
Adam F. Fanaki Competition Law Moot

2023 Adam F. Fanaki Competition Law Moot Problem
Commissioner of Competition v Pear Inc.

A. Executive Summary

1. The Commissioner of Competition (the "**Commissioner**") has filed an application pursuant to subsection 74.11(1) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "**Act**"), seeking a temporary order requiring Pear Inc. ("**Pear**") not to engage in conduct that the Commissioner alleges is reviewable under Part VII.1 of the Act.

2. Pear is a leading producer of electronic devices and software products. Its product portfolio includes laptops, tablets and smartphones, together with the operating systems that power these devices and a large number of widely used applications, which it makes available through its own application store.

3. On March 15, 2022, Pear unveiled its newest smartphone, the PearGab 6, and an updated version of its mobile operating system (Rootz Deep Earth), which is currently only available for the PearGab 6. Contemporaneously, Pear launched a large scale, multichannel advertising campaign for its new offering (the " **PearGab 6 Campaign**"). Each advertisement featured Pear's mascot, an anthropomorphic pear named Pyrus, and highlighted a different feature of the PearGab 6. Among the features highlighted in Pear's advertising campaign was "Pyrus' Privacy Promise", which was promoted using a number of taglines and marketing vignettes (collectively, the "**Privacy Representations**").

4. On August 6, 2022, Pear disclosed that it had detected a security breach affecting Rootz Deep Earth (the "**Security Breach**"). Two days later, Pear announced that its internal investigation had determined that an unauthorized third party appeared to have obtained access to sensitive data of PearGab 6 users. While Pear indicated that it had not yet been able to identify which users had their data accessed, its preliminary analysis indicated that the data of more than a million users was likely implicated.

5. Since the Security Breach, Pear has continued to run the PearGab 6 Campaign, including the Privacy Representations. The Commissioner's application seeks a temporary order requiring Pear not to engage in making the Privacy Representations or substantially similar conduct.

6. For the reasons set out below, the Tribunal finds that Pear appears to be engaged in reviewable conduct under Part VII.1 of the Act; however, the Tribunal is not satisfied that serious harm is likely to ensue unless the order is issued.

7. Having found that the Commissioner has failed to establish that serious harm is likely to ensue absent the order sought, the Tribunal does not consider it necessary to consider whether the balance of convenience favours issuing the order, and the Commissioner's application is dismissed.

B. The Parties

8. The Commissioner is the public official appointed by the Governor in Council under section 7 of the Act to be responsible for the administration and enforcement of the Act.

9. Pear is a leading technology company. Headquartered in Chile, it is globally active and produces some of the world's most popular devices and software. Its innovative products, user-friendly design and cohesive ecosystem have allowed it to grow into one of the world's most valuable companies.

10. Pear's portfolio of personal electronic devices operate exclusively on Pear's own Rootz operating systems, which support both Pear's own software applications and third party applications. Pear's suite of applications includes a web browser, a mobile wallet (Bag of Seeds), an email client and a health and wellness application (Pear a Day), among many others. Through its broad product offering, Pear collects and maintains a large volume of user data.

C. Factual Background

I. PearGab 6 Launch and the PearGab 6 Campaign

11. Pear is considered a leading innovator and generally seen as a first mover, introducing product features and capabilities that set new standards, which others quickly rush to emulate. Consistent with Pear's overall reputation, the PearGab is one of the world's most popular smartphones. While the PearGab's advanced features command a premium price, typically over $1,000 for the latest model, it is consistently ranked among the top five selling smartphones across Canada.

12. On March 15, 2022, Pear's CEO, Nelly Stench, unveiled the PearGab 6, which runs on an updated version of Pear's mobile operating system, Rootz Deep Earth, and would be available in select countries, including Canada, as of April 1, 2022. To coincide with the March 15 product launch, Pear initiated an international multichannel marketing campaign, which began the same day with TV commercials, online advertisements, promotional influencer posts, billboards and print advertisements in newspapers and magazines, with each of the foregoing channels activated in Canada.

13. The PearGab 6 Campaign highlighted five different features of the PearGab 6: its ability to capture 3D pictures, its "superfast" browsing speeds, its availability in seven new colours, including burnt greige, its lightweight large screen design and Pyrus' Privacy Promise. Certain marketing materials referred to each of these features, while others highlighted just one.

14. The Pyrus' Privacy Promise was described in the PearGab 6 Campaign, as well as on Pear's website more broadly, as a "robust set of features and tools designed to protect your data." The Pyrus' Privacy Promise marketing materials included:

    a. a print ad with an image of Pyrus sound asleep with the tag line "we're up worrying about your privacy so you don't have to be";

    b. a short video ad in which Pyrus is shown using the PearGab 6 for a range of activities including taking pictures of a newborn baby pear, applying for a mortgage and updating medical information, with a voiceover that states: "We know you trust us with the things that matter most; that's why data security is at the core of the PearGab 6. Privacy; that's Pyrus' promise to you."; and

c. a digital display ad that featured a picture of a PearGab 6 device, with different images cycling through on its screen to promote each of the five highlighted features; one such image showed Pyrus dressed as a security guard in front of a bank vault with the “Pyrus’ Privacy Promise” appearing across the bottom.

15. The advertising agency retained by Pear for the PearGab 6 Campaign, Wally’s Wacky Publicity (WWP), described the campaign’s central theme as “balance” and indicated that it has been specifically designed to ensure that each of the five highlighted features is given equal prominence over the course of the PearGab 6 Campaign. Pear’s public financial reports described the PearGab 6 Campaign as “Pear’s largest ever”, with an annual worldwide budget of more than $800 million.

16. When the PearGab 6 became available on April 1, 2022, Pear announced that it had already sold 500,000 units globally, including 20,000 in Canada. Since that time, sales have grown considerably and Pear estimates that at least 150,000 PearGab 6 units have been sold in Canada to date.

II. Security Breach

17. On August 6, 2022, Pear released a short statement indicating that it had detected unusual activity on PearGab 6 devises, urging users to immediately install an update for the Rootz Deep Earth operating system and promising to provide more details as its internal investigation advanced.

18. On August 8, 2022, Pear held a press conference where it announced that its internal investigation had confirmed that there had been a “malicious breach” of Rootz Deep Earth and that an unauthorized third party had obtained access to user data stored on PearGab 6 devices, including users’ financial information stored in Bag of Seeds and personal health information from Pear a Day. Pear’s investigation remains ongoing and it has yet to identify all impacted users, but it estimates that at least one million users were impacted globally, with at least some affected users in Canada.

19. On August 10 and 14, respectively, Pear’s two leading smartphone competitors, Frugle and Mattspoke, announced that certain of their own smartphone devices had been the victim of cyberattacks, pursuant to which their own users’ data had been compromised.

20. While none of Pear, Frugle nor Mattspoke are yet to release the resultsof their respective internal investigations, industry experts believe all three attacks to be the work of JesterRoast, an anarchist collective that is believed to be responsible for seven other high profile cyberattacks over the past two years.

III. The Commissioner’s Investigation

21. On September 9, 2022, the Competition Bureau (the “**Bureau**”) sent a letter by registered mail to Pear advising it that it received complaints with respect to Pear’s ongoing promotion of the Privacy Representations (the “**Complaints**”) following the Security Breach and of the Bureau’s role in enforcing the deceptive marketing provisions of the Act. The Bureau invited Pear to make any submissions it considered relevant to the Bureau’s consideration of the Complaints. The Bureau also specifically requested that Pear provide to the Bureau testing to substantiate the Privacy Representations. The Bureau noted that,

under the Act, the onus is on the advertiser to ensure that any statement or guarantee of performance is based on adequate and proper testing.

22. On September 15, 2022, Pear responded to the Bureau's letter, writing that truth in advertising is a vital value for Pear and that, in response to the Bureau's letter, it carefully reviewed the Privacy Representations and that it remained satisfied with the validity of such representations. Pear noted that the Security Breach in fact "demonstrated the sincerity of Pyrus' Privacy Promise; which was evidenced by the seriousness and urgency with which Pear responded to the breach." Pear asserted, however, that the Privacy Representations communicate an "ethos" and "underlying design principle", which are not conducive to testing. While data privacy "is front and center throughout Pear's development process", Pear indicated that no specific testing was undertaken in connection with the Privacy Representations.

23. On September 30, 2022, the Commissioner commenced an inquiry under subparagraph 10(1)(b)(ii) of the Act on the basis that she has reason to believe that grounds exist for the making of an order under Part VII.1 of the Act, specifically pursuant to paragraphs 74.01(1)(a) and 74.01(1)(b) of the Act.

24. The Commissioner's inquiry is ongoing and it brings this application in an effort to halt the Privacy Representations while she proceeds as expeditiously as possible to complete her inquiry.

D. Position of the Parties

25. Under subsection 74.11(1) of the Act, a court (which, as defined in section 74.09 of the Act, includes the Tribunal), may order a person not to engage in conduct reviewable under Part VII.1 of the Act where it appears to the court that:

    a. the person is engaging in conduct that is reviewable under Part VII.1 of the Act;

    b. serious harm is likely to ensue unless the order is issued; and

    c. the balance of convenience favours issuing the order.

26. The parties' positions with respect to each element are set out in turn below.

I. Reviewable Conduct under Part VII.1 of the Act

27. As a threshold matter, the Commissioner submits that in requiring "only" that "it appears to the court" that a person is engaging in reviewable conduct under Part VII.1 of the Act, subsection 74.11(1) establishes a low standard, which the Commissioner can discharge by demonstrating that her allegations are neither frivolous nor vexatious.

28. The Commissioner contends that, in the present case, this standard is satisfied with respect to both paragraphs 74.01(1)(a) and 74.01(1)(b) of the Act.

29. With respect to paragraph 74.01(1)(a), the Commissioner asserts that the Privacy Representations (i) were made to the public for purposes of promoting the PearGab 6, (ii) created the general impression that the PearGab 6 would safeguard the privacy of user data, (iii) were material as consumers may be induced into purchasing the PearGab 6 on

the basis of the Privacy Representations and (iv) were demonstrably false in light of the Security Breach.

30. With respect to paragraph 74.01(1)(b), the Commissioner submits that Pyrus' Privacy Promise is explicitly framed as a "guarantee" of performance and that, by Pear's own admission, no specific testing was undertaken to support this claim.

31. Pear asserts that the Commissioner's interpretation of the threshold applicable to subsection 74.11(1) is wrong and maintains that, in any event, it is not engaged in reviewable conduct under Part VII.1 of the Act.

32. Pear submits that it is not sufficient for the Commissioner to demonstrate that her allegation of reviewable conduct is neither frivolous nor vexatious. Rather, Pear contends that, as a matter of statutory interpretation, by requiring that "it appears to the court" that reviewable conduct is being engaged in, the Act "clearly requires the Commissioner to put forward sufficient evidence so as to allow the Tribunal to reach an affirmative finding that the alleged transgression has occurred." While Pear impresses the importance of this issue as a matter of law, it contends that even under the Commissioner's own interpretation, the first requirement of subsection 74.11(1) is not satisfied here.

33. In response to the Commissioner's allegations under paragraph 74.01(1)(a), Pear disputes both that the Privacy Representations are "material" within the meaning of the Act and that they are "false or misleading." With respect to materiality, Pear contends that privacy protection is "at most, an ancillary feature of its products." As Pear's counsel put it in oral argument: "Pear sells smartphones, not data vaults." In furtherance of this claim, Pear referred to a consumer study it commissioned as part of its most recent product development cycle. The study found that the three most important smartphone features for users are (i) a wide range of available applications, (ii) excellent connectivity and (iii) a powerful camera; "data security" was not identified as the most important smartphone feature by any study participants. Moreover, the study found that 82% of consumers either had "no knowledge" or only "limited knowledge" of their smartphone's privacy settings.

34. Pear further contends that even if the Privacy Representations were considered material, they are not false or misleading. Pear submits that when considering the general impression of a representation, the analysis must not be "divorced from reality through consideration of a generic consumer"; and, rather, the "ordinary consumer within the context of the product at issue" must be considered. Pear asserts that with respect to the PearGab 6, the ordinary consumer would be aware of the unavoidable risk of a malicious data attack, not least of all in light of the consistent press coverage such attacks have received in recent years.

35. Finally, with respect to the Commissioner's allegation that the Privacy Representations are reviewable under paragraph 74.01(b), Pear submits that the Privacy Representations represent mere puffery and do no constitute a statement or guarantee. Pear further contends that, in any event, the Privacy Representations do not pertain to the performance, efficacy or length of life of any product and, rather, as set out in its letter to the Bureau, represent an overarching design philosophy. Accordingly, Pear asserts that the Privacy Representations fall outside the scope of paragraph 74.01(1)(b) of the Act.

II. Serious Harm is Likely to Ensue Unless the Order is Issued

36. The Commissioner asserts that if the Tribunal is satisfied that Pear appears to be engaging in conduct contrary to Part VII.1 of the Act (as required under the first branch of the subsection 74.11(1) test), then, on the basis of that finding, the Tribunal can infer that serious harm is likely to ensue if Pear is permitted to continue to make the Privacy Representations.

37. In furtherance of this position, the Commissioner emphasises that Part VII.1 is intended to protect competition and the proper functioning of the market. The seriousness of the harm to competition that occurs as a result of reviewable conduct is demonstrated by the material penalties the Act prescribes for such conduct. Accordingly, the Commissioner submits, where reviewable conduct under subsection 74.01(1) is occurring and is likely to continue to occur, as the Commissioner alleges to be the case here, serious harm is necessarily likely to ensue.

38. Pear rejects the Commissioner's approach and contends that the second branch of subsection 74.11(1) must necessarily require the Commissioner to demonstrate harm separate from the mere occurrence of reviewable conduct. In Pear's submission, the Commissioner's assertion would render the second branch of subsection 74.11(1) superfluous, which cannot have been Parliament's intent.

39. Pear submits that the second branch of subsection 74.11(1) must have meaning of its own and, in the present case, no such harm has been put forward by the Commissioner. Moreover, Pear asserts, there is no harm to be found. In particular, Pear contends that the PearGab 6 Campaign has saturated the media for several months, with recent WWP survey data showing that 90% of Pear's target demographic was at least "moderately familiar" with the PearGab 6 Campaign and able to recall each of the five promoted features. As such, Pear submits that to the extent the Privacy Representations are material within the meaning of the Act (which Pear disputes) "there is no putting the message back in the bottle." Similarly, Pear submits that should the Tribunal find that the Privacy Representations appear to be reviewable under paragraph 74.01(1)(b) of the Act, in order for the second branch of subsection 74.11(1) to have any meaning, the "mere making of a statement without adequate and proper testing must be treated as a simple foot fault"; in particular as even true claims can constitute reviewable conduct under paragraph 74.01(1)(b). Pear urges that the Tribunal must find "real and specific harm" as being likely to ensue as a result of the continued making of the Privacy Representations, of which it contends there is none in the present case.

III. The Balance of Convenience Favours Issuing the Order

40. The Commissioner submits that where an injunction is sought to protect the public interest or to enforce public rights, such as the Commissioner claims to do here, courts must be, and have been, very reluctant to conclude that the public interest in having the law obeyed is outweighed by the hardship the injunction would impose upon the person subject to the injunction. The Commissioner asserts that there is no basis here for the Tribunal to depart from this precedential practice.

41. Pear asserts that there is no harm occasioned by a refusal to grant the order sought by the Commissioner as, for the reasons set out above, Pear is not engaged in reviewable

conduct under Part VII.1 of the Act and serious harm is not likely to ensue if the order is not issued.

42. However, Pear has not put before the Tribunal the harm (if any) that it would suffer if the order sought by the Commissioner is made and has not challenged that the balance of convenience favours issuing the order in the event that the Tribunal finds in favour of the Commissioner with respect to the first two branches of subsection 74.11(1).

43. Accordingly, in the present case, the Tribunal will consider the first two branches of subsection 74.11(1) to be dispositive and the balance of convenience will not be further considered in these reasons.

E. The Issues

44. As set out above, the parties bring into issue the first two branches of subsection 74.11(1) and raise a number of novel and important considerations with respect to each. As detailed below, the Tribunal considers the outcome of the matter to turn on four principal issues:

    a. What standard does subsection 74.11(1) of the Act establish for the granting of a temporary order? Stated differently, what burden does the Commissioner bear?

    b. Under paragraph 74.01(1)(a), what is the appropriate test for materiality and how is the general impression test to be applied?

    c. Under paragraph 74.01(1)(b), what is the test for determining whether a representation constitutes a statement or guarantee of performance?

    d. What constitutes serious harm for purposes of paragraph 74.11(1)(a)? Is the continuation of reviewable conduct itself sufficient harm?

F. The Tribunal's Analysis

45. The Tribunal has carefully considered the parties' submissions, the relevant jurisprudence and the evidence available to it. For the reasons below, the Tribunal has concluded that:

    a. While the language of subsection 74.11(1) establishes a relatively low standard in requiring only that it "appear to the court" that a party is engaging in reviewable conduct, in order for the Commissioner to discharge her burden, she must demonstrate at least on a balance of probabilities that there is evidence of such conduct.

    b. In order for a representation to be false or misleading in a material respect, the representation must influence the purchasing decision of a credulous and inexperienced generic consumer. Materiality does not require that a representation be shown to be the *sine qua non* of a purchasing decision; it is sufficient that it be pertinent and influential to the decision-making process. The Tribunal finds that the Privacy Representations created the general impression that the PearGab 6 offered privacy protection, including from cyberattacks. It appears to the Tribunal that the Privacy Representations are false or misleading in a material respect, such that they appear to constitute reviewable conduct under paragraph 74.01(1)(a) of the Act.

c. The Privacy Representations were presented as a "promise"; the literal meaning of this is clear and its general impression must be understood as statement or guarantee within the meaning of paragraph 74.01(1)(b). However, not all statements or guarantees must be substantiated by testing under paragraph 74.01(1)(b) of the Act. It does not appear to the Tribunal that the Privacy Representations relate to the performance, efficacy or length of life of a product, and as such, it does not appear to the Tribunal that Pear is engaged in reviewable conduct under paragraph 74.01(1)(b) of the Act.

d. Paragraph 74.11(1)(a) of the Act must have independent meaning; it cannot be merely redundant of the analysis required under subsection 74.11(1) as to whether a person is engaging in reviewable conduct under Part VII.1 of the Act. The Tribunal finds that the Commissioner has failed to demonstrate that serious harm is likely to ensue unless the order she seeks is issued.

I. The Applicable Standard for subsection 74.11(1)

46. Subsection 74.11(1) allows this Tribunal to order a person not to engage in conduct when it "appears to the court" that that person is engaging in reviewable conduct under Part VII.1 of the Act. The current version of subsection 74.11(1) has not yet been judicially applied and, as such, this Tribunal has not had opportunity to establish the nature of the threshold it invokes.

47. Upon the initial adoption of subsection 74.11(1) in 1999, the prior form of this provision stated that:

> Where, on application by the Commissioner, a court finds a strong prima facie case that a person is engaging in reviewable conduct under this Part, the court may order the person not to engage in that conduct or substantially similar reviewable conduct if the court is satisfied that
>
> […]

48. The current form of subsection 74.11(1) came into force on July 1, 2014. The Commissioner submits that Parliament's amendments "speak clearly" and that the displacement of a "strong prima facie case" with "it appears to the court" was intended to establish a low standard and to facilitate the ability of the Tribunal to enjoin potentially reviewable conduct. The Commissioner contends that it follows that, subsection 74.11(1), in its current form, requires only that the allegation that a person is engaging in reviewable conduct be neither frivolous nor vexatious. Stated differently, in the present case, the Commissioner proposes that it is sufficient for the Tribunal to be satisfied that it is neither frivolous nor vexatious to allege that the Privacy Representations are reviewable under either paragraph 74.01(1)(a) or 74.01(1)(b).

49. The Tribunal agrees with the Commissioner that the history of subsection 74.11(1) is appropriately considered in interpreting its meaning. However, while the legislative history informs the assessment of Parliament's intent, this represents only one facet of statutory interpretation. As the Supreme Court of Canada explained in *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

50. In considering the provision's text, context and purpose, the Tribunal finds that whether it "appears to the court" that certain conduct is occurring is a meaningful threshold. An order requiring a respondent not to engage in certain conduct can be highly consequential to that respondent's business. For this Tribunal to order a person to cease particular conduct, the Commissioner must investigate the matter and present sufficient evidence to show that the conduct is indeed likely occurring on a balance of probabilities.

51. It would be unjust to allow this Tribunal to make an order enjoining conduct without first requiring the Commissioner to satisfy this burden. It is unlikely that the drafters of subsection 74.11(1) intended for this Tribunal to have the power to enjoin conduct that, on a balance of probabilities, does not appear to be occurring; particularly given that it is well established that the conduct in issue is speech.

52. The Commissioner need not meet the standard of a "strong prima facie case", nor must she necessarily present "clear and non-speculative" evidence. She must simply convince the Tribunal that, on balance, the respondent appears likely to be engaging in the conduct alleged. The respondent similarly has the opportunity to convince the Tribunal that it does not appear to be engaged in reviewable conduct.

53. Accordingly, in considering below whether Pear is engaged in reviewable conduct under Part VII.1 of the Act, the Tribunal will consider whether on a balance of probabilities there is evidence that such conduct is likely occurring.

II. Paragraph 74.01(1)(a) – False or Misleading in a Material Respect

54. The first provision of Part VII.1 pursuant to which the Commissioner alleges Pear's conduct is reviewable is paragraph 74.01(1)(a). In order for Pear to be engaged in reviewable conduct under that paragraph, the Privacy Representations must (i) have been for the purpose or promoting, directly or indirectly, a product or other business interest, (ii) have been made to the public, and (iii) be false or misleading in a material respect. For the reasons that follow, it appears to the Tribunal that Pear's Privacy Representations satisfy each of the foregoing elements and are, accordingly, reviewable under paragraph 74.01(1)(a).

55. In the present case, it is not at issue whether Pear made the Privacy Representations for the purposes of promoting a business interest or that they were made to the public. The Privacy Representations were part of a multichannel advertisement campaign, which included TV commercials, digital advertisements, billboards and print campaigns, which was clearly directed at promoting sales of the PearGab 6. Both parties agree that it is indisputable that these representations were made to the public for purposes of promoting a business interest. As such, whether the Privacy Representations are reviewable under paragraph 74.01(1)(a) turns on whether they are false or misleading in a material respect.

a. The General Impression

56. First, the Tribunal will consider the general impression conveyed to consumers, in addition to the literal meaning of the representation, based only on the representations actually made to the public.

57. Pear contends that when considering the general impression of a representation, the general impression analysis must be made through the lens of a consumer with a perspective relevant to the product at issue. In the present case, its assertion is that such a consumer would have contextual knowledge regarding data security that would act as a qualification for the representations in question. Such a consumer would know that cyberattacks are unavoidable, effectively an act of god, regardless of any privacy protections in place. This would of course inform their general impression of the Privacy Representations.

58. The Tribunal disagrees with Pear's contention. In evaluating the appropriate consumer lens, the Supreme Court in *Richard v. Time*, 2012 SCC 8, ("***Richard***") is instructive. It tells us that the relevant consumer is deemed to be "credulous and inexperienced" – a purposely low standard. Further, the "credulous and inexperienced consumer" is a generic consumer, not a consumer who is otherwise informed, prepared to consider the advert within an unspoken context. The Privacy Representations were made to the public at large, looking to attract persons wanting smartphones but also those who were not looking for smartphones but may be persuaded by the advertisements to purchase one. The consumers should be prepared to trust merchants, in this case Pear, on the basis of the general impression conveyed to them by the representation. It is therefore appropriate when evaluating the general impression to consider the perspective of the ordinary hurried purchaser – one who takes "no more than ordinary care to observe in that which is staring them in the face upon their first contact with an advertisement" (*Richard* at para 67), and not only that of a consumer with prior knowledge relevant to the purchase of smartphones.

59. In any event, the general impression must be based on the representations actually made to the public. Per *Richard* at para 57, it relates to "both the layout of the advertisement and the meaning of the words used." The Privacy Representations created the impression, both with respect to the literal words and the overall context, that the PearGab 6 would protect user privacy; moreover, the Privacy Representations suggested that users need not worry about their privacy when using the PearGab 6 because of its data protection features. The Privacy Representation did not explicitly exclude cyberattacks from the scope of their assurances or otherwise reference the frequency or unavoidable risk of cyberattacks; consumers' consideration of such factors cannot be assumed.

60. It follows that the general impression conveyed to the public was that the PearGab 6 offered privacy protection, including from cyberattacks.

61. The Tribunal accepts that cyberattacks have become a not uncommon occurrence and that it may be expected that a consumer with even a passing familiarity of such attacks would appreciate the unavoidable risk they represent. Further, the Tribunal does not rule out the possibility that the preponderance of purchasers of the PearGab 6, particularly during the initial months after its release, may be expected to have such familiarity. However, the Tribunal considers none of this to be germane to the question at hand;

which, rather, requires consideration of the general impression created for a generic, credulous and inexperienced consumer.

62. As the general impression has been determined, the Tribunal will now determine whether, on that basis, the Privacy Representations are false or misleading.

63. The Commissioner argues that, upon viewing the Privacy Representations, the ordinary consumer would understand the PearGab 6 offered users privacy protection, including from cyberattacks. The ordinary consumer would infer from the advertisements that if they bought a PearGab 6, they could safely use the device without fear of their privacy being breached by bad actors.

64. Upon examination of the Privacy Representations and consideration of the evidence provided, the Tribunal agrees with the Commissioner. The ordinary consumer would understand from the Privacy Representations that the PearGab 6 offered errorless security, which proved incorrect within six short months of launching the device. The Privacy Representations included no indication that the PearGab 6's privacy protections could be breached and that user's data was – to a degree – vulnerable.

65. The fact that a consumer could have disabused him or herself of the false impression (for example, by reading news reports of cyberattacks) does not provide a defence for the falsehood (*Go Travel Direct Inc. v Maritime Travel Inc.*, 2009 NSCA 42). It is the representations that the Act is focused on, not the actions of potential consumers. It is not incumbent on consumers to conduct additional research regarding the validity of a merchant's claim. It is the merchant's responsibility to provide all material facts that impact a consumer's understanding of the merchant's representation. If anything, Pear's failure to reference something as material as the unavoidable susceptibility of the PearGab 6 to cyberattacks when promoting the device's privacy protections constitutes a negative representation or omission, which is itself misleading (*R v Shell Canada Ltd*, O.J. No. 290).

66. The Tribunal therefore finds that the Privacy Representations appear to be false and misleading.

b. Materiality

67. Having determined that the Privacy Representations, on the basis of their general impression, appear to be false and misleading, the Tribunal must now assess the materiality of these misrepresentations. Courts have affirmed that the word "material" refers "to the degree to which the purchaser is affected by the words used in coming to a conclusion as to whether or not he should make a purchase" (*Commissioner of Competition v. Sears Canada Inc.*, 2005 CACT 2 at para 335). The Tribunal must determine whether the Privacy Representations could lead a consumer to a course of conduct that, on the basis of the representations, they believe to be advantageous. Put more simply, materiality is established if it is likely to influence an ordinary consumer's purchasing decision.

68. The Commissioner argues that the Privacy Representations were material as they may have induced consumers into purchasing the PearGab 6, a $1,000 device. Given the intended uses of the PearGab 6, including its storage of user's sensitive health and financial data, the Commissioner contends that the Privacy Representations would be a critical factor in purchasers' buying decisions.

69. Pear disagrees with the Commissioner's assertion, contending instead that privacy protection is at most an ancillary feature of the PearGab 6 and would not induce consumers to purchase the device. To support its claim, Pear produced an internal study which showed that privacy was not one of the smartphone's three most important features for users and demonstrated consumers' general ignorance to smartphone privacy settings.

70. The data provided by Pear does not evidence that privacy is immaterial to consumers' buying decisions. For one, Pear's question to consumers in its self-conducted study is distinct from the question at hand. When asked what a smartphone's "most important features" are, most respondents would naturally consider applications that one actively uses and provide users with convenience or enjoyment, rather than passive features that the users unconsciously depend on in the day-to-day, like privacy protections. Further, users' lack of understanding of privacy settings only demonstrates general ignorance to the technical application of privacy functions. It does not demonstrate an apathy toward privacy protection in general. The ordinary and credulous consumer is often technologically unskilled.

71. The Tribunal does, however, accept Pear's assertion that privacy may not be the only – or most significant – consideration for consumers when buying a smartphone. But that is not the test. The Tribunal must consider the degree to which the representations may influence the consumers' purchasing decisions. Privacy protection was clearly persuasive enough to consumers for Pear to run dedicated advertisements on privacy across multiple channels, all of which highlighted its privacy protection as a key benefit to consumers. It is difficult to accept that Pear would expend resources, producing advertisements for television, print, digital channels, and more, had it not believed privacy protection to be a material consideration for consumers.

72. Accordingly, the Tribunal agrees with the Commissioner, it appears that the Privacy Representations were false and misleading in a material respect, such that Pear appears to be engaging in conduct that is reviewable under Part VII.1 of the Act.

III. Paragraph 74.01(b) – Statement or Guarantee of Performance

73. Having concluded that the Privacy Representations appear to constitute reviewable conduct under paragraph 74.01(1)(a), the Tribunal is satisfied that, for purposes of subsection 74.11(1), Pear appears to be engaging in conduct that is reviewable under Part VII.1 of the Act. Accordingly, consideration of whether or not the Privacy Representations also appear to constitute reviewable conduct under paragraph 74.01(1)(b) is not necessary to the disposition of the Commissioner's application. However, the parties each made detailed submissions on the issue, and the Tribunal has considered them carefully.

a. Reviewable Conduct under paragraph 74.01(1)(b)

74. Paragraph 74.01(1)(b) of the Act provides that:

> 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,

> […]
>
> makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation;

75. As such, in order for the Privacy Representations to constitute reviewable conduct under that paragraph, the Privacy Representations (i) must have been made for the purpose of promoting a product or business interest, (ii) must have been made to the public, (iii) must constitute a statement, warranty or guarantee of the performance, efficacy or length of life of a product and (iv) must not be based on adequate and proper testing.

76. As discussed in connection with paragraph 74.01(1)(a) of the Act, it has not been contested by Pear that the Privacy Representations were made for the purpose of promoting the PearGab 6 and that they were made to the public. Consistent with the discussion above, the Tribunal is satisfied that the first two elements of paragraph 74.01(1)(b) are satisfied here.

77. By Pear's own admission no testing was carried out in connection with the Privacy Representations prior to the PearGab 6 Campaign. No evidence was led by either party with respect to whether any such testing was conducted subsequent to Pear's September 15 letter. However, an adequate and proper test for purposes of paragraph 74.01(1)(b) must be undertaken prior to the related representation being made to the public (*Canada (Commissioner of Competition) v. Imperial Brush Co.*, 2008 Comp. Trib. 2 at para 125; *Canada (Competition Bureau) v. Chatr Wireless Inc.*, 2013 ONSC 5315 at para 293 ("***Chatr***")). While paragraph 74.01(1)(b) has been found to establish a flexible standard for assessing whether a claim has been adequately and properly tested, "there must be a test" (*Chatr* at para 344). As no testing was carried out, the Tribunal finds that the Privacy Representations satisfy the final element of paragraph 74.01(1)(b).

78. Accordingly, the question of whether or not the Privacy Representations constitute reviewable conduct under paragraph 74.01(1)(b) of the Act turns on whether or not the Privacy Representations constitute "a statement, warranty or guarantee of the performance, efficacy or length of life of a product" (a "**Performance Claim**"). While, as discussed above, it appears to the Tribunal that the Privacy Representations are false and misleading in a material respect, to the extent the Privacy Representations are a Performance Claim, they constitute reviewable conduct under Part VII.1 of the Act entirely independent of the Tribunal's earlier finding. A Performance Claim must be based on adequate and proper testing; the truth of the statement provides no defence under paragraph 74.01(1)(b).

b. Are the Privacy Representations a Performance Claim?

79. The Commissioner contends that the application of paragraph 74.01(1)(b) to the Privacy Representations is unambiguous: Pear has a made "promise"; a mere synonym for a "guarantee." However, the Commissioner's assertion addresses only one half of the Performance Claim requirement under paragraph 74.01(1)(b). The Act does not require

proper and adequate testing for all claims, rather, only those that pertain to "performance, efficacy or length of life of a product."

80. As Marrocco J. observed in *Chatr*, in contrasting the application of the Act with the approach of the Federal Trade Commission ("**FTC**") in the United States:

> Section 74.01(1)(b) applies only to performance claims. In the United States, the FTC substantiation policy applies to "objective claims." The only claims exempted from the FTC substantiation requirement are subjective or immaterial claims.

81. Accordingly, two questions must be considered in order to determine whether the Privacy Representations constitute a Performance Claim. First, do the Privacy Representations constitute a "statement, warranty or guarantee"? Second, if so, do they pertain to "performance, efficacy or length of life of a product"?

82. With respect to the first question, the Tribunal agrees with the Commissioner that it is indisputable that the literal meaning of a "promise" is a "statement, warranty or guarantee". However, consistent with subsection 74.03(5), the Tribunal must also consider the general impression of the Privacy Representations.

83. The Tribunal agrees with Pear that, in assessing the general impression, the context of the Privacy Representations must be taken into account. However, with respect, the Tribunal cannot accept Pear's contention that the association of the "promise" with a fictional character, and one that is a fanciful anthropomorphic pear at that, establishes the Privacy Representation as "mere puff", rather than a serious "statement, warranty or guarantee." Pear, in its letter to the Bureau, explicitly affirmed the sincerity of Pyrus' Privacy Promise. Pear cannot at once assert both that the Privacy Representations are a genuine reflection of Pear's "ethos" and that they should not be understood as such by consumers. Advertisers cannot insulate themselves from Part VII.1 of the Act simply by having their mascots speak for them. The Tribunal is satisfied that the Privacy Representations appear to constitute a "guarantee".

84. However, even if a discount ought to be applied to a promise from a pear, the Tribunal considers the first branch of the Performance Claim test to establish a low threshold. While "warranty" and "guarantee" communicate a fairly strong form of assurance, paragraph 74.01(b) also applies to "statements". Even accepting Pear's position that the association with Pyrus renders the promise puff, the Tribunal would nonetheless consider that the Privacy Representations appear to constitute a "statement".

85. Having found that the Privacy Representations satisfy the first branch of the Performance Claim test, it is necessary to consider whether the substance of the Privacy Representations is of the kind covered by paragraph 74.01(1)(b).

86. Paragraph 74.01(1)(b) identifies three subject matters: (i) performance, (ii) efficacy and (iii) length of life. The Commissioner has not suggested that the Privacy Representations relate to length of life and the Tribunal considers it plainly to be the case that they do not. The Commissioner does assert that the Privacy Representations relate to both the "performance" and the "efficacy" of the PearGab 6, the meanings of which she contends are broad. In oral argument, the Commissioner acknowledged that there is a class of

"objective statements" that would fall outside the ambit of paragraph 74.01(1)(b), but she submits that this class is narrow.

87. While the Commissioner suggested that it is not necessary for this case to define the outer limit of "performance" and "efficacy" claims, she asserted that such terms must capture "anything that a product does, achieves or provides through some action"; with the class of "objective statements" that fall outside the ambit of paragraph 74.01(1)(b) being fairly limited and including "static, physical attributes." The Commissioner asserts that privacy is the result of the "continuous performance" of a large number of processes and functions and a promise of privacy (such as, the Commissioner contends, the Privacy Representations) is accordingly a performance guarantee within the meaning of paragraph 74.01(1)(b).

88. With respect, the Tribunal considers the Commissioner's proposed standard to be vague and uncertain. It is also inconsistent with the language of the Act: such a broad interpretation of performance and efficacy would render "length of life" redundant. Rather, the Tribunal accepts Pear's position that in order for a statement to pertain to "performance" or "efficacy" it must relate to a specific and measurable achievement.

89. Pear's assertion that its products were "designed" to protect a user's data privacy is an objective statement. Pear either did or did not specifically consider data privacy in its design process and, if it did, it should be able to produce evidence to this effect. However, because the Privacy Representations do not relate to a specific or measurable achievement, the Act does not require it do so.

90. It does not appear to the Tribunal that the Privacy Representations pertain to "performance, efficacy or length of life of a product" and accordingly it does not appear to the Tribunal that Pear is engaged in conduct reviewable under paragraph 74.01(1)(b) of the Act.

IV. Paragraph 74.11(1)(a) – Serious Harm is Likely to Ensue

91. The second element of the test under subsection 74.11(1) requires that the Commissioner satisfy the Court that serious harm is likely to ensue from the reviewable conduct unless the order sought is issued by the Tribunal.

92. For the reasons that follow, the Tribunal is not satisfied that the Commissioner met her burden under paragraph 74.11(1)(a).

    a. The Threshold under paragraph 74.11(1)(a) of the Act

93. The Commissioner argues that section 74.11 sets out a lower standard than the one applicable for interlocutory injunctions at common law for the Tribunal to conclude that harm will occur absent the order sought.

94. The Tribunal agrees with the Commissioner that the demonstration of a "serious" harm is different than the one applicable at common law where "irreparable" harm must be demonstrated. As explained by the Supreme Court in *Manitoba (A.G.) v. Metropolitan Stores Ltd.,* [1987] 1 SCR 110, "irreparable" refers to harm that is not susceptible or difficult to be compensated in damage. It refers to the nature of the harm rather than its "magnitude" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311).

Under section 74.11 of the Act, the Commissioner need not demonstrate that the harm could not be compensated monetarily, but rather that the harm at issue is serious.

95. In addition, the Commissioner need only demonstrate that serious harm is likely to ensue absent the order sought, rather than that harm has occurred or will necessarily occur, as is the case to obtain interlocutory relief at common law. In this regard, the language at paragraph 74.11(1)(a) expressly differs from the test applicable for common law interlocutory relief, and in light of statutory interpretation rules, the Tribunal is satisfied that it was Parliament's intent to provide for a lower threshold to obtain interim relief under section 74.11 of the Act.

96. The Tribunal disagrees, however, with the Commissioner's submission that in the event the Tribunal finds that Pear appears to be engaged in reviewable conduct under paragraphs 74.01(1)(a) and/or 74.01(1)(b) of the Act, an inference can then be made that serious harm is likely to ensue from the conduct. The mere occurrence of reviewable conduct is not sufficient to satisfy the second branch of the test. On the contrary, the Commissioner must demonstrate (i) the seriousness of the harm that is likely to ensue from the conduct and (ii) that the harm alleged ensues from the reviewable conduct, here the Privacy Representations made as part of the PearGab 6 Campaign. Such demonstration can only be made by putting forward specific evidence of likely harm.

b. Application to the case at hand

97. The Tribunal finds that in the present case, the Commissioner has not directed the Tribunal to any real and specific serious harm to consumers or competition.

98. The Commissioner contends that she is presumed to bring this application in the public interest and that section 74.01 of the Act is intended to protect competition and the proper functioning of the market. In the Commissioner's view, the seriousness of the harm to competition and consumers that occurs as a result of deceptive marketing practices is demonstrated by the fact that the legislator made such conduct reviewable and that material penalties are prescribed by the Act for such conduct.

99. The Tribunal agrees with the Commissioner that the scheme of Part VII.1 of the Act is consistent with the conclusion that Parliament considered the conduct made reviewable thereunder sufficiently deleterious as to warrant material sanction. However, this is not sufficient to satisfy the second branch of the test under subsection 74.11(1) of the Act. The seriousness of the harm to competition or consumers must be made out with specificity on the evidence. Concluding otherwise would render the second branch of the test for interim relief superfluous, which would be to suggest that Parliament has spoken in vain.

100. The Commissioner asserted in oral argument that the continued dissemination of the Privacy Representations harms both consumers, who may purchase a PearGab 6 and unwittingly be exposed to cyberattacks through unjustified reliance on Pear's privacy protections, and the market, as the Privacy Representations will, in the Commissioner's view, distort competition and create a disincentive for genuine advancements in data protection. The Tribunal does not dispute that such harms could arise and support a finding in the Commissioner's favour under paragraph 74.11(1)(a). However, the Commissioner bears the burden of demonstrating, on the evidence, that such harms are likely and would be serious. The Commissioner has not discharged this burden.

101. While, pursuant to paragraph 74.03(4)(a), for purposes of paragraph 74.01(1)(a) it is not necessary to establish that any person was deceived or misled, the same cannot be said for establishing that serious harm is likely to ensue under subsection 74.11(1).

102. Considering the evidence presented by Pear with respect to the widespread and effective dissemination of the PearGab 6 Campaign, including the Privacy Representations, since its launch, there is nothing to indicate that the continuance of the PearGab 6 Campaign will have any effect on the target consumers, as they have already been exposed to the Privacy Representations for months now. Further, data security has not been found to be an important smartphone feature for 82% of surveyed consumers; as such, it is unclear to what extent more PearGab 6 devices will be sold from the continuation of the Privacy Representations as compared to their cessation.

103. Against this factual backdrop, the Commissioner has adduced no evidence with respect to the magnitude of consumers, if any, that are likely to be misled or with respect to the extent, if any, to which the potential harms raised in oral argument are likely to ensue.

104. Since the burden falls on the Commissioner to demonstrate that a real and specific serious harm is likely to ensue from the reviewable conduct unless the order she seeks is issued, and she has not done so, the Tribunal finds that the Commissioner has not met her burden of proof under subsection 74.11(1) of the Act.

G. Order

105. For these reasons, the application brought by the Commissioner is dismissed.

DATED at Ottawa, this 18th day of October 2022.

SIGNED on behalf of the Tribunal by the Panel Members.