a serious imbalance of standards for accuracy and truth-telling, especially since the line between an NGO making claims to raise funds versus their regular public communications may be difficult to ascertain.

## Considerations for the Bureau's Public Consultation:

The following comments to the Bureau's provided consultation questions are meant to bring attention to the challenges that businesses will face if the new provisions, which hinge upon the interpretation of key undefined terms, are enforced in ways that do not consider many potential unintended consequences.

For the sake of simplicity, and because the Bureau's sets of questions for provisions 74.01(1) (b.1) and (b.2) have so much overlap, the comments below address key themes applicable across both sets of questions despite being categorized under the provided set of questions for (b.2).

### **Question 1:** What kinds of claims about environmental benefits are commonly made in the marketplace about businesses or business activities? Why are these claims more common than others?

The scope of the legislation and the general reference to "claims about environmental benefits or business activities" indicates that the legislation is to apply broadly. As such, we must acknowledge that businesses make environmental claims across many platforms, by many different people, for various reasons, according to many different regulatory requirements, and across many different jurisdictions.

Statements about environmental performance can be mandatory or voluntary. For example, Canada already has many different reporting requirements including the prescriptive reporting mandated by securities regulators; federal and provincial permitting/licensing and impact assessment regimes; statements in public and private sector requests for proposals (RFPs); and more. And what's more, businesses operating or listed in multiple jurisdictions will be required to—or at least be able to—make different types of environmental claims according to different legal standards and frameworks.

Concerning voluntary reporting, businesses produce all kinds of communications products regarding their environmental performance—from extensive sustainability reports tracking year-over-year progress on company environmental targets, to short statements on social media. And what's more, a wide range of individuals at a company may regularly comment on their business's environmental performance on any number of platforms—and often in an informal manner and without direct oversight from corporate head offices and legal counsel. For example, a field worker or a communications specialist can post on LinkedIn on their own time about their pride in the environmental impact they're making, or hope to make, at work.

These voluntary and mandatory environmental claims can be about a near-infinite number of distinct and nuanced topics, and often about matters where the environmental science is evolving. Topics could include greenhouse gas emissions performance on Scope 1, 2, or 3 emissions; effluent or other pollutant releases; environmental reclamation efforts; biodiversity impacts; species at risk protections; climate change resiliency efforts; and much more.

For each of the nearly endless categories of environmental claims that can be made across a growing number of mandatory and voluntary mediums by any number of individuals, there may be several ways of measuring progress or improvement about the topic at hand. For example, a company could talk about restoring a wetland, or it could talk about how new business practices will reduce the amount of wetland impacted. Similarly, a business could talk about how they are reducing their total emissions, or they could talk about how they are reducing their domestic emissions intensity, or how their exports reduce the emissions of their customers.

In short, the near infinite permutations of the environmental claims that businesses and their employees are making that could be captured under this law raise many pressing questions, including: Who is liable for making a claim—the company or the employee? Does liability change depending on the position of the employee making the claim or the medium on which it is made? Does it matter if a business is required to make a claim under existing laws in Canada or elsewhere? What if a claim is required to be substantiated differently in another jurisdiction? Are companies allowed to discuss environmental performance aspirations if the ability to reach performance targets depends on factors beyond a business's reasonable foresight (e.g., federal regulatory approvals)? Does a business have to verify the environmental claims of companies providing them materials or services, and on what basis?

### Question 2: Are there certain types of claims about the environmental benefits of businesses or business activities that are less likely to be based on "adequate and proper substantiation in accordance with internationally recognized methodology"? Is there something about those types of claims that makes them harder to substantiate?

Most importantly, this question cannot be properly answered unless clear criteria are established regarding what constitutes an "internationally recognized methodology". The criteria must be sufficiently broad so as to cover the various types of claims businesses make, and also not conflict with compliance requirements under other federal and provincial regulatory frameworks. This is discussed in more detail in our answer to question 3 below.

Nevertheless, there are several types of claims about the environmental benefits of business or business activities that are, by their nature, more challenging to substantiate than others. Some of these are summarized, below.

***Forward-looking Claims:*** *Considerations for, and potential unintended consequences of, substantiating future environmental targets*

The time horizon of a claim can complicate how it is substantiated. A business can make claims about environmental benefits resulting from existing practices or products, or it can make forward-looking claims based on strategic targets and aspirations to achieve environmental goals along a multi-year or decades-long timeline (e.g., aspiring to reach net-zero emissions by 2050).

BCA recognizes that the Bureau published a "Deceptive Marketing Practices Digest – Volume 7" Bulletin last July, which advises businesses against making aspirational forward-looking environmental claims. And if they were to do so, the Bureau suggests businesses should:

- Have a clear understanding of what needs to be done to achieve what is being claimed;
- Make sure to have a concrete, realistic and verifiable plan in place to accomplish the objective, with interim targets; and
- Be sure there are meaningful steps underway to accomplish the plan.

However, the fact that the future cannot be known does not mean that striving toward an environmental target, communicating the plan to achieve it, and taking risks in making unproven investments toward that end ought to be avoided or discouraged. In fact, by definition, innovation requires establishing a future aspirational target, developing a plan, establishing a timeline, and risking capital to achieve it—even if results do not always meet expectations.

We feel that the Bureau's guidance within the above noted Digest – Volume 7 lacks an understanding of the realities facing companies who wish to innovate and deploy capital to do so. Specifically, the ever-evolving and layered federal policy frameworks around resource sector activity, and a highly uncertain and unpredictable federal regulatory and permitting regime, make it virtually impossible to have a "concrete, realistic and verifiable plan." It is unfortunate that the Bureau is discouraging companies from making aspirational claims about the future when it is highly likely that it is federal processes and policies that would put companies at risk of penalty due to this recent amendment.

The same applies for innovating toward environmentally beneficial business practices. If a business plans to develop innovative technological solutions to improve its environmental performance, it will have to risk investing capital in those solutions that may or may not produce the targeted results over the anticipated time horizon. As such, forward-looking claims, or claims that communicate business aspirations and investment plans in unproven technologies, for example, come with the obvious challenge that their veracity cannot be determined until the time horizon has passed, and there are any number of scenarios—economic push-pull factors, government policy changes, lengthy delays by government in regulatory or permitting approvals, business strategy adjustments, technological developments or failures, and more—that cannot be anticipated at the time of making a claim.

Furthermore, if Canada is to meet its ambitious climate targets, businesses will need to attract capital in order to develop those innovations or to invest in high-risk emissions reduction technologies. Many of these (often multidecade) investment plans will require a favourable policy environment, the ability to build projects quickly, and economic conditions suitable for deploying billions of dollars. If there is a risk that these conditions, which are often outside of a business's ability to control, do not come to pass, businesses may be forced to abandon environmental aspirations altogether. If this is the case, Canada will cease to be a competitive jurisdiction for attracting the capital needed to achieve national climate goals.

For these reasons, when considering whether to take enforcement action regarding forward looking environmental claims (like multi-decade plans to achieve net-zero emissions), the Bureau should consider the efforts that were made to substantiate the claims at the time the claims were made. This should include considerations of whether claims were made in good faith; and under realistic assumptions about the economy, the assumed pace of technological advancement, and the unfolding policy and regulatory environment. The Bureau should not retroactively determine that a claim is deceptive if unforeseeable or unanticipated circumstances make achieving a target unattainable.

***Cross-jurisdiction Compliance:***

Businesses often operate across multiple jurisdictions both within Canada and internationally. Substantiating environmental claims or performance may look different in one jurisdiction versus the next depending on the laws in place. Regardless, these claims are often made through publicly accessible documents. This creates a dilemma: If a business must report in another jurisdiction according to those standards, are they creating a legal risk in Canada? And if so, is it worth reporting and/or operating in that jurisdiction? Or is it better to stop reporting (or stop reporting in a way that keeps the business competitive in that jurisdiction) or cease operating altogether? There are no good options. As such, the Bureau should address how it intends to proceed in circumstances where reporting standards or requirements within other jurisdictions or regulatory regimes do not align with the provisions of the *Act*.

### **Question 3:** What internationally recognized methodologies should the Bureau consider when evaluating whether claims about the environmental benefits of the business or business activities have been "adequately and properly substantiated"? Are there limitations to these methodologies that the Bureau should be aware of?

Defining the boundaries for what the Bureau accepts as an "internationally recognized methodology" is at the heart of much of the uncertainty created by this legislation. BCA believes that a prescriptive definition is not only folly, but also potentially places businesses at risk of becoming offside with global market trends in voluntary ESG reporting, and mandatory reporting schemes through securities regulators or accounting standards, thereby impacting access to capital. There are several reasons we believe this to be the case:

First, it is impossible to prescriptively define "internationally recognized methodology" because, as already discussed, there is a near-infinite number of environmental claims about products and business activities that can be made. There is no one standard that can apply to every type of public claim, and there are claims that are exceptionally difficult to measure or have no universally recognized standards.

Second, global convergence on the substantiation and reporting methodologies of environmental claims is rare—and even for the narrow environmental topics where convergence is occurring, the process is still underway and is often market-driven. Access to environmentally conscious capital requires answering investor questions through the methodologies they request. If the enforcement of this legislation places Canadian businesses out-of-step with changes in market-based reporting requests, access to capital to advance environmental progress in Canada will be stifled and progress will halt.

Third, environmental science is constantly evolving and improving. Methodologies for quantifying environmental impacts, and the technologies used to measure them, are rarely static. As technologies change and methods improve, so does a business's ability to report accurately. Businesses should not be held responsible for reporting according to standards that didn't exist at the time a claim was made.

Fourth, when governments are involved in establishing rules and standards, the tendency is for jurisdictions to develop regulations and reporting standards reflecting their own industrial makeup. For instance, service- or manufacturing-based economies will often have different reporting and regulatory standards than extractive resource-based economies. In other words, being prescriptive about an international standard that must be followed may not align at all with methodologies that work best for Canada and its many regions and industries.

Fifth, Canada already has a host of world-leading laws and guidance regulating matters of environmental reporting and deceptive marketing practices, including the existing general deceptive marketing practices provisions of the *Act*. BCA believes that lawmakers have forged ahead with changes to the *Act* without considering their interplay with existing and forthcoming disclosure rules/standards. With this new law, there will be overlap with existing financial disclosure laws (governed by securities commissions); rules governing public RFPs; and federal and provincial environmental reporting laws. Laws in these areas have, or are, developing/changing at a rapid pace. For example, the Canadian Sustainability Standards Board (CSSB) is currently undergoing a consultation process parallel to this one to determine standards for climate- and sustainability-related disclosures.

We do not believe that the Bureau has the core competencies needed to determine whether a specific "internationally recognized methodology" is appropriate or valid in assessing a specific environmental claim. For that reason, we believe it should, rather, develop a broad framework which considers a wide range of established standards—with special deference for those used by the federal and provincial governments—to be in full compliance with the *Act.* New standards by organizations like provincial securities regulators, the CSSB and the Canadian Standards Association (CSA) Group can be incorporated into the framework as they are finalized.

**Question 4:** What other factors should the Bureau take into consideration when it evaluates whether claims about the environmental benefits of businesses or business activities are based on "adequate and proper substantiation in accordance with internationally recognized methodology"?

*A failure to achieve an environmental claim does not mean the claim was made to deceive:*

As noted earlier, businesses sometimes make environmental claims, especially forward-looking or aspirational ones, that may end up not meeting expectations—often for reasons outside of their own control. As long as a claim is made in good faith, with realistic assumptions about the economy, the known state of technology, and the unfolding policy and regulatory environment (and other reasonable, available assumptions about the future), a business should not be liable for the inability to meet their aspirations.

*One-size-fits-all methodologies may not make sense for specific types of claims:*

As there are so many different types of environmental claims, and even similar businesses often have unique operations, processes, and facilities, the technologies and the methodologies required or available to measure and validate specific environmental claims will differ. Businesses need to have discretion in their ability to determine what methods are best suited to their needs, provided they are reasonable and accurate. In such circumstances, neither the Bureau nor the Tribunal should be substituting its own judgment for that of the business.

*Substantiation of claims should be judged on their own merits, not on the normative merits as determined by another party:*

By making a claim about environmental performance, businesses are making self-contained statements that ought to be judged on their own merit, and not by the value assessments of another party. For example, a factory may reduce its emissions per unit of output while also increasing output enough to increase its overall emissions. In this case, if a business substantiates that it has reduced its emissions intensity, it should not be liable for increasing its absolute emissions. While a third party may believe that it is better for the environment to decrease absolute emissions, the claim's accuracy should be judged on its own benchmark – i.e., a decrease in emissions intensity.

**Question 5:** What challenges may businesses and advertisers face when complying with this new provision of the law?

Guidance on the enforcement of the new provisions of the *Act* should consider how to mitigate the following potential unintended consequences:

*Impact on capital formation, risk-taking, and good-faith environmental progress:*

The lack of certainty about the enforcement of these new provisions, and in particular the potential company time, effort, and resources that may be consumed by addressing frivolous private litigation applications (more on these applications in the "Private litigation and the decision-making processes of the Tribunal" section below) has the perverse incentive of discouraging both voluntary disclosure and capital investment in environmental improvements for environmentally progressive companies.

Implementing environment, social, and governance (ESG) voluntary disclosure best practices can be a competitive advantage when seeking capital investment. In the global competition to secure scarce capital, financiers are increasingly requiring companies to voluntarily disclose their ESG initiatives. Savvy companies are working to align their business strategies and ESG reporting with existing and emerging best practices and according to the forms and structures requested by ESG interested investors.

Companies with good voluntary disclosure practices that align with the information requests of investors, and demonstrable sustainability excellence, will have access to a larger pool of available capital. However, there is significant risk that if the enforcement of the *Act* does not align with existing and emerging market trends in the ESG reporting space, it may limit access to ESG-aligned investment in Canadian companies versus international competitors.

Companies are already making decisions about information they have publicly reported, what they want to continue publicly reporting, and whether pursuing environmental improvements to their business practices are worth the costs—and they will continue making these decisions until the risks tied to this legislation dissipate. Without accruing benefits from marketing incremental progress on environmental actions and future benefits of planned investments, the ability of the corporate sector to attract capital to make these investments will become increasingly challenging and difficult, to the detriment of all Canadians and the environment.

As such, while the intent of the new provisions of the *Act* is to reduce deceptive claims about environmental performance and benefits, the unintended consequence may be to significantly reduce private sector investment in environmentally beneficial activities altogether—especially for businesses seeking to deploy capital into innovative technologies that carry a risk of underperformance once deployed. Innovation requires risking capital on technologies that may or may not pan out as anticipated.

To justify the cost and resources necessary for innovation, companies must be able to make forward looking statements about the potential benefits of nascent technologies to their investors, so long as claims are made in good faith, with realistic assumptions about the economy, the known state of technology, and the unfolding policy and regulatory environment (and other reasonable, available assumptions about the future). There is inherent risk in deploying capital to innovate. If these provisions unintentionally create too much risk for a company to bother taking risks with capital deployment on environmental progress, then no progress will be made at all.

### Question 6: What other information should the Bureau be aware of when thinking about how and when to enforce this new provision of the law?

*Environmental claims often depend on the stated performance of purchased materials and goods:*

Businesses often rely on purchasing the parts, materials, and services of other businesses—many of which are not based in Canada. These businesses also make claims about the environmental benefits of their products and services, and the substantiation of their claims may be proprietary, not otherwise made public, or subject to truth-in-advertising standards that do not align with Canadian law. Accordingly, the Bureau's guidance should consider that companies making environmental claims must, at least in part, rely in good faith on the environmental claims of other businesses and that those companies will not be held accountable for claims made by third parties with whom they interact.

*The chilling effect of uncertainty around who is liable for deceptive or false claims:*

As stated, a wide interpretation of what constitutes an environmental claim can include anything from a claim in a sustainability report to an innocuous post on social media by a junior communications employee excited about a business initiative. More clarity is required around who will be held liable for the entire range of possible environmental claims—from the most to least prominent types of claims—or else global talent may not be willing to risk working for Canadian companies.

### Suggested parameters around the proposed enforcement guidance:

Reflecting the comments and concerns we provide to the Bureau's discussion questions above, and in addition to the considerations already raised, BCA believes the following principles should help frame the guidance provided to businesses:

*The definition of "adequate and proper substantiation in accordance with internationally recognized methodology," should be broad, non-prescriptive, and ensure the following:*

- Canadian businesses' competitiveness for ESG investment is not curtailed by narrow enforcement guidance that, if drafted poorly, could be misaligned with market-driven environmental information requests;
- Businesses can adjust methodologies for substantiating and reporting environmental requests according to market-driven changes in sustainability reporting;
- Businesses can publicly communicate environmental claims made for Canadian regulators and RFPs without fear of liability;

- Guidance is harmonized with existing and future federal and provincial environmental, securities, and financial reporting requirements;
- Guidance is permissive of the environmental communications made in all the international jurisdictions that Canadian businesses operate in, including for their reliance on claims made by businesses in their supply chain outside of Canada;
- Businesses are provided a safe harbour from liability when making forward-looking environmental claims and discussing sustainability and climate aspirations, including claims made on the basis of scenario analyses, so long as claims are made in good faith; under reasonable assumptions about the economy, the known state of technology; and the unfolding policy and regulatory environment;
- As long as a methodology is considered to be reasonable, it should be deemed as adequate to substantiate an environmental claim and count as an "internationally recognized methodology." Methodologies should be considered reasonable if they adhere to existing federal and/or provincial standards or reporting requirements, including existing and forthcoming securities regulation and guidance from organizations like the CSSB and the CSA Group.
- Guidance is permissive and welcoming of the ongoing evolution of science and the changes this will create to methodologies of substantiating environmental claims, including in modeling adjustments;
- Guidance and enforcement are applied equally to both for-profit and not-for-profit entities; and
- Guidance creates clarity on when the Bureau expects to take enforcement action against a business or individual, including circumstances when the Bureau is more likely to seek the imposition of an administrative monetary penalty.

## Private litigation and the decision-making processes of the Tribunal:

The new deceptive marketing practices provisions combine with severe penalties and other changes to the *Act* to create significant implications for businesses beyond the Bureau's scope of enforcement and of this consultation exercise. In particular, the expansion of access to the Tribunal to private claimants creates significant uncertainty for businesses and a heightened risk of cost increases via vexatious claims. The problem, however, is that the Bureau's guidance to businesses on how it will consider enforcement, which this public consultation process is meant to inform, is not binding on the Tribunal or on private claimants.

Prior to the amendments to the *Act*, private parties could submit complaints about alleged deceptive marketing directly to the Bureau, which would then investigate and, if appropriate, file an application to the Tribunal. While the Bureau can still pursue enforcement of the law through this process, the changes to the *Act* now allow private parties to seek leave to file claims directly with the Tribunal.

This means that an individual or an organization, like an environmental NGO, can apply to the Tribunal for leave to privately litigate a claim challenging a business's environmental claims. To be granted leave, the Tribunal must be satisfied that the challenge is in the "public interest." No clear guidance, however, has been given about the processes and procedures that the Tribunal will follow in granting leave. Likewise, the "public interest" threshold has not been defined. As a result, businesses will have to wait until there is a body of case law on this point, creating significant uncertainty in the meantime. Notably, however, the new provisions do not require the applicant to prove that an environmental claim made by a business is false or misleading in any respect.

All things considered, businesses are concerned about the prospect of vexatious claims being brought to the Tribunal by strategic third parties motivated not by increasing truthfulness in marketing, but by a desire to simply increase the cost and burden of doing business—especially in the traditional energy and agriculture sectors. This is particularly the case in the burgeoning age of artificial intelligence and data scraping, where the possibility of filing a large volume of frivolous claims has never been easier. And, since the changes to the *Act* mean that businesses (and not private litigants or the Commissioner of Competition) now have the burden of proof placed upon them, the risk of being swamped by claims to which businesses must respond has increased precipitously. Without adequate tests and processes established to weed out frivolous and vexatious claims, both the Tribunal and Canada's private sector could be inundated with AI generated claims.

To be clear, BCA appreciates that the Bureau is not responsible for establishing the legal tests applied by the Tribunal for granting leave to private litigants. As such, this is out of the scope of the Bureau's discussion questions. However, businesses would still appreciate clarity about how the Tribunal's decision-making processes and procedures will impact them; and how the Bureau's decisions about how to apply the *Act* may inform the Tribunal's processes and decisions.

By requesting clarity, we are not suggesting that businesses have any concern whatsoever about the independence of the Tribunal. That said, clarity from the Tribunal on the following questions—particularly concerning how it intends to grant leave—would be helpful:

- Can anyone – Canadian or non-Canadian individual or non-governmental organization – file a claim?
- How will the Tribunal apply the public interest test to the claims being made by private litigant applicants seeking leave?
- Will the Tribunal require targeted businesses to provide evidence and answers to all applications filed, and how will companies be engaged?
- What guards will the Tribunal have in place to protect against vexatious claims?
- When would claims be made public? At their initial submission, or only after a third party is successfully granted leave?

BCA appreciates that guidance may only come through future Tribunal decisions addressing leave and, where granted, applications under the new provisions. However, this provides cold comfort to businesses who, given the uncertainty they face, must make decisions about public disclosure practices and investment decisions today—not in several years when the body of case law has developed.

## Recommendations and Proposed Next Steps:

To be clear, neither our comments on the Bureau's questions nor the principles outlined to help the Bureau avoid enforcement pitfalls should be construed as support for the new provisions of the *Act*.

That said, it is our view that the Bureau should provide a framework for "adequate and proper" substantiation of "internationally recognized methodologies" where existing federal and provincial rules and requirements, and ongoing efforts to release new standards such as those produced by securities regulators, the CSSB, and the CSA Group, are deemed to be in full compliance with enforcement under the new provisions of the *Act*.

Our chief recommendation, however, is that the crafting of the Bureau's guidance framework should be methodical, involve meaningful and iterative consultation with industry, and provide businesses adequate time to adjust to changes and to apply them to past public communications as necessary. As such, enforcement should not occur until all the following consultative steps take place:

- The Bureau, after consulting with Canadian securities regulators and standard-setting bodies like the CSA and others, develops a framework for "internationally recognized methodologies" that recognizes current Canadian standards that businesses are using for securities compliance and regulatory reporting;
- Meaningful engagement with industry is conducted prior to the publication of this draft guidance;
- Draft guidance is provided to businesses on how to comply with the new amendments to the *Act* and how the amendments will be implemented and adjudicated;
- Industry is provided another period of feedback on this draft guidance;
- Amendments are made to the guidance in consideration of industry feedback; and
- A 6–12-month period is given for companies to amend their work/material in response to the final guidance.

## Concluding Remarks

BCA thanks the Bureau for establishing the public consultation with such haste. The federal government has put the Bureau in a difficult and unenviable position. Nevertheless, we are glad the Bureau is taking its role seriously and doing what it can to create more certainty for businesses.

Regardless, it is our opinion that the amendments to the *Act* have created tremendous uncertainty that will undoubtedly have significant cost and profoundly negative competitive impacts for Canadian businesses. Even with the forthcoming guidance from the Bureau, many of the impacts these provisions have on Canadian businesses will not become clear until they've been tested by claims that come before the Tribunal. The process toward achieving clarity, which could take many years, does not help businesses communicate about their environmental performance now, nor does it provide comfort that this law will be interpreted such that businesses' concerns are reflected. The business community cannot afford the potential impacts on capital formation and competitiveness. As such, and while we broadly support the values of transparency and truth-in-advertising on environmental claims, we do not support the *Act*'s new provisions as currently drafted.

Thank you for considering our comments.