



ecojustice

May 2, 2019.

Matthew Boswell
Commissioner of Competition
Competition Bureau
Place du Portage I
50 Victoria Street, Room C-114
Gatineau, QC K1A 0C9

Dear Commissioner Boswell:

Application for Inquiry Re: Keurig Canada Inc.'s apparent false and misleading material representations of its K-cup product as a "Green" and easily recyclable product for Canadian consumers

The undersigned write to you on behalf of Matthew Ray Miller, David John Boudinot, Margaret Lesley McCullough, Garth Aidan Covernton, Chris-Ann D. Lake, James Anthony McIsaac, six Canadian residents over 18 years of age, submitting the following application for an inquiry under ss. 9(1) and 10(1)(a) of the *Competition Act*. See Appendix A for the solemn declarations of these applicants which support this application.

We submit that Keurig Canada Inc. (Keurig) has engaged in reviewable conduct, prohibited under s. 74.01(1)(a) of the *Competition Act*, by making representations to the public that are false or misleading in a material respect for the purpose of promoting its business interests.

We submit that, if your inquiry finds that Keurig has made materially false and misleading representations to the Canadian public, Keurig should be required to, at a minimum:

- a) retract its misleading advertisements and issue a public apology; and
- b) pay a \$10 million fine, to be paid to Canadian recycling authorities to help them deal with contamination of plastic recycling streams from improperly recycled Keurig K-cups and similar products.

We would be happy to answer any questions about this matter, and to provide further

information relevant to this application, upon request.

Sincerely,



Calvin Sandborn, Q.C.



Bronwyn Roe, Barrister and Solicitor



Kevin Kisser, Law Student



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Margaret Lesley McCullough – adviser to Kids for a Plastics Free Canada

Matthew Ray Miller - PhD candidate studying marine micro-plastic pollution at the School of Earth and Ocean Sciences at the University of Victoria; President of the Surfrider Foundation University of Victoria Club

David John Boudinot - volunteer researcher who has documented plastic pollution around Vancouver Island for the Surfrider Foundation of Vancouver Island

Garth Aidan Covertton - PhD candidate in the Department of Biology at the University of Victoria researching mico-plastics contamination of the marine environment

Chris-Ann D. Lake – Chapter Co-Manager at Surfrider Foundation Vancouver Island

James Anthony McIsaac – Executive Director of T Buck Suzuki Foundation, which works to prevent pollution and promote sustainable fisheries

Application for Inquiry Re: Keurig Canada Inc.'s apparent false and misleading material representations of its K-cup product as a "Green" and easily recyclable product for Canadian consumers

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Part I: Context

Concern is rising about the devastating global environmental impact of plastic pollution.¹ Recognizing the central importance of this issue, Canada's federal and provincial environment ministers have now unanimously agreed to develop a national strategy to reduce plastic pollution – setting ambitious targets for the eventual elimination of all waste plastic.² However, a major impediment to the reduction and recycling of single-use plastic products is misleading advertising by companies that make environmental claims regarding wasteful products.

We are bringing this application because it raises important issues related to the Competition Bureau's priority area of ensuring reliable environmental claims. The Competition Bureau has recognised consumers' concerns about environmental performance and the value of reliable environmental claims:

Canadian consumers are becoming increasingly concerned about the environmental performance of products. For example, consumers are concerned about...the sustainability of the product design (can it be reused or recycled? Is it biodegradable? Is it made of recycled materials?) among other issues...Industries may choose to communicate environmental benefits through environmental labelling and use advertising vehicles to promote these benefits...The value of environmental claims rests on the assurance that the information provided is credible, objective, and easily identifiable and understood by consumers.³

In 2008, the Competition Bureau of Canada, in partnership with Canadian Standards Association, published *Environmental Claims: A Guide for Industry and Advertisers* (the “**Environmental Claims Guide**” or “**Guide**”) to provide assistance to industry and advertisers in complying with the *Competition Act*.⁴ The Environmental Claims Guide focuses on self-declared environmental claims made by persons who will benefit. The Guide sets out 18 requirements that apply to self-declared environmental claims consistent with the *Competition Act*. Two relevant requirements are that claims must (1) not be misleading and (2) be unlikely to result in misinterpretation. The Guide states that “[i]n self-declared environmental claims, the assurance of reliability is essential.”⁵ Further, the Guide states:

The overall goal of environmental labels and declarations is, through communication of verifiable, accurate information, that is not misleading, on environmental aspects of products, to encourage demand for and supply of those products that cause less stress on the environment,

¹ For a more comprehensive review of the general problem of plastic pollution and the problem of single-use plastic products, see: Environmental Law Centre, *Seven Reforms to Address Marine Plastic Pollution and A National Strategy to Combat Marine Plastics Pollution: A Blueprint for Federal Action*, both found at www.elc.uvic.ca.

² See *Federal Government, Provinces and Territories Push Forward on a Canada-Wide Zero Plastic Waste Strategy*, news release from Catherine McKenna Minister of Environment and Climate Change, found at: <https://www.newswire.ca/news-releases/federal-government-provinces-and-territories-push-forward-on-a-canada-wide-zero-plastic-waste-strategy-701156812.html>

³ Canadian Standards Association and Competition Bureau, “Environmental Claims: A Guide for Industry and Advertisers,” (2008) PLUS 14021 at v, online: [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/guide-for-industry-and-advertisers-en.pdf/\\$FILE/guide-for-industry-and-advertisers-en.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/guide-for-industry-and-advertisers-en.pdf/$FILE/guide-for-industry-and-advertisers-en.pdf) [*Environmental Claims: A Guide for Industry and Advertisers*].

⁴ *Ibid* at p. 1.

⁵ *Environmental Claims: A Guide for Industry and Advertisers*, *supra* note 3 at p. 5.

thereby stimulating the potential for market-driven continual environmental improvement [emphasis added].⁶

We submit that Keurig Canada Inc.’s (“**Keurig**”) marketing campaign for its “recyclable K-cups,” is an example of misleading advertising that attempts to “green-wash” an environmentally damaging product. This submission is an application under s. 9(1) of the *Competition Act* for an inquiry into Keurig’s marketing campaign, which we argue contains false and misleading material representations that constitute reviewable conduct under s. 74.01(1)(a): representations to the public that are false or misleading in a material respect.⁷

We request that the Commissioner inquire into Keurig’s apparent misrepresentations identified in this application. We also request that, upon finding Keurig has made false and misleading material representations to the public, that the Commissioner pursue a public apology, retraction and monetary penalty.

Part II: Keurig’s Marketing Campaign

In Keurig’s 2015 Annual Report, the company acknowledged criticism of the environmental impact of coffee pods threatened its brand. The Annual Report warned that if Keurig fails to meet “sustainability targets, including the successful development and introduction of a recyclable K-cup® pod prior to our 2020 100% implementation goal, consumers may lose trust and confidence in our brand and our Company’s commitment to sustainability, and our brand could be damaged.”⁸ In order to reduce consumer concerns about wastefulness, in 2016, Keurig launched a campaign communicating the representation that its new K-cups are conveniently recyclable across Canada.

Keurig released advertisements aimed at communicating the recyclability of its new K-cups. These advertisements have been distributed throughout Canada via YouTube, Keurig’s website, and K-cup packaging. Six examples of advertisements are summarized below.

Ad ID	Medium Used	Link to Advertisement
1	Keurig Canada’s YouTube Channel	https://www.youtube.com/watch?v=eFdr7FwjNrE
2	Keurig Canada’s YouTube Channel	https://www.youtube.com/watch?v=yqzWjoQM2NM
3	Keurig Canada’s YouTube Channel	https://www.youtube.com/watch?v=4Ed0h6K1fu8
4	Keurig Canada’s YouTube Channel	https://www.youtube.com/watch?v=J_FW3x0l-6o
5	3-Step Image on Keurig’s Packaging and Website	https://www.keurig.ca/recyclable-kcup-pods
6	Keurig Canada’s Website	https://www.keurig.ca/recyclable-kcup-pods

⁶ *Environmental Claims: A Guide for Industry and Advertisers*, supra note 3 at p. 6.

⁷ *Competition Act*, RSC 1985, c. 34 [*Competition Act*].

⁸ Keurig Green Mountain Inc. Annual Report 2015, online: http://www.annualreports.com/HostedData/AnnualReportArchive/k/NASDAQ_GMCR_2015.pdf.

In **Ad 1**, the audio states:

As part of our sustainability commitment, we collaborated with Canadian recycling facilities to create our recyclable K-cup pod. To test their recyclability, we attached temporary chips to K-cup pods that allow us to track them through recycling facilities, to see how many would find their way through the process. On average, 90% were successfully sorted – and have the potential to be sorted. A number similar to other commonly recycled plastic containers. By 2018, all certified Keurig K-cup pods in Canada will be recyclable and will have a useful second life.

At the end of the video, the ad shows Keurig's logo in white on a black background with the words "*Currently recyclable in select locations" at the bottom in small white letters.

In Keurig's **Ad 2**, the video shows a close-up of a man's hands, bound by the wrist with rope, dumping coffee grinds out of a Keurig K-cup. The video pans out to show the man tossing the newly-emptied K-cup into a blue recycle bin, held by a second man, dressed in a suit. The second man is heard saying "you see – recycling with Keurig is easy." The tied-up man grunts reluctantly: "uh huh." There is no disclaimer that appears in the ad. At no point does the ad show the K-cup being rinsed or washed out to remove coffee grounds.

Keurig's **Ad 3** opens with the same suit-clad man from Ad 2 driving a Hummer through a quarry while being chased by two people on motorcycles and a semi-truck spewing black smoke. The suit-clad man states: "At work, respecting the environment can be difficult." He then tosses a device out of the truck window, towards his pursuers, where it causes a small explosion. The video switches to show the man in his kitchen. He states: "But with Keurig, recycling is easy." The man peels off the foil lid of a K-cup, dumps out the coffee grinds, tosses it into a blue bin nearby, and adjusts the lapel of his suit. The video switches to show a Keurig machine being turned on and starting to brew, next to Keurig's logo. There is no disclaimer that appears in the ad. At no point does the ad show the K-cup being rinsed or washed out to remove coffee grounds.

Ad 4 opens on the words "KEURIG PRESENTS 3 EASY RECYCLING STEPS." The video switches to show a Keurig machine in front of a green, tropical background. A K-cup flies out of the machine and into another frame where the words "KEURIG K-CUP PODS NOW RECYCLABLE" and 5 generic K-cups are shown in front of a green background. The labels on the K-cups change to depict the brands Lavazza, Eight O'Clock, Green Mountain Coffee, Van Houtte, Timothy's, Folgers, and Donut House. The K-cups switch back to their generic labels. The word "PEEL" appears on the screen and the labels peel themselves off the K-cups in a circular fashion. The word "EMPTY" appears at the top and "and compost coffee grounds" appear at the bottom, while the K-cups dump themselves out, to reveal perfectly clean K-cups. The video switches to show multi-coloured green triangles on a green background surrounding a clear container containing green yoghurt and milk containers. White K-cups drop into the container from the top of the screen. The word "RECYCLE" appears in white. The image shifts to the right and a light green Mobius loop with the number 5 in the center appears on a darker

green background. The Mobius loop changes into a white Keurig logo on the same green background. The background changes to black and the white Keurig logo is joined by the words “Same perfect taste, now recyclable” and the small disclaimer “*Currently recyclable in select locations” at the bottom. The image disappears and is replaced by another logo depicting the words “Certified Keurig Perfect Grind Perfect Taste” in a circular arrangement.

Ad 5 appears on Keurig’s packaging and website and consists of the following image:

How to Recycle K-Cup® Pods in Three Easy Steps



PEEL

Allow K-Cup® pod to cool. Starting at the puncture, peel and dispose of the lid.



EMPTY

Compost or discard the coffee grounds. Filter can remain.*



RECYCLE

Discard the empty K-Cup® pods in your recycling bin. It's that simple!**

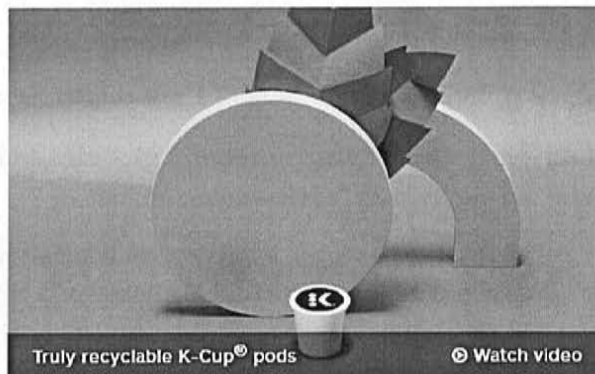
* When recycling K-Cup® pods containing hot chocolates or specialty beverages, step 2 is not required.

**Currently recyclable in select locations.

Ad 6, the “Sustainability” section of Keurig’s website, displays the following images:

SAME PERFECT TASTE, NOW RECYCLABLE

Our solution is simple: the pods are designed so you can peel off the foil lid, compost the coffee grounds, and recycle the plastic #5 cup, alongside other recyclable containers from your home, in local community recycling programs.



Truly recyclable K-Cup® pods

© Watch video

*Currently recyclable in select locations.



Step by step

© Watch video

*Currently recyclable in select locations.

THE MAKING OF OUR RECYCLABLE K-CUP® PODS

We were determined to reduce our environmental footprint, but knew there would be challenges along the way. In this video, see how we pursued innovative strategies to make sure our K-Cup® pods were not only recyclable, but could actually be recycled.*

Part III. Keurig’s Representations

Keurig’s marketing campaign for its “recyclable K-cups” contains three distinct representations:

1. K-cups are generally recyclable;
2. The “Dump and Toss” method of recycling shown in Keurig ads (where coffee grounds are simply dumped out and the K-cup tossed into recycling without further treatment and washing) is acceptable and environmentally responsible;
3. Recycling of the product in the manner shown is good for the environment.

As demonstrated below, these representations are misleading. Recycling of K-cups in the manner advertised by Keurig causes serious problems (including contamination of the entire plastic recycling stream) and expense to recycling programs. A remarkably large number of

Canadian recycling systems ban consumers from recycling of K-cups at all. Even jurisdictions that allow the product to be recycled ban the effortless and careless “dump and toss” method of recycling shown in the ads. Finally, Toronto recycling authorities have specifically identified such advertising by Keurig as being harmful – not beneficial – to their recycling programs.

Part IV. Relevant Law and Guidance

A. Applicable Provisions of the *Competition Act*

Section 74.01 of the *Competition Act* provides a civil prohibition against false or misleading advertising (known as “reviewable conduct”):

- (1) A person engages in reviewable conduct who, 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, by any means whatever,
- (a) makes a representation to the public that is false or misleading in a material respect.⁹

B. General Impression Test

Section 74.03(5) of the *Competition Act* requires a consideration of the general impression conveyed by a representation as well as its literal meaning when determining whether or not the person who made the representation engaged in reviewable conduct:

In proceedings under sections 74.01 and 74.02, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.¹⁰

This General Impression Test was interpreted by the Supreme Court of Canada in *Richard v. Time Inc.*:

In the case of false or misleading advertising, the general impression is the one a person has after an initial contact with the entire advertisement, and it relates to both the layout of the advertisement and the meaning of the words used.¹¹

The general impression conveyed by a representation must be analyzed in the abstract – without considering the personal attributes of the consumer who has instituted the proceedings.¹²

The General Impression Test effectively recognises the power of the “sum of the parts” in advertising, and ensures that the Competition Bureau or reviewing court consider the overall impression an advertisement as a whole makes on consumers.¹³

⁹ *Competition Act*, *supra* note 7 at s. 74.01(1)(a).

¹⁰ *Competition Act*, *supra* note 7 at s. 74.03(5).

¹¹ *Richard v. Time Inc.* 2012 SCC 8, [2012] 1 SCR 265 at para 57. Note that in this case the SCC interpreted the General Impressions Test as it applied to Quebec’s *Consumer Protection Act*, RSQ., c. P-40.1.

¹² *Richard v. Time Inc.*, *supra* note 11 at para 49.

¹³ Competition Bureau Canada, “The Deceptive Marketing Practices Digest,” Volume I, online: [https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-digest-deceptive-marketing-e.pdf/\\$FILE/cb-digest-deceptive-marketing-e.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-digest-deceptive-marketing-e.pdf/$FILE/cb-digest-deceptive-marketing-e.pdf).

C. Guidance from *Environmental Claims: A Guide for Industry and Advertisers*

The Competition Bureau's own Environmental Claims Guide directs industry and advertisers to qualify disposal claims such as "recyclable," with details on the availability of necessary infrastructure from municipalities – otherwise, the claim could be considered false or misleading:

Claims that a product or package is...recyclable... might not be met by all facilities collecting materials; therefore, the product claim for collection and processing should be clear.

...Claims that a product is recyclable, reusable, and refillable always depend on the existence of systems and facilities. Further, systems or facilities must be conveniently available to a reasonable proportion of purchasers, potential purchasers, and users in the area that the product is to be sold; otherwise, such claims could be considered false or misleading.

It is not considered adequate to state "where facilities exist" after a claim that is dependent on the existence of such facilities. It is important to obtain information on the availability of the necessary infrastructure from municipalities or distributors before making this claim or any such generalized qualifications...[emphasis added].¹⁴

i. Usage of Term "Recyclable"

The Environmental Claims Guide states that "[i]t is not enough to confirm that there are municipal or industry collection systems where the product is sold in order to make a claim of "recyclable" – there must be facilities to process the collected materials and use them as an input to another product that can be marketed and used" [emphasis added].¹⁵ The Guide also recommends that, given it is sometimes not practical to have claims based on the facility of various types of local recycling programs, "if at least half the population has access to collection facilities, a claim of "recyclable" may be made without the use of any qualification."¹⁶

The Guide says that the question is not just whether a recycling facility *exists* or is available to the consumer; industry must also consider that recycling programs are in place in most major Canadian cities but that these programs do not all accept the same products.¹⁷ Thus, the industry actor may only claim its products are recyclable where a recycling facility that actually accepts a product as recyclable is available to the consumer.

ii. Qualification on Claim of "Recyclable"

The Environmental Claims Guide states that the specific location of the available recycling program or facilities should be identified in the following cases: (1) limited availability of recycling facilities, (2) facilities are not available to a reasonable proportion of purchasers, potential purchasers, and users, or (3) recycling programs do not all accept the product.¹⁸ The Guide is clear that "[g]eneralized qualifications, such as 'Recyclable where facilities exist,'

¹⁴ *Environmental Claims: A Guide for Industry and Advertisers*, supra note 3 at p. 31.

¹⁵ *Environmental Claims: A Guide for Industry and Advertisers*, supra note 3 at p. 42.

¹⁶ *Environmental Claims: A Guide for Industry and Advertisers*, supra note 3 at p. 31.

¹⁷ *Environmental Claims: A Guide for Industry and Advertisers*, supra note 3 at p. 43.

¹⁸ *Environmental Claims: A Guide for Industry and Advertisers*, supra note 3 at p. 31.

which do not convey the limited availability of collection facilities are not adequate.”¹⁹ The Guide provides the following example:

Preferred

This container is recyclable through the blue box program in Southern Ontario and at recycling depots in Winnipeg and Edmonton.

Discouraged

Recyclable where facilities exist.²⁰

Part V: Applying *Competition Act* Law and Guidance to Keurig’s Representations

The general impression conveyed by Keurig’s representation and the literal meaning of Keurig’s representations must be considered in determining whether Keurig has made materially false or misleading representations that constitute reviewable conduct under the *Competition Act*.²¹

The section will demonstrate that representations contained in Keurig advertisements satisfy the following elements of reviewable conduct under the *Competition Act*:

- a. Keurig’s representations are made for the purpose of promoting business interests,
- b. Keurig’s misrepresentations have been made to the public, and
- c. Keurig’s misrepresentations are false or misleading in a material respect.²²

A. Keurig’s Representations were Made for the Purpose of Promoting Business Interests

Keurig’s misrepresentations in the above advertisements inherently promote its business interests.

A pollster recently described the business imperative that requires Keurig to convince consumers that K-cups are both sustainable and ultra-convenient – the core message of these ads:

“Over 60 per cent of Keurig users say that impact on the environment of using these machines is their number one concern,” said Robert Carter of NPD Canada, whose questionnaires survey 130,000 Canadians. “That’s really, really big...Pollution concerns, however, have not stopped people from buying K-Cups, because “the convenience factor always outweighs other factors,” Carter said.

Financial Post, August 10, 2017

As noted above, Keurig’s 2015 Annual Report specifically warned that consumers could lose trust in the Keurig brand if the company could not provide a recyclable coffee pod. Keurig is aware of the threat posed to it by increasing criticism and scrutiny of its environmental impact.

¹⁹ *Environmental Claims: A Guide for Industry and Advertisers*, supra note 3 at p. 42.

²⁰ *Environmental Claims: A Guide for Industry and Advertisers*, supra note 3 at p. 43.

²¹ *Competition Act*, supra note 7 at s. 74.03(5).

²² *Competition Act*, supra note 7 at s. 74.01(1)(a).

In 2015, Keurig’s Chief Sustainability Officer, Monique Oxender, acknowledged the threat of increasing environmental criticism stating:

We’re not happy with where we are either. We have to get a solution, and we have to get it in place quickly.²³

Keurig subsequently launched its new K-cups and the marketing campaign that goes with them in an attempt to paint its business as sustainable and eco-friendly. The marketing campaign, featuring the misrepresentations identified, directly promoted the sale of Keurig’s new “recyclable” K-cups, which is a clear business interest.

B. Keurig’s Misrepresentations Have Been made to the Public

The misrepresentations identified above were all made to the public, through media outlined in the table below.

Table 1: Advertisements Which Contain False and Misleading Material Representations

Ad ID	Description of False or Misleading Representations ²⁴	Medium Used	Link to Advertisement
1	Makes the representation that new K-cups are recyclable across Canada.	Keurig Canada’s YouTube Channel	https://www.youtube.com/watch?v=eFdr7FwjNrE
2	Demonstrates the convenient but improper “dump and toss” method to recycle K-cups and makes the representation that recycling with Keurig is easy.	Keurig Canada’s YouTube Channel	https://www.youtube.com/watch?v=yqzWjoQM2NM
3	Demonstrates the “dump and toss” method and makes the representation that recycling with Keurig is easy.	Keurig Canada’s YouTube Channel	https://www.youtube.com/watch?v=4Ed0h6K1fu8
4	Demonstrates the “dump and toss” method, by suggesting K-cups are recyclable with three easy steps and makes the representation that K-cups are now recyclable in jurisdictions where they are not accepted by recycling bodies.	Keurig Canada’s YouTube Channel	https://www.youtube.com/watch?v=J_FW3x0l-6o
5	Image showing an easy three-step method for recycling the K-cups.	3-Step Image on Keurig’s Packaging and Website	https://www.keurig.ca/recyclable-kcup-pods
6	Makes the representation that K-cups are easily recyclable.	Keurig Canada’s Website	https://www.keurig.ca/recyclable-kcup-pods

Under the *Competition Act*, when demonstrating that a person, such as Keurig, has made a misrepresentation *to the public*, it is unnecessary to prove that:

- a) any person was deceived or misled;

²³ Hamblin, James. “A Brewing Problem. What’s the healthiest way to keep everyone caffeinated?” *The Atlantic*, (March 2, 2015), online: <<https://www.theatlantic.com/technology/archive/2015/03/the-abominable-K-cup-coffee-pod-environment-problem/386501/>>.

²⁴ For descriptions of the content of the advertisements, see p 2-6, above.

- b) any member of the public to whom the representation was made was within Canada; or
- c) the representation was made in a place to which the public had access.²⁵

These representations were made through media easily accessed by the general public. In addition, courts have upheld an extremely broad definition of what constitutes a representation to the public under s. 74.01(1)(a). The Federal Court of Appeal dealt with this issue in *Canada (Commissioner of Competition) v. Premier Career Management Group Corp.* J. Edgar Sexton J.A, speaking for the court, stated at para 52:

the fact that representations were made in private does not dictate that they were not made to the public. One must look at all the circumstances of the communication. If, as in this case, the communications reach a significant portion of the public, they are made "to the public."²⁶

Based on the language of the *Competition Act*, the interpretation given by courts, and the media used by Keurig, these representations meet the criteria of being made "to the public" under the Act.

C. Keurig's Representations Are False or Misleading in a Material Respect

A representation is "misleading in a material respect" where an "ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered."²⁷ A misleading representation is material where it is of "much consequence or [is] important or pertinent or germane or essential to the matter."²⁸

i. Keurig's Representations are False or Misleading

Applying the General Impression Test to Keurig's advertisements, the question becomes whether Keurig's advertisements would appear false or misleading on first impression to a credulous and inexperienced person. The text, the layout, and the graphic design of the advertisements must all be considered in evaluating them on the general impression. The overall message relayed in these advertisements is that Keurig's K-cups are "easily and conveniently" recyclable in Canada using the "dump and toss" method. (*e.g., without rinsing or washing out coffee grounds.*)

This message is disseminated using both verbal and visual cues in Keurig's advertisements. For example, Keurig employs the visual cue of a "blue recycling bin" in its advertisements (see identified advertisements 2 and 3). Blue recycling bins are symbolic of municipal recycling programs across Canada and Keurig's use of them clearly suggests its products are recyclable in

²⁵ *Competition Act*, *supra* note 7 at s.74.03(4).

²⁶ *Canada (Commissioner of Competition) v. Premier Career Management Group Corp.* 2009 FCA 295.

²⁷ *Canada (Commissioner of Competition) v. Sears Canada Inc.*, [2005] C.C.T.D. No. 1 (Competition Trib.) at paras. 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. In *Kintex*, the Court considered the elements of the offence of making any representation to the public that was false or misleading in a material respect, prohibited by ss. 36(4) of the *Combines Investigation Act*. In *Sears*, the Competition Tribunal found that the *Combines Investigation Act* prohibition was substantially the same as the *Competition Act* prohibition and thus adopted the *Kenitex* test.

²⁸ *Canada (Commissioner of Competition) v. Sears Canada Inc.*, *supra* note 27 at paras. 333-336 citing *R v. Tege Investment Ltd.* (1978), 51 C.P.R. (2d) 216 and *R. v. Kellys on Seymour Ltd.* (1969), 60 CPR 24; cited by *Canada (Commissioner of Competition) v. Yellow Page Marketing*, *supra* note 27 at para 34.

municipal programs. Keurig may argue that its advertisements include a disclaimer to check local recycling guidelines. However, Toronto Report PW 28.9, an official review of coffee pod impact on Toronto recycling, raises serious concerns about problems with such products undermining the Toronto recycling system and states:

...the advertising space allocated to the recyclability or the composability of the material is significantly more than the qualifying statements about acceptability in municipal programs.²⁹

Keurig’s video-based advertisements, identified in this complaint, include a disclaimer in small font near the bottom of the advertisement; this is not accompanied by an auditory disclaimer. Similarly, the disclaimer on the physical packaging is in small font underneath a much larger “recyclable symbol.”

Ultimately, the general impression left by Keurig’s advertisements is that Canadian consumers may simply “dump and toss” the product into any recycling stream in Canada – allowing them to purchase a convenient and eco-conscious product. This constitutes a material misleading misrepresentation.

Representation 1: K-cups are Recyclable across Canada

Keurig makes the representation that its K-cups are currently recyclable across Canada. In Ad 4, the video shows the words “KEURIG K-CUP PODS NOW RECYCLABLE” and 5 generic K-cups are shown in front of a green background. In addition, the video depicts a light green Mobius loop with the number 5 in the center on a darker green background. In Ad 6, our Keurig’s website, images claim “SAME PERFECT TASTE, NOW RECYCLABLE” and “THE MAKING OF OUR RECYCLEABLE K-CUP PODS.”

However, contrary to the thrust of the Keurig ads, the recycling of such coffee pods actually creates problems or undermines current recycling of plastics. A brief review of Canadian recycling systems reveals that **at least fifteen major cities, metropolitan areas, and regional municipalities actually prohibit K-cups from their recycling systems**; see the table below.

Table 3: City, Region or Province Which Does Not Accept K-cups in Recycling

City/Region/Province	Comments on K-Cup Recycling	Source
Calgary	Plastic – Single-serve coffee packages: Put plastic, aluminum and other single-serve coffee pods in your black cart as garbage. Coffee grounds inside the pod can be put into your green cart for composting.	City of Calgary, “What Goes Where?” online: http://www.calgary.ca/UEP/WRS/Pages/What-goes-where/Plastic-Single-serve-coffee-packages.aspx
Durham Region	Keurig K Cup: Put this item in your garbage.	Durham, “Know Before You Throw” online: https://www.durham.ca/en/living-here/know-before-you-throw.aspx

²⁹ Report PW 28.9, “Review of Single-Serve Coffee Pods in the City of Toronto’s Waste Diversion Programs,” (March 13, 2018), online: <https://www.toronto.ca/legdocs/mmis/2018/pw/bgrd/backgroundfile-113676.pdf>.

Edmonton	Single-serve coffee pod & disk/K-cup: Put this item in your garbage.	Edmonton, "Recycling" online: https://www.edmonton.ca/programs_services/garbage_waste/recycling.aspx
Halton Region	Coffee pods (plastic): This item is not accepted in the Blue Box because some plastics are extremely difficult to sort or recycle, or there is a limited market for the material. Put this item in your garbage.	Halton, "Put Waste In Its Place," online: http://beta.halton.ca/For-Residents/Recycling-Waste/Recycling-and-Waste-Tools/Put-Waste-In-Its-Place
Hamilton	Garbage Cart: Keurig Coffee Pods.	Hamilton, "What can be Recycled," online: https://www.hamilton.ca/garbage-recycling/blue-box-recycling/what-can-be-recycled
Moncton	Garbage: Single Service Coffee Pods.	New Brunswick, "Sorting Guide: For Households in Westmorland and Albert Counties," online: https://www.eco360.ca/sites/default/files/inline-files/162949_4_A_ECO360_FullSortingGuide_En_11.pdf
Ottawa	This item goes in the garbage.	Service Ottawa, "Garbage and Recycling," online: http://app06.ottawa.ca/online_services/recycling/items/1070_en.html
P.E.I.	Non-Recyclable Plastics: K-cups.	PEI IWMC, "Interactive Sorting Guide," online: https://www.iwmc.pe.ca/interactivesortingguide.php?sfor=keurig&submit=Search
Peel Region	This item is garbage. Empty the coffee or tea out of the pod into your organics kitchen container, then dispose of the packaging in your garbage (grey) cart. Additionally information: this item is not compostable or recyclable in Municipal collection systems; please contact the manufacturer or retailer to see if there is a return-to-retailer option for recycling.	Region of Peel, "How to Sort your Waste" online: http://www.peelregion.ca/scripts/waste/how-to-sort-your-waste.pl?action=search&query=Single-serve%20coffee%20or%20tea%20pods
Regina	Recycling unacceptable: coffee pods.	Regina, "Recycle the Right Stuff," online: https://www.regina.ca/opencms/export/sites/regina.ca/residents/waste/media/pdf/sorting-guide-2017.pdf
Saskatoon	Put this item in your black garbage cart for disposal. All garbage items must be bagged.	City of Saskatoon, "Waste Wizard," online: https://www.saskatoon.ca/services-

		residents/waste-recycling/waste-wizard
St. John's	Put this item in your garbage bag for disposal.	St. John's, "Put Waste in its Place," online: http://www.stjohns.ca/living-st-johns/city-services/garbage-and-recycling/put-waste-its-place
Toronto	Place item in the Garbage Bin. All coffee pods, including those that are labelled as "recyclable" or "compostable" must be disposed of in the garbage or returned to retailers who have return programs. The City does not accept coffee pods in its Blue Bin Recycling or Green Bin Organics programs.	Toronto, "Waste Wizard," online: https://www.toronto.ca/services-payments/recycling-organics-garbage/waste-wizard/
Winnipeg	Garbage cart.	Winnipeg, "What Goes Where?" online: https://winnipeg.ca/waterandwaste/recycle/cartcollection.stm#faq
York Region	Please place this item in the garbage.	York Region, "Bindicator," online: http://www.york.ca/wps/portal/yorkhome/environment/bindicator/bindicator/

The cities/regions listed above represent a significant portion of Canada's population; at least 11,690,856, as will be demonstrated on page 18. Their refusal to accept K-cups because of the problems such products create in the recycling system directly contradicts Keurig's representations. The ad representations mislead consumers by advertising within these jurisdictions that Keurig K-cups are recyclable and by promoting the more specific representation that the K-cups are recyclable across Canada.

Among the jurisdictions who refuse K-cups in their recycling, Toronto has scrupulously documented many of the problems these products cause in their recycling system. The 2018 Toronto Report PW 28.9 "Review of Single-Serve Coffee Pods in the City of Toronto's Waste Diversion Programs" (Toronto Report PW 28.9), was compiled by Toronto's Solid Waste Management Service to evaluate the possibility of adding coffee pods to Toronto's recycling system. The report cited contamination issues and the confusion created by differing brand designs in deciding that coffee pods should not be accepted in Toronto's recycling stream.³⁰ Speaking to contamination issues, the report cited the marketing of these pods as recyclable as a major issue, stating:

³⁰ Report PW 28.9, *Review of Single-Serve Coffee Pods in the City of Toronto's Waste Diversion Programs*, supra note 29.

...this advertising is misleading to residents, results in confusion, and ultimately is increasing the cost of waste management in the City because coffee pods are mistakenly placed in both the Blue Bin and Green Bin.³¹

Speaking to these issues, the General Manager of Solid Waste Management Services with the City of Toronto stated to the Financial Post:

Part of the problem we have with recycling generally is there's mixed messages out there and it's just confusing the consumer and the resident ... They're advertising within the city limits that (Keurig coffee pods are) recyclable when they're actually not recyclable within the city limits. It's misinformation at this point.³²

This misinformation contributes to the issue, with over 10 million coffee pods wrongly discarded in Toronto's recycling system.³³ The Toronto situation is just one example of the broad social harm created by the advertising challenged in this application.

Representation 2: The “Dump and Toss” Method is Acceptable

Keurig's advertisements suggest that K-cup coffee pods can be recycled simply by “dumping and tossing” the product into a blue bin. For example, one advertisement shows a man with bound wrists being able to complete the touted “dump and toss” maneuver. Ad 2 depicts the “dump and toss” method of recycling K-cups and the main character states “you see – recycling with Keurig is easy.” In Ad 3, the main character states: “But with Keurig, recycling is easy.” The man peels off the foil lid of a K-cup, dumps out the coffee grinds, tosses it into a blue bin nearby, and adjusts the lapel of his suit. Ad 4 depicts the words: “KEURIG PRESENTS 3 EASY RECYCLING STEPS.” The word “PEEL” appears on the screen and the labels peel themselves off the K-cups in a circular fashion. The word “EMPTY” appears at the top and “and compost coffee grounds” appear at the bottom, while the K-cups dump themselves out, to reveal perfectly clean K-cups. The video switches to show multi-coloured green triangles on a green background surrounding a clear container containing green yoghurt and milk containers. White K-cups drop into the container from the top of the screen. Ad 5, which appears on K-cup packaging and Keurig's website, announces “How to Recycle K-cup Pods in Three Easy Steps” and shows “PEEL” “EMPTY” and “RECYCLE.”

The General Manager Jim McKay of the City of Toronto Solid Waste Management Services also expressed concern with people employing the “dump and toss” method stating:

We have some very serious concerns that nobody is going to separate the parts of the pod, and it's just going to make the problem worse.³⁴

Speaking to the Toronto Star about this issue, McKay noted that an audit of coffee pods found in the recycling system found that 97% of pods were improperly cleaned and contained coffee

³¹ *Ibid.*

³² Kuitenbrouwer, Peter. “Keurig cleans up with 'recyclable' coffee pods — but it's still trash” *Financial Post*, August 11, 2017, online: <https://business.financialpost.com/news/keurig-cleans-up-with-recyclable-coffee-pods-but-its-still-trash>.

³³ *Ibid.*

³⁴ *Ibid.*

grounds.³⁵ It is clear that consumers are currently improperly disposing of these coffee pods and Keurig’s advertisements simply reinforce this behavior.

The table below lists regions that do accept K-cups in their recycling programs **but specifically do not accept the “dump and toss” method**. The table also indicates the rinsing and other processing measures necessary to properly prepare K-cups for recycling.

Table 4: City, Region or Province That Does Not Accept the “Dump and Toss” Method

City/Region/Province	Recommended Preparation for Recycling	Source
Vancouver	<ol style="list-style-type: none"> 1. Foil lid: Peel off the foil lid and throw in the garbage. 2. Coffee Grounds: Empty the coffee grinds into your food scraps kitchen container or directly into your Green Bin (or into your backyard composter). 3. Coffee liner/filter: Paper liners can be recycled in your Green Bin (or backyard composter). To remove the filter, pull on the side of the filter until the paper begins to separate from the plastic shell. Work your way around the filter until the paper pulls free. Plastic liners go in the garbage. 4. Plastic/Foil Cup: Empty and rinse then place in your Blue Box or Mixed Containers cart. 	City of Vancouver, “Recycling – Waste Wizard,” online: https://vancouver.ca/home-property-development/recycling.aspx
Halifax	Plastic may be recycled if pod is taken apart. Grounds and filter can go in the green bin. Lid is garbage.	Halifax, “Recycling,” online: https://www.halifax.ca/home-property/garbage-recycling-green-cart/recycling
Quebec City	Rinse the containers to remove residues that may have been deposited there.	Ville de Quebec, “Matières et Objets Recupérés et non Recupérés,” online: https://www.ville.quebec.qc.ca/citoyens/matieresresiduelles/recyclage/matieres_et_objets.aspx
Montreal	It’s always necessary to rinse containers to prevent mould and unpleasant odours.	Ville Montreal, “Montreal and the 3[R]s + [V],” online: http://ville.montreal.qc.ca/pls/portal/docs/PAGE/ENVIRO_FR/MEDIA/DOCUMENTS/DEPLIANT_PELERMELE_ANG.PDF

These are the few Canadian jurisdictions that do not explicitly disallow K-cups in recycling – yet they still mandate a more rigorous preparation process than the one Keurig advertises. Speaking

³⁵ Rider, David. “Grounds for a brouhaha?: Keurig, Toronto spar over whether coffee pods belong in blue bin.” *Toronto Star*, April 22, 2018, online: <https://www.thestar.com/news/gta/2018/04/20/grounds-for-a-brouhaha-keurig-toronto-spar-over-whether-coffee-pods-belong-in-blue-bin.html>.

to the required process, The City of Toronto report found at Appendix B of this application (Toronto Report PW 28.9) describes the appropriate preparation as onerous and states:

the complexity of this process raises concerns that residents may dispose of the non-separated coffee pods directly into the Blue Bin, where it could contaminate other Blue Bin recyclables.³⁶

If the advertisements showed the actual complexity of *proper* preparation for recycling, consumers who specifically buy the product for convenience might not buy the product.

Representation 3: Recycling of the product in the manner shown is good for the environment.

Key to the advertising is the theme that buying K-cups and recycling them as shown in the ads is good for the environment. Quite to the contrary, recycling K-Cups as shown in Keurig’s ads creates significant contamination and problems for recycling programs, and results in less recycling overall. Contamination caused by the improper recycling of K-cups has caused problems with recycling and cost the City of Toronto a significant amount of money.³⁷ The City of Toronto Report found at Appendix B specifically identified contamination issues and the confusion created by differing brand designs in deciding that coffee pods should not be accepted in Toronto’s recycling stream.³⁸

ii. Keurig’s Representations are False or Misleading in a Material Respect

Test for Determining Whether Representation is False or Misleading in a “Material Respect”

Prior jurisprudence in the context of criminal prosecutions under the *Competition Act* has interpreted what is meant by “misleading in a material respect.”³⁹

In *R. v. Tege Investment Ltd.*, the Alberta Provincial Court applied the dictionary meaning of “material” which was “of much consequence or important or pertinent or germane or essential to the matter.”⁴⁰ The Court noted that it was not necessary to establish that any person was *actually* misled by a representation. Rather, it was sufficient to establish that an advertisement was published for public view and that it was untrue or misleading in a material respect.

In *Apotex Inc. v. Hoffmann-La Roche Ltd.*, the Ontario Court of Appeal considered whether a representation is “material” under subsection 52(1) of the *Competition Act*; the criminal prohibition against “knowingly and recklessly” deceiving the public.⁴¹ The ONCA held that “a representation is material...if it is so pertinent, germane or essential that it could affect the

³⁶ *Ibid.*

³⁷ Each percentage point of recycling contamination costs Toronto \$600,000 to \$1 million a year. Chung, Emily. “Many Canadians are recycling wrong, and it’s costing us millions.” *CBC News*, April 6, 2018, online: <https://www.cbc.ca/news/technology/recycling-contamination-1.4606893>.

³⁸ Report PW 28.9, *Review of Single-Serve Coffee Pods in the City of Toronto’s Waste Diversion Programs*, *supra* note 29.

³⁹ *Canada (Commissioner of Competition) v. Sears Canada Inc.*, *supra* note 27 at para 333.

⁴⁰ *R. v. Tege Investment Ltd.*, 51 C.P. R. (2d) 216, 1978 CarswellAlta 507 at para 7; cited and adopted by *Canada (Commissioner of Competition) v. Sears Canada Inc.*, *supra* note 27 at para 334.

⁴¹ *Apotex Inc. v. Hoffmann-La Roche Ltd.* [2000] O.J. No. 4732.

decision to purchase” [emphasis added].⁴² It is important to note that in *Apotex*, the ONCA considered whether a representation “could” affect the decision to purchase.

As such, it is not necessary to establish that a person was actually misled by Keurig’s representations regarding K-cup recyclability. Rather, the Competition Bureau should consider whether Keurig’s representations regarding K-cup recyclability are “pertinent, germane, or essential enough” that they *could* affect the consumer’s decision to purchase K-cups.

Consumers are increasingly evaluating their purchases based on sustainability. Indeed, Keurig’s 2015 Annual Report identified that failing to convince consumers its product was truly sustainable could potentially lead to lower sales and threaten its business model:

...consumers may lose trust and confidence in our brand and our Company’s commitment to sustainability, and our brand could be damaged.⁴³

To address this problem, Keurig apparently implemented an entire marketing campaign to focus on – and promote – its brand’s sustainability. This suggests that Keurig’s misrepresentations were pertinent, germane, or essential enough to potentially affect consumers’ decision-making. Indeed, their central design appears to be to convince consumers concerned about environmental impacts to purchase the product because it is so environmentally advantageous; hence the “green” product name and green colour scheme featured in the advertisements.⁴⁴

D. Keurig’s Claim of Recyclability is not Properly Qualified

Recall that the Competition Bureau’s Environmental Claims Guide directed industry to qualify claims of recyclability to indicate the limitation of recycling facilities and said that general qualifications such as “recyclable where facilities exist” are not adequate.⁴⁵ The Guide recommends that, given it is sometimes not practical to have claims based on the facility of various types of local recycling programs, “if at least half the population has access to collection facilities, a claim of “recyclable” may be made without the use of any qualification.”⁴⁶ The Guide provides that in the case of limited availability of recycling facilities or where facilities are not available to a reasonable proportion of purchasers, potential purchasers, and users, the specific location of the acceptable recycling program or facilities should be identified.⁴⁷

⁴² *Ibid* at para 16.

⁴³ *Keurig Green Mountain Inc. Annual Report 2015*, *supra* note 9.

⁴⁴ For example, Ad 4 opens on the words “KEURIG PRESENTS 3 EASY RECYCLING STEPS.” The video switches to show a Keurig machine in front of a green, tropical background. A K-cup flies out of the machine and into another frame where the words “KEURIG K-CUP PODS NOW RECYCLABLE” and 5 generic K-cups are shown in front of a green background. The word “PEEL” appears on the screen and the labels peel themselves off the K-cups in a circular fashion. The word “EMPTY” appears at the top and “and compost coffee grounds” appear at the bottom, while the K-cups dump themselves out, to reveal perfectly clean K-cups. The video switches to show multi-coloured green triangles on a green background surrounding a clear container containing green yoghurt and milk containers. White K-cups drop into the container from the top of the screen. The word “RECYCLE” appears in white. The image shifts to the right and a light green Mobius loop with the number 5 in the center appears on a darker green background. The Mobius loop changes into a white Keurig logo on the same green background.

⁴⁵ *Environmental Claims: A Guide for Industry and Advertisers*, *supra* note 3.

⁴⁶ *Environmental Claims: A Guide for Industry and Advertisers*, *supra* note 3 at p. 31.

⁴⁷ *Environmental Claims: A Guide for Industry and Advertisers*, *supra* note 3 at p. 31.

As stated previously, fifteen of Canada’s major cities, metropolitan areas and regional municipalities explicitly prohibit the recycling of K-cups through their recycling system. By our preliminary calculation, together these cities, metropolitan areas and regional municipalities are home to approximately 11,690,856 Canadians. Further, three large cities/regions explicitly state that they do not accept K-cups treated with Keurig’s “dump and toss” method of recycling. These three cities/regions are home to 5,838,647 Canadians. As such, the K-cup recycling advertised by Keurig is unavailable to *at least* 17,529,503 Canadians.

City/Region/Province Which Does Not Accept K-cups in Recycling	Statistics Canada 2016 Census Population
City of Calgary	1,239,220
Durham Region	645,862
City of Edmonton	932,546
Halton Region	548,435
City of Hamilton	536,917
Moncton	108,620
City of Ottawa	934,243
P.E.I	142,907
Peel Region	1,381,739
Regina	214,631
City of Saskatoon	246,376
St. John’s	205,955
City of Toronto	2,731,571
Winnipeg	711,925
York Region	1,109,909
Total Population	11,690,856

City/Region Which Does not Accept “Dump and Toss” Method	Statistics Canada 2016 Census Population
City of Vancouver	631,486
Halifax Regional Municipality	403,131
Quebec City	705,103
City of Montreal	4,098,927
Total Population	5,838,647

Total Population to which Keurig’s Advertised K-Cup Recycling is Unavailable	
Population to which K-Cups Recycling Unavailable	11,690,856
Population to which Keurig’s Advertised K-cup Recycling Method Unavailable	5,838,647
Total	17,529,503

This brief review is limited to Canada's largest metropolitan areas. However, it is reasonable to infer that smaller cities and municipalities would similarly either:

- not accept K-cups in their recycling programs or
- require more extensive preparation than the "dump and toss" method advertised by Keurig.

The Competition Bureau may wish to further investigate the availability of recycling programs to determine whether *any* Canadian recycling programs accept recycled K-cups as advertised (e.g., without rinsing, etc.) It is certainly highly questionable whether recycling of this product as advertised is available to anywhere near half the Canadian population.

Clearly, recycling facilities which do accept K-cups for recycling in the manner advertised by Keurig, are not available to a *reasonable* portion of purchasers, potential purchasers and users. At the very least, the claim of recyclability should be qualified with the specific location of any recycling programs or facilities which might accept K-cups prepared via the effortless "dump and toss" recycling method advertised.

It may be worth noting that, according to the Competition Bureau's Environmental Claims Guide, Keurig's advertisement should include a qualifier such as: "this product is recyclable through the blue box program in X city." Keurig's existing qualification falls short of the Competition Bureau's recommendation because the advertisements at issue in this complaint include the qualifier: "Currently recyclable in select locations." The qualifier appears on the "Recyclable K-Cup Pods" section of Keurig's website three times. See screenshots below.

How to Recycle K-Cup® Pods in Three Easy Steps



PEEL

Allow K-Cup® pod to cool. Starting at the puncture, peel and dispose of the lid.



EMPTY

Compost or discard the coffee grounds. Filter can remain.*



RECYCLE

Discard the empty K-Cup® pods in your recycling bin. It's that simple!**

* When recycling K-Cup® pods containing hot chocolates or specialty beverages, step 2 is not required.

**Currently recyclable in select locations.



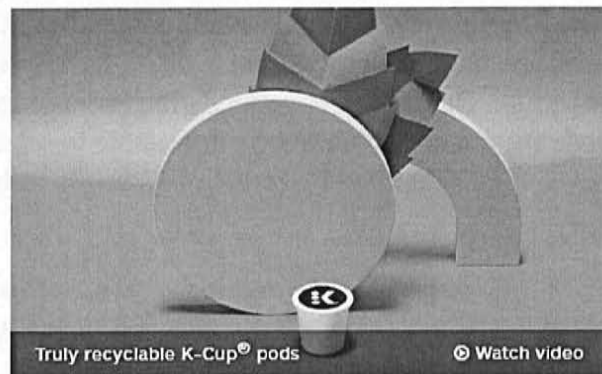
THE MAKING OF OUR RECYCLABLE K-CUP® PODS

We were determined to reduce our environmental footprint, but knew there would be challenges along the way. In this video, see how we pursued innovative strategies to make sure our K-Cup® pods were not only recyclable, but could actually be recycled.*

*Currently recyclable in select locations.

SAME PERFECT TASTE, NOW RECYCLABLE

Our solution is simple: the pods are designed so you can peel off the foil lid, compost the coffee grounds, and recycle the plastic #5 cup, alongside other recyclable containers from your home, in local community recycling programs.



*Currently recyclable in select locations.

The qualifier utilized by Keurig is extremely similar to the Competition Bureau’s example of an unacceptable qualifier: “recyclable where facilities exist.”

The absence of an acceptable qualifier on Keurig’s claim of recyclability further supports the conclusion that Keurig’s representations addressing the recyclability of K-cups are false and/or misleading.

Perhaps most important, the ads are misleading because they represent that an improper method of “dump and toss” is an acceptable way of recycling this product. Indeed, they represent that such a method of treating the product is environmentally sustainable – when it is actually exactly the opposite. It is undermining and impairing recycling systems in Canada.

One can hardly imagine a form of misleading advertising that could be more injurious to the public interest.

Part IV. Action Requested

On behalf of the undersigned residents, we request that you conduct an inquiry into the alleged materially false and misleading representations Keurig has made to the Canadian public, which constitutes reviewable conduct under s. 74.01(1)(a) of the *Competition Act*.

Secondly, we submit that, if your inquiry finds, consistent with the evidence presented in this complaint, that Keurig has made materially false and misleading representations to the Canadian public, that Keurig should be required to, at a minimum:

- a) retract its misleading advertisements and issue a public apology; and
- b) pay a \$10 million fine, to be paid to Canadian recycling authorities to help them deal with contamination of plastic recycling streams from improperly recycled Keurig K-cups and similar products.

A. Request for Inquiry

Based on the publicly available evidence presented in this complaint, we submit that Keurig has violated s. 74.01 of the *Competition Act*. A thorough, rigorous s. 9 inquiry is clearly needed. Based on all the foregoing, we submit that the Commissioner should conduct a thorough, rigorous inquiry of Keurig Canada Inc., pursuant to ss. 9(1) and 10(1)(a) of the *Competition Act*. This inquiry should investigate the representations identified, as well as any others the Commissioner may find, regarding the recyclability of Keurig's new K-cups.

B. Proposed Enforcement Measures

We recommend that if the Commissioner's inquiry finds, consistent with the evidence presented in this complaint, that Keurig has made materially false and misleading representations to the Canadian public, that the Commissioner pursue enforcement of the *Competition Act*, either by way of consent agreement or court order.⁴⁸ Appropriate enforcement would require Keurig to, at a minimum:

- a) retract its misleading advertisements⁴⁹ and issue a public apology,⁵⁰ and
- b) pay a \$10 million fine, to be put towards recycling initiatives in Canada.⁵¹

A court – upon finding reviewable conduct – may order a corporation to pay an administrative monetary penalty up to \$10 million for the first order.⁵² It is important to note that where a court

⁴⁸ Under the *Competition Act*, consent agreements can be based on terms that could be the subject of a court order, and may include other terms “whether or not they could be imposed by the court”: *Competition Act, supra note 7* at s. 74.12(2).

⁴⁹ “[T]he court may order the person...not to engage in the conduct;” *Competition Act, supra note 7* at s. 74.1(1)(a).

⁵⁰ “[T]he court may order the person...to publish or otherwise disseminate a notice, in such a manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including (i) a description of the reviewable conduct;” *Competition Act, supra note 7* s. 74.1(1)(b).

⁵¹ “[T]he court may order the person...to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding...in the case of a corporation, \$10,000,000 and, for each subsequent order, \$15,000,000;” *Competition Act, supra note 7* at s. 74.01(1)(c)(ii).

⁵² *Competition Act, supra note 7* at s. 74.1(1)(c).

finds that a corporation has conducted reviewable conduct under s. 74.01(1)(a), the court may order the administrative monetary penalty be paid “in any manner the court specifies.”

Although there could conceivably be an order to pay the penalty monies to persons who have purchased K-cups⁵³, it would make far more sense to order the penalty to be paid to recycling programs -- to mitigate the harm that misleadingly advertised K-cups have caused to those recycling efforts. (N.B. See Appendix B and the statements from Toronto officials quoted above for details on how misleading advertising of coffee pods is harming Toronto recycling efforts.)

Funds should be directed to recycling programs because the improper recycling of contaminated (e.g., unwashed) K-cups causes direct economic harm to recycling systems. As the City of Toronto report at Appendix B points out:

Residents must perform multiple tasks (remove lid, empty grounds, and clean container) to ensure the coffee pods can be properly processed in the Blue Bin recycling. Failure to execute each task will result in cross contamination and, as a result, increase contamination rates and reduce revenues from the sale of recyclables. (p. 3)

Speaking to the CBC about the economic impact of recycling contamination in Toronto, the General Manager of Solid Waste Management for the City of Toronto estimated that “each percentage point decrease in contamination could lower recycling costs in Toronto by \$600,000 to \$1 million a year.”⁵⁴ The article also noted that many recycling contracts were contingent on maintaining a contamination threshold. For example, Toronto’s contract stipulated that “if the city’s average contamination rate reaches 27 per cent,⁵⁵ it will get hit with an extra \$5 million charge.”⁵⁶

C. Aggravating Factors

The proposed enforcement measures recognise that there are many aggravating factors in Keurig’s behaviour that a court would likely take into account under s. 74.1(5) of the *Competition Act*. Relevant aggravating factors include “the reach of the conduct within the relevant geographic market,” “the frequency and duration of the conduct,” “the materiality of [the] representation,” and Keurig’s “financial position.”⁵⁷

i. Reach of the conduct within the relevant geographic market

Keurig’s misleading advertisements are available on its website and YouTube channel. As such, any Canadian consumer could access the misleading information.

In addition, Keurig’s misleading advertising appears on its packaging. Thus, the misleading advertising appears anywhere Keurig K-cups are sold. Keurig’s website indicates that “[y]ou can

⁵³ *Competition Act*, *supra* note 7 at s. 74.1(1)(d).

⁵⁴ Chung, Emily. “Many Canadians are recycling wrong, and it’s costing us millions.” *CBC News*, April 6, 2018. Accessed at: <https://www.cbc.ca/news/technology/recycling-contamination-1.4606893>

⁵⁵ At the time of the article, Toronto’s contamination rate sat at 26%.

⁵⁶ *Ibid.*

⁵⁷ *Competition Act*, *supra* note 7 at s. 74.1(5).

find Keurig coffee makers and K-Cup packs at thousands of retail locations across Canada and the United States.”⁵⁸

ii. Frequency and duration of the conduct

Keurig has been advertising the shift to recyclable K-cups since 2013.⁵⁹ The misleading YouTube advertisements on Keurig’s YouTube Channel were published on April 23, 2018. It is difficult to determine when the 3-Step image depicting the “dump and toss” method of recycling first appeared on Keurig’s packaging and website. However, the website indicates the most recent change was made to it in 2018.

iii. Materiality of the Representation

The advertisements promoting K-cup recyclability were made to induce people to buy K-cups who might not otherwise buy K-cups due to concerns about the waste and environmental consequences associated with K-cups.

iv. Keurig’s Financial Position

Keurig Canada Inc. operates as a subsidiary of Keurig Dr Pepper. Keurig Dr Pepper has annual revenue in excess of \$11 billion.⁶⁰ Keurig Dr Pepper reported its net sales amounted to \$7.361 billion USD in 2018.⁶¹ Keurig Dr Pepper also reports that its “Coffee Systems” segment, which reflects sales in the U. S. and Canada of the manufacture and distribution of finished goods relating to the Company’s coffee system, pods and brewers, generated net sales of \$4.003 billion USD in 2018.⁶²

v. Other Factors

It is important that other companies be deterred from similar acts of greenwashing. It must be made clear to Keurig and other companies that such misleading representations -- which are factually inaccurate and compromise recycling processes for Canadians -- are unacceptable.

Due to the deceptive nature of Keurig’s marketing campaign, the potential for significant economic damage to recycling systems, and Keurig’s economic resources, we submit that a substantial fine up to \$10 million is appropriate. Moreover, proceeds from the fine could assist in funding better recycling programs.

⁵⁸ Keurig, “Find a Store Near You,” online: <https://www.keurig.ca/find-a-store>.

⁵⁹ Keurig Green Mountain Sustainability Report, Fiscal 2013, online: <http://www.keuriggreenmountain.com/~media/Sustainability/PDF/ReportsDisclosures/Fiscal2013SustainabilityReportPDF.ashx>.

⁶⁰ Keurig Dr Pepper, “Keurig Dr Pepper Inc. Reports Second Quarter 2018 Results for Keurig Green Mountain, Inc. and Dr Pepper Snapple Group, Inc. – Keurig Dr Pepper Inc. Affirms Guidance for Full Year 2018,” online: <https://investors.keurigdrpepper.com/2018-08-08-Keurig-Dr-Pepper-Inc-Reports-Second-Quarter-2018-Results-for-Keurig-Green-Mountain-Inc-and-Dr-Pepper-Snapple-Group-Inc>.

⁶¹ Keurig Dr Pepper Inc., Form 10-Q, (Filed November 8 2018) at p. 1.

⁶² Keurig Dr Pepper Inc., (Filed November 8 2018) Form 10-Q, at p. 35.

Furthermore, the confusion and damage created for local recycling systems across Canada must be redressed by Keurig informing the public of the misinformation in the relevant advertisements, and correcting the public's impression that:

- Contaminated coffee pods can be casually thrown into plastic recycling streams, and
- Canadian recycling authorities welcome such contaminated material.

The corrective advertisements should be distributed as broadly as the original misleading advertisements.

APPENDIX A

SOLEMN DECLARATIONS OF APPLICANTS

**Solemn declaration of Resident respecting an application to the Commissioner of
Competition under s. 9(1) of the Competition Act**

I, Matthew Ray Miller, living at 4236 Shelbourne St., Victoria, British Columbia, V8N 3E9, solemnly declare all information contained in this application, including the nature of the alleged contravention or offence and the evidence supporting my opinion. I authorize Calvin Sandborn and/or Bronwyn Roe, barristers and solicitors whose contact information is included in this application, to represent me in this matter. I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

1. I am a PhD student in the School of Earth and Ocean Sciences at the University of Victoria studying marine micro-plastic pollution. I am also President of the Surfrider Foundation University of Victoria Club. The Club runs monthly beach cleanups, campaigns against single-use plastics, and educates the public about ocean plastic pollution. I found what appears to be a Keurig K-Cup during a May 22, 2018 beach cleanup at the remote Lepas Bay Beach, Haida Gwaii. The K-Cup I found on Lepas Bay Beach is pictured here:



2. I have read the above application dated May 2, 2019 and styled "Re: Keurig Canada Inc.'s apparently false and misleading material representations of its K-cup product as a green and easily recyclable product for Canadian consumers."
3. To the best of my information and belief, the said application is an accurate statement of the nature of the alleged contravention; the grounds alleged; the alleged offence; and the name of the company (Keurig Canada Inc.) concerned. It is also a concise statement of the evidence supporting my belief that the Competition Act has been contravened and that a remedy is necessary.
4. I am a resident of Canada and am over 18 years of age.



Matthew Ray Miller

Declared before me at Victoria
in the Province of British Columbia on
this 6th day of May, 2019.



Commissioner for Taking Oaths for the
Province of British Columbia

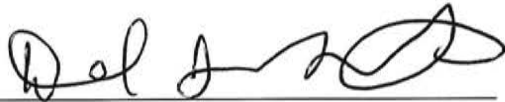
Calvin Sandborn
Barrister and Solicitor
Faculty of Law, University of Victoria
Victoria, BC V8W 2Y2



**Solemn declaration of Resident respecting an application to the Commissioner of
Competition under s. 9(1) of the Competition Act**

I, David John Boudinot, living at 1141 Empress Ave, Victoria, British Columbia, V8T 1P3, solemnly declare all information contained in this application, including the nature of the alleged contravention or offence and the evidence supporting my opinion. I authorize Calvin Sandborn and/or Bronwyn Roe, barristers and solicitors whose contact information is included in this application, to represent me in this matter. I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

1. I have been documenting and researching plastic pollution around Vancouver Island since 2016, including both pre- and post-consumer plastics. I am a volunteer researcher with the Surfrider Foundation of Vancouver Island, and have seen first-hand the environmental impact of single use plastic pollution at beach cleanups.
2. I have read the above application dated May 2, 2019 and styled "Re: Keurig Canada Inc.'s apparently false and misleading material representations of its K-cup product as a green and easily recyclable product for Canadian consumers."
3. To the best of my information and belief, the said application is an accurate statement of the nature of the alleged contravention; the grounds alleged; the alleged offence; and the name of the company (Keurig Canada Inc.) concerned. It is also a concise statement of the evidence supporting my belief that the Competition Act has been contravened and that a remedy is necessary.
4. I am a resident of Canada and am over 18 years of age.



David John Boudinot

Declared before me at Victoria
in the Province of British Columbia on
this 2nd day of May, 2019.



Commissioner for Taking Oaths for the
Province of British Columbia

Calvin Sandborn
Barrister and Solicitor
Faculty of Law, University of Victoria
Victoria, BC V8W 2Y2

Solemn declaration of Resident respecting an application to the Commissioner of Competition under s. 9(1) of the Competition Act

I, Margaret Lesley McCullough, living at 159 Joseph St, Victoria, British Columbia, V8S 3H6, solemnly declare all information contained in this application, including the nature of the alleged contravention or offence and the evidence supporting my opinion. I authorize Calvin Sandborn and/or Bronwyn Roe, barristers and solicitors whose contact information is included in this application, to represent me in this matter. I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

1. I have been working with an unincorporated group of Victoria students, sometimes referred to as "Kids for a Plastic Free Canada" on a public education and legislative campaign regarding single use plastics. The group have made presentations to local schools, businesses, councils and the BC government asking for support of a ban on single use plastics in BC. We believe that with the amount of plastic ending up in landfills and the ocean increasing, we must find alternative solutions wherever possible and move towards a circular economy, and away from a disposable one.
2. I have read the above application dated May 2, 2019 and styled "Re: Keurig Canada Inc.'s apparently false and misleading material representations of its K-cup product as a green and easily recyclable product for Canadian consumers."
3. To the best of my information and belief, the said application is an accurate statement of the nature of the alleged contravention; the grounds alleged; the alleged offence; and the name of the company (Keurig Canada Inc.) concerned. It is also a concise statement of the evidence supporting my belief that the Competition Act has been contravened and that a remedy is necessary.
4. I am a resident of Canada and am over 18 years of age.

M L McCullough
Margaret Lesley McCullough

Declared before me at Victoria
in the Province of British Columbia on
this 2nd day of May 2019.
Calvin Sandborn

Commissioner for Taking Oaths for the
Province of British Columbia

Calvin Sandborn
Barrister and Solicitor
Faculty of Law, University of Victoria
Victoria, BC V8W 2Y2

**Solemn declaration of Resident respecting an application to the Commissioner of
Competition under s. 9(1) of the Competition Act**

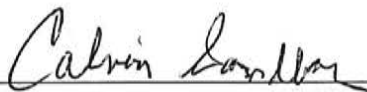
I, Garth Aidan Covernton, living at 2648 Fernwood Road, Victoria, British Columbia, V8T 3A2, solemnly declare all information contained in this application, including the nature of the alleged contravention or offence and the evidence supporting my opinion. I authorize Calvin Sandborn and/or Bronwyn Roe, barristers and solicitors whose contact information is included in this application, to represent me in this matter. I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

1. I am a PhD candidate in the Department of Biology at the University of Victoria. I conduct research on micro-plastics contamination of the marine environment, primarily in relation to coastal marine fish and invertebrates and their ecology. I also regularly speak to audiences, including elementary and high school classrooms, about plastic pollution and the need to reduce our use of plastics and improve our practices related especially to single-use items.
2. I have read the above application dated May 2, 2019 and styled "Re: Keurig Canada Inc.'s apparently false and misleading material representations of its K-cup product as a green and easily recyclable product for Canadian consumers."
3. To the best of my information and belief, the said application is an accurate statement of the nature of the alleged contravention; the grounds alleged; the alleged offence; and the name of the company (Keurig Canada Inc.) concerned. It is also a concise statement of the evidence supporting my belief that the Competition Act has been contravened and that a remedy is necessary.
4. I am a resident of Canada and am over 18 years of age.



Garth Aidan Covernton

Declared before me at Victoria
in the Province of British Columbia on
this 2nd day of May, 2019.



Commissioner for Taking Oaths for the
Province of British Columbia

Calvin Sandborn
Barrister and Solicitor
Faculty of Law, University of Victoria
Victoria, BC V8W 2Y2

Solemn declaration of Resident respecting an application to the Commissioner of Competition under s. 9(1) of the Competition Act

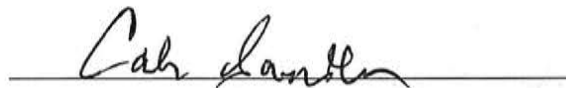
I, Chris-Ann D. Lake, living at #306-1400 Beach Drive, Victoria, British Columbia, V8S 2N7, solemnly declare all information contained in this application, including the nature of the alleged contravention or offence and the evidence supporting my opinion. I authorize Calvin Sandborn and/or Bronwyn Roe, barristers and solicitors whose contact information is included in this application, to represent me in this matter. I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

1. In my work with Surfrider Foundation Vancouver Island our efforts to reduce plastic waste and encourage recycling are undermined by misleading “greenwashing” ads – ads that encourage people to buy plastics that are “compostable,” “biodegradable” or “recyclable.” We do not believe that the sole onus should be onto the consumer when it comes to recycling or composting. Industries, not communities, need to be responsible for the end of life of their products. They also need to be held accountable for being unclear if not outright deceptive, about the life cycle of their products.
2. I have read the above application dated May 2, 2019 and styled “Re: Keurig Canada Inc.’s apparently false and misleading material representations of its K-cup product as a green and easily recyclable product for Canadian consumers.”
3. To the best of my information and belief, the said application is an accurate statement of the nature of the alleged contravention; the grounds alleged; the alleged offence; and the name of the company (Keurig Canada Inc.) concerned. It is also a concise statement of the evidence supporting my belief that the Competition Act has been contravened and that a remedy is necessary.
4. I am a resident of Canada and am over 18 years of age.



Chris-Ann D. Lake

Declared before me at Victoria
in the Province of British Columbia on
this 6th day of May, 2019.



Commissioner for Taking Oaths for the
Province of British Columbia

Calvin Sandborn
Barrister and Solicitor
Faculty of Law, University of Victoria
Victoria, BC V8W 2Y2



**Solemn declaration of Resident respecting an application to the Commissioner of
Competition under s. 9(1) of the Competition Act**

I, James Anthony McIsaac, living at 9361 East Saanich Road, Sidney, British Columbia, V8L 0C2, solemnly declare all information contained in this application, including the nature of the alleged contravention or offence and the evidence supporting my opinion. I authorize Calvin Sandborn and/or Bronwyn Roe, barristers and solicitors whose contact information is included in this application, to represent me in this matter. I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.


1. I am Executive Director of the T Buck Suzuki Environmental Foundation, which works to protect habitat, prevent pollution and promote sustainable fisheries. I am increasingly concerned about the impact of plastic waste on fisheries and aquatic/marine environments, and have commissioned two reports on the issue, *Seven Reforms to Address Marine Plastic Pollution* and *A National Strategy to Combat Marine Plastic Pollution: A Blueprint for Federal Action*. I am deeply concerned about the possibility that misleading advertising will exacerbate our plastic waste problems.
2. I have read the above application dated May 2, 2019 and styled "Re: Keurig Canada Inc.'s apparently false and misleading material representations of its K-cup product as a green and easily recyclable product for Canadian consumers."
3. To the best of my information and belief, the said application is an accurate statement of the nature of the alleged contravention; the grounds alleged; the alleged offence; and the name of the company (Keurig Canada Inc.) concerned. It is also a concise statement of the evidence supporting my belief that the Competition Act has been contravened and that a remedy is necessary.
4. I am a resident of Canada and am over 18 years of age.



James Anthony McIsaac



Declared before me at Victoria
in the Province of British Columbia on
this 2nd day of May, 2019.


Commissioner for Taking Oaths for the
Province of British Columbia

Calvin Sandborn
Barrister and Solicitor
Faculty of Law, University of Victoria
Victoria, BC V8W 2Y2

APPENDIX B

Report PW 28.9

Review of Single-Serve Coffee Pods in the City of Toronto's Waste Diversion Programs

March 13, 2018

Download at:

<https://www.toronto.ca/legdocs/mmis/2018/pw/bgrd/backgroundfile-113676.pdf>

