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COMPREHENSIVE RIGHT TO REPAIR: THE FIGHT AGAINST PLANNED OBSOLESCENCE IN CANADA

Emma Fillman*

ABSTRACT

The comprehensive right to repair—one that addresses overconsumption and enables a circular economy—is an integral part of climate change policy in Canada. Where it is traditionally approached from an economic perspective, this article presents the right to repair as an instrument of environmental law. This reframing looks to France’s *Anti-Waste and Circular Economy Law* for structural and substantive elements of such legislation. Further, this article examines previous attempts to legislate the right to repair in Canada and explores how an overarching environmental purpose aids in overcoming political and jurisdictional barriers to its implementation. Ultimately, this article advocates for realization of a comprehensive right to repair through the updating of multiple pieces of existing federal legislation.

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INTRODUCTION

As humanity stares down the barrel of climate change, countries around the world are grappling with the reality of our current economic systems in the pursuit of net-zero greenhouse gas emissions by 2050. Businesses' pursuit of profit in the name of shareholder primacy has created a culture of consumption and nurtured the "take-make-waste" economy that exists in developed and developing nations. As a result of this linear "take-make-waste" economy and continued population growth, the global extraction of raw materials more than doubled between 1990 and 2017—and, without intervention, will double again by 2060.¹

Not only does the linear economy utilize vast amounts of resources, it creates extensive waste which leads to adverse consequences for the environment, human health, ecosystems, and the economy.² An estimated 45 percent of the world's greenhouse gas emissions come from material extraction, production, packaging, and waste management, making the linear economy a major contributor to climate change.³ While G20 countries have taken steps to minimize material extraction in their economies, the current trajectory is not enough to overcome the negative effects of expanding linear economies around the world.⁴

With the support of the United Nations ("UN") Sustainable Development Goals, UN Environmental Program International Resource Panel, and the OECD Guidelines for Multinational Enterprises, states and businesses around the world have recognized a transition to a circular economy as a potential solution to the overconsumption of resources and the resulting waste.⁵ A circular economy

¹ OECD, *Towards a more resource-efficient and circular economy: The role of the G20*, Background Report for the 2021 G20 Presidency of Italy (2021) at 9 [OECD].

² *Ibid.*

³ Ellen MacArthur Foundation, "Completing the Picture: How the circular economy tackles climate change" (2021) at 13, online (pdf): *Ellen MacArthur Foundation* <<https://ellenmacarthurfoundation.org/completing-the-picture>> [perma.cc/GU7X-72DD] [Completing the Picture].

⁴ OECD, *supra* note 1 at 9.

⁵ For further information see UN Sustainable Development Goal 12: Sustainable Consumption and Production: United Nations, *Transforming our World: The 2030 Agenda for Sustainable Development*, UN Doc A/Res/70/1 (2015) at 24; See also International Resource Panel, "Push to pick up the pace on the circular economy" (24 January 2018), online: *United Nations Environment Programme* <<https://www.resourcepanel.org/news-events/push-pick-pace-circular-economy>> [perma.cc/JPF7-A2GJ]; United Nations, *Guiding Principles on Business and Human Rights*, UNHR 2011, UN Doc HR/PUB/11/04; OECD, Directorate for Financial and Enterprise Affairs, *Guidelines for Multinational Enterprises*, (Paris: OCED, 2011).

“decouples economic activity from the consumption of finite resources” and seeks to eliminate the production of waste in the first place.⁶ A circular economy aims to reduce the need for new resources in the making of products—meaning that products should be reused, repaired, and remanufactured as much as possible.⁷ A product at the end of its life is to be recirculated into the economy. Recycling and waste management is the last resort of the circular economy, although most circular economy initiatives in North America are focused on this aspect.⁸

As it stands, the world will not achieve current climate goals without a transition to a circular economy.⁹ As a party to the *Paris Agreement*, Canada is obligated to do its part in holding global temperature rise to below two degrees Celsius above pre-industrial levels and to pursue efforts to limit this rise to only 1.5 degrees.¹⁰ Canada aims to achieve this by reaching net-zero greenhouse gas emissions by 2050, a commitment that was embodied with the passing of the *Canadian Net-Zero Emissions Accountability Act* in 2021.¹¹

It follows that Canada should be taking concrete steps toward a circular economy if the country is to reach net-zero greenhouse gas emissions by 2050. The fact that Canada generates the most per capita waste in the world exacerbates the need for this transition.¹² The Canadian government has recognized the social, environmental, and

⁶ “What is a circular economy” online: *Ellen MacArthur Foundation* <<https://ellenmacarthurfoundation.org/topics/circular-economy-introduction/overview#:~:text=A%20circular%20economy%20decouples%20economic,loss%2C%20waste%2C%20and%20pollution.>> [perma.cc/8JU4-FNQQ].

⁷ “Circulate products and materials” online: *Ellen MacArthur Foundation* <<https://ellenmacarthurfoundation.org/circulate-products-and-materials>> [perma.cc/Z457-GB3L].

⁸ Environment and Climate Change Canada, *Circular North America: Accelerating the Transition to a Thriving and Resilient Low-Carbon Economy*, Catalogue No En4-413/2021E-PDF (Gatineau: Environment and Climate Change Canada, May 2021) at 9 [Circular North America].

⁹ Completing the Picture, *supra* note 3 at 16 (referring to climate goals of 1.5°C temperature rise); See also “FAQ Chapter 1: Why are we talking about 1.5°C?” (2018) online: *Intergovernmental Panel on Climate Change* <<https://www.ipcc.ch/sr15/faq/faq-chapter-1/>> [perma.cc/7JQG-ELRM] (explaining that limiting temperature rise to 1.5°C is the “central aim” of the *Paris Agreement*).

¹⁰ *Paris Agreement*, UNFCCC, 12 December 2015 (entered into force 4 November 2016) [*Paris Agreement*].

¹¹ *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c 22 [CNZEA].

¹² See “Circular Economy” (23 December 2022), online: *Government of Canada* <<https://www.canada.ca/en/services/environment/conservation/sustainability/circular-economy.html>> [perma.cc/TEZ6-JMSZ]; Environment and Climate Change Canada, *Executive Summary of the Socio-economic and environmental study of the Canadian remanufacturing section and other value-retention processes in the context of circular economy*, (Gatineau: ECCC, 14 March

economic benefits of a circular economy, but has so far failed to take concrete steps away from the “take-make-waste” linear economy.¹³

In this paper I will discuss how Canada can address these challenges through the implementation of a comprehensive right to repair. Comprehensive right to repair legislation targets overconsumption and planned obsolescence for the ultimate environmental purpose of enabling the circular economy. In part one, I examine the phenomenon of planned obsolescence as a hindrance to the circular economy and the policy approaches through which it can be overcome. In part two, I look to France’s *Anti-Waste and Circular Economy* law as an incorporation of these policy approaches in the comprehensive right to repair. In part three, I will discuss the state of right to repair in Canada. After reviewing previous attempts to legalize the right to repair, I demonstrate how a comprehensive approach to the right to repair helps to overcome political challenges, making such legislation possible at the federal level. By amending existing federal legislation and encouraging provincial cooperation, holistic right to repair legislation can end planned obsolescence and enable the transition to a circular economy in Canada.

I. PLANNED OBSOLESCENCE

In its traditional sense, planned obsolescence refers to a manufacturer’s deliberate strategy to make products unrepairable in order to reduce their life span—the goal of which is to boost consumption, sales, and profits.¹⁴ Over time this practice has become a more subtle, nuanced method to perpetuate a cycle of consumption. Now, planned obsolescence includes designing products that are meant to go out of date or become incompatible before the end of their useful life, in order to sell new

2021) at 9 (Re-use, refurbishment, repair, remanufacturing and comprehensive refurbishment in studied sectors created revenues of \$44 billion in 2019, which could increase to \$51 Billion in 2030 through circular economy action. The same initiatives saved 1.6 million tonnes in CO₂ emissions and 444 thousand tonnes of raw materials in 2019, which could increase to 1.94 million and 535 tonnes, respectively, through circular economy action).

¹³ *Ibid.*

¹⁴ Annick Girard et al, “Obsolescence of Home Appliance and Electronics: What is the Role of the Consumer?” (May 2018) at 6 online (pdf): *Équiterre* <https://legacy.equiterre.org/sites/fichiers/en_obsolescencereport_equiterremay2018.pdf> [perma.cc/MNK2-Z5UE] [Girard].

models and upgrades.¹⁵ It also includes the practice of limiting a consumer's ability to repair a product by using digital locks (technological protective measures), copyrighted software, or incompatible parts—or even refusing to share repair manuals or waiving the right to repair in user agreements.¹⁶

In the legal sense, however, there is no universal definition of planned obsolescence.¹⁷ France, one of the only jurisdictions to officially ban the practice, describes it as “a group of techniques by which a marketer aims to deliberately reduce the lifespan of a product in order to increase the replacement rate.”¹⁸ This broad definition appears to include the subtle, nuanced aspects of this phenomenon discussed above, as well as planned obsolescence in the traditional sense. In Canada, the lack of clarity as to the meaning of planned obsolescence in the legal context may have contributed to the unsuccessful attempts at legislation discussed in part three of this paper.

The practice of planned obsolescence is a direct contradiction to the circular economy, as it promotes “a culture of wastefulness by perpetuating a ‘buy new and buy often’ mentality.”¹⁹ This perpetuates the cycle of “take-make-waste” by both depleting resources and creating waste. Therefore, ending planned obsolescence is an integral part of the transition to a circular economy.

1. Planned Obsolescence and Consumption

In many ways, today's competitive and global business environment is to blame for modern iterations of planned obsolescence. New technologies “amplify

¹⁵ European Parliament, Directorate-General for Internal Policies Policy Department A: Economic and Scientific Policy, *A Longer Lifetime for Products: Benefits for Consumers and Companies*, Documents, PE 579.000 (2016) at 65; See also “Built to Fail: Is Planned Obsolescence Really Happening?” (2022) online: *Consumers International* <<https://www.consumersinternational.org/news-resources/blog/posts/built-to-fail-is-planned-obsolescence-really-happening/>> [perma.cc/9BQM-A4S3].

¹⁶ *Ibid.*

¹⁷ Jurgita Malinauskaite & Faith Bugra Erdem, “Planned Obsolescence in the Context of a Holistic Legal Sphere and the Circular Economy” (2021) 41:3 *Oxford J Leg Stud* 719 at 724 [Malinauskaite & Erdem].

¹⁸ *Code de la consommation* article L441-2, France; See also “The Fundamentals in a few words: Questions & answers” (2022) online: *HOP Stop Planned Obsolescence* <<https://www.stopobsolescence.org/#:~:text=Articles%20L441%2D2%20and%20L454,to%20increase%20its%20replacement%20rate.>> [perma.cc/4RQX-SSYG] (As there is no official English translation of French Codes, this translation is provided by HOP, a French charitable organization dedicated to fighting planned obsolescence).

¹⁹ Malinauskaite & Erdem, *supra* note 17 at 720.

economies of scale and scope that can only be realized through faster product replacement and increasing consumption of products.”²⁰ However, the strategy of planned obsolescence predates the modern technologized and globalized economy.²¹ As early as 1919, the common law recognized that a corporation’s sole duty is to the shareholder, and that the company is to pursue profits above all else.²² While Canada no longer subscribes to the notion of “profits above all else,” shareholder interests still tend to come first.²³ Businesses remain motivated to sell as much as possible—incentivising planned obsolescence strategies.

Although it has negative connotations, the notion of planned obsolescence can be somewhat comforting to the consumer in that it encourages consumption. Behavioural habits of consumers are complex, and a culture of consumption has emerged in developed nations around the world.²⁴ A 2018 survey of Canadian consumers found that 86 percent believed that home appliances and electronics were deliberately designed to have a short lifespan.²⁵ At the same time, 80 percent of those consumers purchased their items new, indicating that the perception of planned obsolescence did not serve as a deterrent to consumption.²⁶ A study of European consumer attitudes towards planned obsolescence found that consumers felt powerless and “locked into” ceaseless upgrades because of both technological advances and wanting to avoid seeming “old fashioned.”²⁷

While it is clear that consumers play a role in perpetuating the phenomenon of planned obsolescence, less than half of Canadian consumers are aware of this.²⁸ When they are aware, consumers tend to be apathetic about corporate social responsibility

²⁰ Joseph Guiltinan, “Creative Destruction and Destructive Creations: Environmental Ethics and Planned Obsolescence” (2009) 89:19-28 *J Bus Ethics* 19 21.

²¹ See Pierre-Emmanuel Moyses, “The Uneasy Case of Programmed Obsolescence” (2020) 71 *UNBLJ* 61 at 86 (the 1924 ‘Phoebus Cartel’ deliberately shortened the lifespan of lightbulbs and is widely recognized as the first case of planned obsolescence).

²² *Dodge v Ford Motor Company*, (1919) 204 *Mich* 459 at 684.

²³ *BCE Inc v 1976 Debentureholders*, 2008 SCC 37 (This case established that Canadian corporate officers are to consider various stakeholders when acting in the best interest of the corporation. Yet, the court offers little guidance as to what this means, and the “best interest of the corporation” is often synonymous with shareholder interests.)

²⁴ C A Bakker & C S C Schuit, “The Long View: Exploring Product Lifetime Extension” *UNE, UN Doc DTI/2116/PA* (2017) at 21 [Bakker & Schuit].

²⁵ Girard et al, *supra* note 14 at 8.

²⁶ *Ibid.*

²⁷ Bakker & Schuit, *supra* note 24 at 22.

²⁸ Girard et al, *supra* note 14 at 9.

campaigns aimed at reducing the practice of planned obsolescence.²⁹ Instead, consumers are likely to avoid activism and take a passive stance on planned obsolescence—blaming the capitalist system in which they feel they are powerless.³⁰

By lessening the lifespan and repairability of products and encouraging the consumption of new ones, planned obsolescence serves as a major barrier to the circular economy in Canada. Given consumer apathy on the matter, market forces alone will not curb the business practice of planned obsolescence. If Canada is to fulfill its obligation under the *Paris Agreement* to reach net-zero greenhouse gas emissions by 2050, there is a desperate need for government action to address this issue and to enable a transition to a circular economy.

2. Policy Approaches to the Problem of Planned Obsolescence

United Nations research into planned obsolescence and product life-extension suggests two main policy perspectives on the issue: “open source” and “closed loop.”³¹ Open source methods reason that if consumers have more information about their consumption habits, they will make better buying decisions.³² Proponents of this approach suggest legislating against planned obsolescence and for the right to repair, along with additional regulations like minimum durability periods for products, product lifetime and repairability labeling, and extended product warranties.³³ This approach relies heavily on consumer education, as consumers must be aware of the meaning, benefits, and availability of these measures.

Critics of the open source approach argue that it places too much responsibility on the consumer.³⁴ In many ways, consumption has begun to fill psychological, not biological needs.³⁵ The role of businesses in marketing and product design needs to be addressed to curb overconsumption at its roots. Relying on education to change consumer attitudes and, in turn, demands on businesses, may be too optimistic to

²⁹ Bakker & Schuit, *supra* note 24 at 22.

³⁰ *Ibid.*

³¹ *Ibid* at 7–8.

³² *Ibid* at 60.

³³ *Ibid.*

³⁴ Ricordo J Hernandez, Constanza Miranda & Julian Goni, “Empowering Sustainable Consumption by Giving Back to Consumers the ‘Right to Repair’” (2020) 12:3 Sustainability 850 at 854-55 [Hernandez, Miranda & Goni].

³⁵ Malinauskaite & Erdem, *supra* note 17 at 723–724.

drive a change in consumption. This is especially true given the apathy felt by consumers in the capitalist economy.³⁶

Lauded by proponents of the circular economy, the closed loop approach targets producers, reasoning that product life extension is a business decision.³⁷ Closing the loop incentivizes businesses to create more durable products by allowing companies to maintain economic control over products. Under this model, extended producer responsibility (“EPR”) and non-traditional business models change the traditional relationship between the business and the consumer, encouraging a shift from “owning” to “using” a product.³⁸

This approach receives criticism for potentially restricting the ways in which consumers can use their products. Closed loop methods could impose obligations on the consumer to take responsibility for a product at the end of its life.³⁹ EPR schemes exist in several Canadian provinces and territories, and sometimes pass the fees onto the consumer.⁴⁰ For example, Ontario imposed EPR requirements in 2020’s *Electrical and Electronic Equipment Regulations* under the provinces *Resource Recovery and Circular Economy Act*.⁴¹ Producers who incur costs for collecting and recycling goods at the end of their lifecycle can choose to pass these on to the consumer as visible “resource recovery fees.”⁴²

The fees are intended to reflect the cost of recycling and aim to incentivize producers to make more environmentally friendly products. In practice, the fees are at the discretion of the producer leading to fee discrepancies on the same products.⁴³

³⁶ See Bakker & Schuit, *supra* note 24 at 22; see also Bruce Ledewitz, “The Constitutions of Sustainable Capitalism and Beyond” (2002) 29:2 BC Entl Aff L Rev 229 240 citing Paul Hawken, Amory B Lovines & Hunter L Lovins, *Natural Capitalism: Creating the Next Industrial Revolution*, 1st ed (New York: Buy Back Books, 2002) at 82 (Ledewitz presents apathy as hindrance to addressing environmental problems in wasteful capitalist systems).

³⁷ Bakker & Schuit, *supra* note 24 at 41.

³⁸ *Ibid.*

³⁹ *Ibid* at 49–53.

⁴⁰ “Introduction to Extended Producer Responsibility” (11 August 2017) online: *Government of Canada* <<https://www.canada.ca/en/environment-climate-change/services/managing-reducing-waste/overview-extended-producer-responsibility/introduction.html>> [perma.cc/XZ8L-5WJK].

⁴¹ O Reg 522/20; *Resource Recovery and Circular Economy Act, 2016*, SO 2016, c 12, Sched 1.

⁴² “Environmental Fees on Products Sold in Ontario” (2022) online: *Resource Productivity & Recovery Authority* <<https://rpra.ca/programs/environmental-fees-on-products-sold-in-ontario/>> [perma.cc/CKM8-M45B] [Resource Productivity & Recovery Authority].

⁴³ Angelina King “Ontario’s new electronics recycling fees causing confusion for some customers”, *CBC News* (18 Feb, 2021), online:

Consumers have felt cheated due to the lack of transparency and standardization of the fees, and often don't understand why an environmental fee is necessary in the first place.⁴⁴ As of March, 2023, producers are not required to provide information regarding who is charging the fee or what it is ultimately used for.⁴⁵ Without proper regulation and consumer education, EPR fees could add to the consumer experience of powerlessness—without driving significant change at the production level.

A fully closed loop system would require a complete shift away from product ownership that might be too drastic in light of Canada's capitalist society. The open source model better aligns with capitalist ideals, allowing for incremental steps towards a larger, circular economy transition. Still, there is room for both closed loop and open source approaches in holistic right to repair legislation.

3. What is Comprehensive Right to Repair Legislation?

At the most basic level, the right to repair requires that manufacturers create a repairable product that consumers are able to repair.⁴⁶ To be effective, however, right to repair legislation should provide consumers with the right and ability to repair their products *and* the conditions needed to make that happen.⁴⁷ Comprehensive right to repair legislation, in the context of the circular economy, would address businesses through product design and availability of repair, and consumers through education and awareness.⁴⁸

The purpose of right to repair legislation will affect how broad the legislation can and must be in order to be effective. Repair.org, an advocacy group for the right to repair in the United States, frames sample state legislation under consumer protection and competition law.⁴⁹ The legislation is basic in that it compels manufacturers to allow and enable repair of digital electronic equipment by providing the necessary tools and instruction.⁵⁰

<<https://www.cbc.ca/news/canada/toronto/ontario-s-new-electronics-recycling-fees-confusion-customers-1.5917581>> [perma.cc/QQ2F-M8MJ].

⁴⁴ *Ibid.*

⁴⁵ Resource Productivity & Recovery Authority, *supra* note 42.

⁴⁶ Hernandez, Miranda & Goni, *supra* note 33 at 861.

⁴⁷ *Ibid* at 860.

⁴⁸ Malinauskaite & Erdem, *supra* note 17 at 725–727.

⁴⁹ “Working Together to Make Repair-Friendly Public Policy” (December 2021) online: [repair.org](https://www.repair.org/legislation) <<https://www.repair.org/legislation>> [perma.cc/WW9G-VG5X].

⁵⁰ *Ibid.*

A study of the right to repair for the purposes of a circular economy, on the other hand, recognizes the right to repair as a multidimensional issue, and advocates for legislation that targets its many aspects.⁵¹ Not only should producers make repairable products and provide the necessary parts, tools, and information to do so, market regulation should promote repair over consumption.⁵² Product design should incorporate repairability and durability from the outset, repair should cost less than replacement, and repair should connote innovation instead of simply maintenance.⁵³

II. FRANCE

The European Union has employed a circular economy transition as both its main approach to reducing waste and overconsumption within its borders and as a “decisive contribution” to achieving net-zero greenhouse gas emissions by 2050.⁵⁴ As early as 1998, the Directorate General for Environment explored sustainable consumption through “integrated product policy” that aimed to reduce the environmental impact of products throughout their lifecycle.⁵⁵ In March 2020, the EU adopted a new Circular Economy Action Plan (“CEAP”) in support of its European Green Deal.⁵⁶ The CEAP advocates for broad rights to repair, calling for sustainable product design, the availability of parts, tools, and information for product repair, and consumer education and empowerment.⁵⁷ The nature of CEAP as a policy framework, rather than a forceful resolution, makes it influential in the European transition to a circular economy, but it does not impose strict requirements for member states.

⁵¹ Hernandez, Miranda & Goni, *supra* note 34 at 860.

⁵² *Ibid* at 860–863.

⁵³ *Ibid*.

⁵⁴ European Commission, European Economic and Social Committee and Committee of the Regions, *A new Circular Economy Action Plan for a cleaner and more competitive Europe*, Brussels, COM(2020) at 1–3.

⁵⁵ Ernst & Young, “European Commission: DGXI Integrated Product Policy” (March 1998), online (pdf): *European Commission* <<https://ec.europa.eu/environment/ipp/pdf/ippsum.pdf>> [perma.cc/86FZ-XZRH].

⁵⁶ European Commission, European Economic and Social Committee and Committee of the Regions, *A new Circular Economy Action Plan for a cleaner and more competitive Europe*, Brussels, COM(2020).

⁵⁷ *Ibid* at 3–5.

While the CEAP mentions planned obsolescence, it is in no way central.⁵⁸ Failing to recognize the practice as a major obstacle hinders the EU's ability to achieve a circular economy. States throughout the EU have implemented circular economy legislation and incentivized the right to repair, but only France has targeted planned obsolescence in a holistic manner.⁵⁹ In its *Anti-Waste and Circular Economy* (“AWCE”) legislation, France formally recognizes ending planned obsolescence as an integral part of the transition to a circular economy.⁶⁰

In 2015, France became the first country in the world to ban the practice of planned obsolescence.⁶¹ Broadly defined under the country's *Consumer Code*, any technique that deliberately shortens the lifespan of products in order to sell more of them is punishable by a term of up to two years imprisonment and a fine of up to €300,000.⁶²

This landmark prohibition served as the foundation for the 2020 *AWCE* legislation, which combines open source and closed loop approaches to combat planned obsolescence in France. Comprehensive and holistic, the *AWCE* is a workable example of right to repair legislation: it has a clear environmental purpose, imposes prohibitions and penalties, integrations and approaches, and creates favourable conditions to facilitate repair in the context of a circular economy. By amending several civil codes—the *Environmental Code*, *Education Code* and *Consumer Code*—the *AWCE* has broad reach, effecting change for a circular economy in multiple areas.

1. Purpose

In the words of Elmer Driedger, the authority on statutory interpretation in Canada, a statute should be written “so that it can be understood by those who are supposed to understand it, namely the persons to whom it is directed, the persons who have to administer it, and the courts and judges who have to apply it.”⁶³ Further,

⁵⁸ *Ibid* at 5–7.

⁵⁹ For example, Sweden has implemented tax breaks and reimbursements for consumers who chose to repair their products. See Alexander Starritt, “Sweden is paying people to fix their belongings instead of throwing them away” (27 October 2016), online: *World Economic Forum* <<https://www.weforum.org/agenda/2016/10/sweden-is-tackling-its-throwaway-culture-with-tax-breaks-on-repairs-will-it-work/>> [perma.cc/G5U7-WZUP].

⁶⁰ *Code de l'environnement* at Article L541-1.1°, amended by law n°2020-105, France [*Code de l'environnement*].

⁶¹ *Code de la consommation* at article L441-2, France.

⁶² *Ibid* at article L454-1.

⁶³ Elmer A Driedger, “Legislative Drafting” (1949) 27:26 *Can Bar Rev* 292 at 296.

the Canadian Department of Justice considers readability the foundation for understanding the policy intentions of legislation.⁶⁴ In its *Guide to fostering the readability of legislative texts*, the department emphasizes the importance of providing overall context through a clear preamble and/or purpose provision.⁶⁵ This becomes particularly important in Canada, where a law's purpose, or "pith and substance," determines its legitimacy in the federalist state.⁶⁶

It follows, then, that the purpose of right to repair legislation is integral to its interpretation and implementation. With the outlawing of planned obsolescence as a backdrop, the purpose of the *AWCE* is clear in its preamble: to enable a transition to a circular economy and to fight against planned obsolescence of manufactured products.⁶⁷ A purpose provision further outlines the intention of the legislation: "As a priority, to prevent and reduce the production and harmfulness of waste, in particular by acting on design, manufacture and distribution of substances and products and by encouraging their re-use..."⁶⁸

Additional purpose clauses outline the importance of waste management and the mitigation of risk to human and environmental health to provide environmental information to the public, to improve resource efficiency, and to implement a hierarchy to waste in order to transition to a circular economy.⁶⁹ These purpose clauses, combined with the preamble, make it clear that although the *AWCE* alters various pieces of legislation, it serves an overarching environmental purpose and should be treated accordingly.

2. Prohibition and Penalties

OECD countries often fall short of meeting environmental goals.⁷⁰ This is largely due to the implementation gap between policy objectives and performance coupled with poor compliance with environmental regulations.⁷¹ Prohibition and penalties are one way of influencing compliance on behalf of individuals and

⁶⁴ "Guide to fostering the readability of legislative texts" (6 August 2021) online: *Government of Canada* <<https://www.justice.gc.ca/eng/trans/ar-lr/rg-gl/p1.html>> [perma.cc/5KXQ-SQTG].

⁶⁵ *Ibid.*

⁶⁶ *R v Morgentaler*, [1988] 1 SCR 30, SCJ No 1.

⁶⁷ *Environmental Code*, *supra* note 56 at article L541-1.1°.

⁶⁸ *Ibid* at article L541-1.2°.

⁶⁹ *Ibid* at article L541-1.

⁷⁰ OECD, "Compliance and enforcement" online: *OECD* <<https://www.oecd.org/env/tools-evaluation/compliance.htm>> [perma.cc/ZD9R-Y7VQ].

⁷¹ *Ibid.*

corporations. Where regulatory fines alone may not serve as a deterrent to large corporate actors, criminal law carries a high stigma, and the risk of reputational harm may be enough to influence these actors into compliance.⁷²

As noted above, France outlawed planned obsolescence as part of its *Energy Transition for Green Growth Law*. The relevant provisions carry a possible penalty of up to two years imprisonment and a fine of up to €300,000.⁷³ Planned obsolescence is categorized as fraud under the *Consumer Code*, and listed in a chapter titled “Deceptions.”⁷⁴ Still, there are issues of proof when it comes to prosecuting under this legislation. Product design is often protected as a trade secret, and technological innovation may justify the upgrading of electronic devices.⁷⁵ Proving that a company employed a “technique that is used to deliberately shorten the lifespan of products in order to sell more” is difficult in practice as evidence of intention can be hard to come by.⁷⁶

Despite these difficulties, multinational corporations such as HP, Epson, and Apple have faced criminal prosecution for planned obsolescence practices.⁷⁷ In 2020, a criminal complaint against Apple alleged that the company engaged in planned obsolescence practices in the distribution of software updates that intentionally slowed down older iPhone models.⁷⁸ Apple was able to demonstrate that the software update was not a deliberate act to shorten the lifespan of older iPhones, but rather an attempt to extend their lifespan by protecting the battery in these models. Despite a lack of intention evidence for planned obsolescence, iPhone users were unaware that these updates would restrain the speed of their devices and the company was

⁷² Stanley D Berger, “The Future of Environmental Prosecutions in Ontario” in Meinhard Doelle & Chris Tollefson, eds, *Environmental Law: cases and materials* 3rd (Toronto: Thomson Reuters Canada 2019) 408. (It should be noted that prohibition and penalties require adequate enforcement to be effective, in depth discussion of which is beyond the scope of this paper.)

⁷³ *Code de law consommation*, *supra* note 18 at article L454-1, Loi n°2015-992 du 17 aout 2015 relative a la transition energetique pour la croissance verte (18 August, 2015) NOR DEVX1413992L.

⁷⁴ *Ibid.*

⁷⁵ Sonia Cisse et al, “In the Crosshairs: Planned Obsolescence” (31 March 2020), online: *Linklaters LLP* <<https://www.lexology.com/library/detail.aspx?g=463c3580-1dfc-48b4-b57c-159b147b4708>> [perma.cc/F57C-7M7Q].

⁷⁶ *Ibid.*

⁷⁷ Global Legal Monitor, “France: Watchdog Agency Fines Apple for Deceitful Practice” (28 February 2020), online: *Library of Congress* <<https://www.loc.gov/item/global-legal-monitor/2020-02-28/france-watchdog-agency-fines-apple-for-deceitful-practice/>> [perma.cc/QW2B-TD92].

⁷⁸ *Ibid.*

ultimately convicted of “misleading commercial practice by omission.”⁷⁹ Apple negotiated a €25 million fine alongside an obligation to publish information regarding their deceitful practice on their website.⁸⁰

While Apple was not convicted of planned obsolescence, the prosecution arose under the *Consumer Code* when a not-for-profit, Halte à l’Obsolescence Programmée, filed a criminal complaint. Although critics and Halte à l’Obsolescence Programmée alike were disappointed when charges for planned obsolescence were dropped, the fine and hit to Apple’s reputation was considered “a historic first victory against outrageous ‘ready-to-toss’ practices, for consumers as well as the environment.”⁸¹ The prosecution and publicization of this case may not have occurred without France’s ban on planned obsolescence.

In addition to the 2015 criminalization of planned obsolescence, France’s *AWCE* legislation imposes further, more specific restrictions on the general practice. An update to the *Consumer Code* prohibits any practice that limits access to spare parts, instructions, tools, or any other information needed to repair products.⁸² The *AWCE* also addresses technological protective measures by prohibiting any techniques, including software, through which a producer “aims to make it impossible to repair or recondition a device outside its approved circuits.”⁸³ Similar to general planned obsolescence, the prohibitions carry penalties of up to two years in prison and €300,000 in fines. Perhaps learning from the Apple prosecution, the fine can increase based on the benefits derived from the offence, to up to five percent of the annual product turnover.⁸⁴ Proportional fines, in addition to reputational damage that accompanies criminal convictions, may serve to increase compliance.

In addition to criminal prohibitions and penalties, the *AWCE* imposes regulatory mechanisms. Section 13, for example, prohibits the words “biodegradable,” “environmentally friendly,” or anything of the like on products or packaging, and mandates product labeling for environmental and repairability

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ “Obsolescence des iPhone: une sanction historique contre Apple” (7 February 2020) online: *Halte à l’Obsolescence Programmée* <<https://www.halteobsolescence.org/apple-condamne-suite-a-la-plainte-deposee-par-hop/>> [perma.cc/TG5Y-UPMA] (comments translated to English by the author).

⁸² Law n°2020-105 of February 10, 2020 relative a la lute contre le gaspillage et a l’economie circulaire, s 25 [Law n°2020-105].

⁸³ *Ibid* (translated to English by the author).

⁸⁴ *Ibid*, s 24 (translated to English by the author).

reasons.⁸⁵ A breach of these requirements can lead to a €3,000–€15,000 administrative fine.⁸⁶ While some regulatory methods are discussed below, an in-depth discussion of the *AWCE* regulatory scheme is beyond the scope of this paper.

3. Open Source Approaches

Aligned with open source ideals, the *AWCE* aims to end planned obsolescence and encourage product repair by providing better information and education to consumers.⁸⁷ With an update to the *Environmental Code*, the *AWCE* imposes a mandatory environmental labelling scheme. Producers and importers of waste-generating products must inform consumers of a product's environmental characteristics, namely the incorporation of recycled material, the use of renewable resources in production, the presence of dangerous substances, and the possibilities of reuse, repairability, and recyclability.⁸⁸ Not only must this information be visible or accessible at the time of purchase, it is uploaded to a public database, which is set up and maintained by administrative authorities.⁸⁹

Perhaps the most notable aspect of the *AWCE* is another labelling scheme: the repairability index, the objective of which is to achieve a 60 percent repair rate of electronic products by 2026.⁹⁰ Under the *Environmental Code*, producers of electric and electronic products must inform the consumer as to their repairability, including the availability and price of spare parts, and their overall “reliability and robustness.”⁹¹ This information is condensed into a uniform repairability index, on which the product is given a repairability score out of ten.⁹² Again, this information must be visible and accessible at the time of purchase, and uploaded to a central database.⁹³

Additionally, producers must provide the consumer with a list of all available spare parts at the time of purchase, and the legal guarantee for a product against

⁸⁵ *Ibid.*, s 13 (translated to English by the author).

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*; *Code de l'environnement*, *supra* note 60, art L541-1.

⁸⁹ *Ibid.*

⁹⁰ Law n°2020-105 *supra* note 82, s 16.

⁹¹ *Ibid.*; *Code de l'environnement*, *supra* note 60, art L541-9-2.

⁹² Ministère de la Transition Ecologique et Solidaire, “The Anti-Waste Law in the Daily Lives of the French People, What Does That Mean in Practice?” (January 2020) at 23, online (pdf): <https://circulareconomy.europa.eu/platform/sites/default/files/anti-waste_law_in_the_daily_lives_of_french_people.pdf> [perma.cc/3UHU-F72J] [“Anti-Waste Law in the Daily Lives of the French People”].

⁹³ Law n°2020-105 *supra* note 82, s 16; *Code de l'environnement*, *supra* note 60, art L541-9-2.

breakdown due to lack of conformity is extended to two and a half years.⁹⁴ Through the legal guarantee of conformity, a consumer can request a repair or replacement of a product in the instance of non-conformity.⁹⁵ The *AWCE* also mandates that spare parts, in general, be available for a minimum for five years after the last unit of a product was placed on the market for all household appliances, small computers, and telecommunications equipment, screens and monitors.⁹⁶ Where an essential part is no longer available and it could be 3D printed, the producer must provide instructions to 3D print the part.⁹⁷

The *AWCE* amends the *Education Code* to implement teachings on waste reduction reuse and recycling in public schools.⁹⁸ It mandates that technological, vocational, and agricultural education promote techniques for product repair and reuse.⁹⁹

Through public education, access to information, and access to repair, the *AWCE* aims to curb consumption using open source methods to provide consumers with relevant understanding and information regarding their consumption habits.

4. Closed Loop Approaches

The *AWCE* implements an innovative regulatory scheme for extended producer responsibility that integrates the traditional method with the right to repair. The EPR requirements demand that producers create or contract eco-organizations to manage the prevention, collection, transport, and treatment of waste.¹⁰⁰ Through these eco-organizations, producers contribute to the financing of repairs carried out by licensed repairers.¹⁰¹ This will result in ‘repair funds’ that, when pooled by producers or sectors, make resources widely available and reduce the cost for product repair.¹⁰²

⁹⁴ Anti-Waste Law in the Daily Lives of the French People, *supra* note 92 at 24 (Conformity refers to the extent to which digital products are functional, compatible, accessible, and secure in accordance with its intended use accompanying accessories).

⁹⁵ Law n°2020-105, *supra* note 82, s 21; Consumer Code L 217-9.

⁹⁶ *Ibid.*, s 19; Consumer Code L 111-4.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* s 24; Education Code L 312-19.

⁹⁹ *Ibid.*

¹⁰⁰ Law n°2020-105, *supra* note 82, s 62; Environmental Code L 541-10

¹⁰¹ *Ibid.*; *Environmental Code*, L 541-10-4.

¹⁰² *Ibid.*

Unlike Ontario's EPR scheme, producers under the *AWCE* are responsible for all fees associated with repair funds.¹⁰³ The use of EPR to subsidize the costs of repairs integrates producer responsibility into the open source approach, actively involving both consumers and producers in the right to repair. Along with the education and information initiatives discussed above, the *AWCE* targets consumers and producers in a variety of ways. This multifaceted approach combines the strengths—and addresses the weaknesses—of closed loop and open source approaches to the fight against planned obsolescence.

5. Market Regulation for Repair

In addition to making repair available and accessible, the *AWCE* attempts to regulate the market such that repair is an attractive option by creating a secondary repair market. The *Consumer Code* prohibits producer prevention of professional third-party repairers to perform repairs on products by restricting parts, information, and tools.¹⁰⁴ Additionally, professional repairers must offer, where possible, spare parts from the circular economy instead of new parts.¹⁰⁵ For their protection, producers do not face liability for faulty third-party repairs so long as adequate information, parts, and tools are made available.¹⁰⁶

Besides information and guaranteed parts and tools for a certain period, the *AWCE* provides little incentive to push consumers toward repair. While the EPR scheme subsidizes the cost of repairs, it may be optimistic to assume education and awareness alone will drive consumers to repair. Financial incentives, such as tax breaks for consumers who choose repair over the purchase of new goods, could strengthen the *AWCE*. Consumers in Sweden, for example, receive tax breaks and labour cost reimbursements when they opt to repair their products.¹⁰⁷ Similar amendments under the *AWCE* could serve to invigorate the secondary repair market that it aims to create.

Overall, the *AWCE* implements broad policy objectives against planned obsolescence by clearly communicating its environmental purpose, imposing prohibitions and penalties, combining open source and closed loop methods, and

¹⁰³ Law n°2020-105, *supra* note 82, s 62.

¹⁰⁴ *Ibid* s 25; Consumer Code L 441-3 to L 441-6.

¹⁰⁵ Law n°2020-105, *supra* note 82, s 19; Consumer Code L 224-109 to L 224-113.

¹⁰⁶ Law n°2020-105, *ibid*, s 25; Consumer Code L441-5.

¹⁰⁷ Carl Dalhammer et al, "Promoting the Repair Sector in Sweden" (2020) at 9, online (pdf): *Lund University, The International Institute for Industrial Environmental Economics* <https://lucris.lub.lu.se/ws/portalfiles/portal/77933910/Promoting_the_repair_sector_in_Sweden_2020_IIIIEE.pdf> [perma.cc/TM27-WNT5]

incentivizing a secondary repair market. Most of the *AWCE* came into force in 2020 and 2021, meaning there is little information as to the effectiveness of these approaches thus far. Regardless, the *AWCE* provides clear objectives and a roadmap that producers, consumers, and policymakers alike can follow in the transition to a circular economy.

III. CANADA

Unlike Canada, France does not face the jurisdictional challenges of a federalist state. Still, *AWCE* takes a multifaceted approach by amending several existing laws in place of a brand-new piece of legislation. Canada's federal government can take a similar approach to put an end to planned obsolescence, implement open source and closed loop policy methods, and make the comprehensive right to repair a legal reality. While provincial cooperation is necessary to achieve certain aspects, legislating in the federal sphere removes jurisdictional barriers to efficacy that hinder provincial progress in the matter.

The constitutional division of powers grants federal authority over criminal law, copyright law, and general trade and commerce which includes competition law.¹⁰⁸ Provincial powers include those over property and civil rights, direct taxation, local works and undertakings, matters of a local and private nature, and non-renewable natural resources.¹⁰⁹ In relation to the comprehensive right to repair, consumer protection, waste management, education, and local economic regulation falls under the provincial domain. The federal and provincial governments enjoy concurrent jurisdiction over the environment.

Jurisdictional challenges aside, environmental policy in both France and Canada is heavily swayed by industry influence. Known as regulatory capture, industry influence and leverage over government action causes laws, regulations, or their application to stray from serving the public interest towards the private interest of

¹⁰⁸ *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*]; *General Motors of Canada v City National Leasing*, [1989] 1 SCR 641, 58 DLR (4th) 255.

¹⁰⁹ *Constitution Act, 1867*, *ibid*, s 91.

regulated industries.¹¹⁰ Overcoming such influence is integral to the implementation of transformative and sustainable policy like the comprehensive right to repair.¹¹¹

The right to repair has graced both federal and provincial agendas across Canada, yet no jurisdiction has successfully implemented such legislation.¹¹² Even where provinces have active circular economy policies, industry influence has halted attempts at right to repair legislation.¹¹³ To fully understand the political and jurisdictional challenges in implementing right to repair legislation, it is necessary to examine prior and ongoing attempts at right to repair legislation in Canada.

1. Legislative Attempts

i. Provincial/Territorial Attempts

Of the 13 provinces and territories, only the legislatures of Ontario and Quebec have tabled right to repair bills. Unfortunately, neither of these bills resulted in a legislated right to repair for Canadians, largely due to political pressures.

In 2019, the Quebec legislature considered Bill 197, which proposed a comprehensive right to repair in the province under the *Consumer Protection Act*.¹¹⁴ Directly modeled after France's *AWCE*, the purpose of the act was to fight planned obsolescence and included product labelling requirements.¹¹⁵ The bill was unanimously adopted in principle in April, 2021, but further progress has stalled, despite the urging of the province's environmental watchdog, Bureau d'Audiences Publiques sur l'Environnement.¹¹⁶ Guy Oullette, the bill's sponsor, reported that he

¹¹⁰ Jason MacLean, "Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture" (2016) 29 J Envtl L & Prac 111 at 111 [MacLean].

¹¹¹ *Ibid.*

¹¹² Anthony Rosborough, "Canada needs right to repair legislation" (14 May 2021), online: *Policy Options* <<https://policyoptions.irpp.org/magazines/may-2021/canada-needs-right-to-repair-legislation/>> [perma.cc/ZF46-BFCN].

¹¹³ *Ibid.* This was particularly the case in Ontario, where the province has active circular economy legislation in place, yet has failed to pass right to repair legislation see *Resource Recovery and Circular Economy Act, 2016*, SO 2016, c12, Sched 1; See also Bill 72, *An Act to amend the Consumer Protection Act, 2002 respecting the repair of electronic products*, 1st Sess, 42nd Leg, Ontario, 2019.

¹¹⁴ Bill 197, *An Act to amend the Consumer Protection Act to fight planned obsolescence and assert the right to repair goods*, 2nd Sess, 42nd Leg, Quebec 2019.

¹¹⁵ *Ibid* at 2.

¹¹⁶ Quebec, Bureau d'Audiences Publiques sur l'Environnement, *Site Inventory and Final Waste*, (Inquiry and Public Hearing Report) Mandate no 364, translated version (January 2022) at 7.

felt the government had no serious desires to tackle the issue.¹¹⁷ While there is little publicly available information regarding industry opposition to Bill 197, the Quebec government's reluctance to vigorously pursue Bill 197 may indicate circumstances of cultural regulatory capture: where regulators begin to think like the regulated industries, weakening the pursuit of policy that threatens the status quo.¹¹⁸

Although Bill 197 is at a standstill, its unanimous adoption in principle by Quebec's Assembly is worth noting. The bill was the product of students and professors at the University of Sherbrooke, who consulted experts and academics on the design of right to repair legislation.¹¹⁹ The drafting process also involved public consultation of Quebec citizens, public interest groups, and government agencies regarding their wishes for the durability and sustainability of consumer goods in addition to industry consultations.¹²⁰ Armed with this information, several members of government and the political opposition were involved in the creation of the bill, contributing to its cross-partisan support in assembly.¹²¹

Ontario's Bill 72 was also tabled in 2019.¹²² Proposing amendments to the province's *Consumer Protection Act, 2002*, the bill narrowly addressed the right to repair of electronic products by requiring producers to provide documents, software, parts, and tools for the repair of products upon consumer request.¹²³ Although lacking consumer education and regulation to foster repair over new product consumption, the bill was nonetheless a step in the right direction.

¹¹⁷ Steve Rukavina, "Quebec environmental watchdog urges province to adopt 'right to repair' law", *CBC News* (26 January 2022), online: <<https://www.cbc.ca/news/canada/montreal/quebec-right-to-repair-proposal-1.6328159>> [perma.cc/3L4R-T3Z8].

¹¹⁸ MacLean, *supra* note 110 at 120–121.

¹¹⁹ "Bill 197, An Act to amend the Consumer Protection Act to fight planned obsolescence and assert the right to repair goods", Adoption in Principle, *Quebec National Assembly*, 42-2, (24 March 2021) (Guy Ouellette).

¹²⁰ *Ibid*; See also Competition Bureau Canada, "Summary on the brief presented to the Office of Consumer Protection on the durability and reparability of goods" (20 January 2022) online: *Government of Canada* <<https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/summary-brief-presented-office-consumer-protection-durability-and-reparability-goods>> [perma.cc/T322-A4MC] (Provides insight into the consultation process, as it is no longer available on the government of WC website).

¹²¹ *Ibid*.

¹²² Bill 72, *An Act to amend the Consumer Protection Act, 2002 respecting the repair of electronic products*, 1st Sess, 42nd Leg, Ontario, 2019.

¹²³ *Ibid*.

Bill 72 was defeated after its second reading when members of the legislature voiced concerns over companies' trade secrets and intellectual property, security threats from potential cyber-attacks, and consumer safety.¹²⁴ These sentiments echoed the concerns of industry groups, including Electronics Product Stewardship Canada, an industry group led by large tech companies like Apple and Panasonic, and the Ontario Chamber of Commerce, whose members include Google and Microsoft.¹²⁵ Representatives from Apple and these lobbying groups visited the bill's sponsor, Michael Couteau, to assert that today's consumer electronics are too complex for the everyday person to repair, causing safety and security concerns.¹²⁶

In addition to industry rhetoric, members of the legislature raised jurisdictional concerns. Many of the documents, tools, and software programs that Bill 72 sought to compel from companies were also impacted by federal intellectual property laws, namely the *Copyright Act*, over which Ontario has no control.¹²⁷ It was also noted that such legislation was antithetical to Ontario's "open for business" policy, as it could inspire business' migration to other provinces in pursuit of more lenient regulatory environments.¹²⁸

Similarly, Ontario's Minister of Government and Consumer Services believed the bill was unenforceable in practice.¹²⁹ Perhaps this is an indication that consumer protection law, alone, is too narrow in scope to tackle this issue. Or perhaps the bill's purpose was not pressing enough to compel enforcement mechanisms. The influence of industry interests on the debate and eventual demise of Bill 72 points to corrosive and or coercive regulatory capture, in which industry power wields its power to weaken regulation or prevent its very inception.¹³⁰

¹²⁴ "Bill 72, An Act to Amend the Consumer Protection Act, 2002, Respecting the Repair of Electronic Products", *Legislative Assembly of Ontario Debates*, 42-1 (2 May 2019) at 4728 (Michael Coteau) [Bill 72]; see also Jordan Pearson "Right to Repair Bill Killed After Big Tech Lobbying in Ontario", *Vice* (2 May 2019), online: <<https://www.vice.com/en/article/9kxayy/right-to-repair-bill-killed-after-big-tech-lobbying-in-ontario>> [perma.cc/U42N-VLCM] [Pearson].

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ Bill 72, *supra* note 124 at 4729 (Stephen Crawford).

¹²⁸ *Ibid.*

¹²⁹ Pearson, *supra* note 124.

¹³⁰ MacLean, *supra* note 110 at 120.

ii. *Federal Attempts*

In the federal sphere, bills amending both the *Copyright Act* and the *Competition Act* have targeted the right to repair. It is notable that these were private members' bills, a possible indication that the federal government is reluctant to take significant action to address this issue.

In 2020, the House of Commons saw the tabling of Bill C-272 to amend the *Copyright Act*.¹³¹ Aimed at diagnosis, maintenance, and repair, the bill was directed at technological protective measures ("TPMs") in software and computer programs. Ultimately, the bill allowed for circumvention of TPMs for the purpose of repair, on the basis that TPMs do not fall within the intended purpose of the *Copyright Act*.¹³² The bill unanimously passed a second reading in the House of Commons only to be dissolved with the legislature due to a federal election.

The bill resurfaced in February 2022 as Bill C-244, *An Act to Amend the Copyright Act (diagnosis, maintenance and repair)*.¹³³ Having passed its second reading in the House of Commons, Bill C-244 is in consideration by the Standing Committee on Industry and Technology as of March 10, 2023. Hansard and stakeholder evidence suggests overrepresentation of industry groups in the committee's study process. Industry groups and companies account for 14 of 18 briefs, and 19 of 29 witness interests presented before the Committee thus far.¹³⁴ Government departments, academics, and non-profits and public interest groups make up the rest.¹³⁵

Bill C-244 claims to be a product of the Mandate of the Minister of Innovation, which charged cooperation with the Minister of Environment and Climate Change Canada to institute the right to repair. Yet, neither the Hansard nor the bill itself reveals any such collaboration.¹³⁶ It appears then, that limited government actors

¹³¹ Bill C-272, *An Act to amend the Copyright Act (diagnosis, maintenance or repair)*, 2nd Sess, 43rd Parl, 2020.

¹³² *Ibid.*

¹³³ Bill C-244, *An Act to amend the Copyright Act (diagnosis, maintenance and repair)*, 1st Sess, 44th Parl, 2021.

¹³⁴ See "Committees – INDU Bill C-244" (22 November 2021), online: *Parliament of Canada* <<https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=11850295>> (includes a list of briefs before the Committee) ["Committees – INDU Bill C-244"]

¹³⁵ *Ibid.*

¹³⁶ "Mandate Letter from Rt Hon Prime Minister Justin Trudeau to Hon Francois - Phillippe Champagne, Minister of Innovation, Science and Industry" (16 Dec 2021), online: <<https://pm.gc.ca/en/mandate-letters/2021/12/16/minister-innovation-science-and-industry-mandate-letter>>; See also "Bill C-244, An Act to Amend the Copyright Act

participated in the bill's creation and its later stakeholder negotiations. The prevalence of industry groups over other stakeholders reflects a need to balance industry power in the law-making process to overcome regulatory capture.¹³⁷

Many of these industry groups seemingly support the right to repair, but oppose the circumvention of TPMs for consumer safety, security reasons, along with concerns for their own intellectual property and trade secrets.¹³⁸ Some industry groups also claim negative environmental consequences from the bill. The Association of Equipment Manufacturers, for example, argues that allowing the circumvention of TPMs would undermine emissions controls on equipment, leading to environmental infractions and risk to human life.¹³⁹

The committee process also drew claims of jurisdictional issues. Speaking before the committee, Global Automakers of Canada asserted that consumer protection is at the heart of the right to repair, that the *Copyright Act*, alone, cannot address.¹⁴⁰ Committee member Brian Masse raised the concern that much of the work of the right to repair would fall to the provinces, threatening a uniform right to repair in Canada.¹⁴¹ This serves as further indication that the comprehensive right to repair is not feasible through a single legal avenue.

Bill C-231, *An Act to amend the Competition Act*, also underwent its first reading in February 2022.¹⁴² Restricted to the automotive industry, the bill requires vehicle

(diagnosis, maintenance and repair)", 2nd reading, *House of Commons Debates*, 44-1, No 56 (8 April 2022) at 1330 (Wilson Miao).

¹³⁷ Jonas Meckling & Jonas Nahm, "When do states disrupt industries? Electric Cars and the Politics of Innovation" (2018) 25:4 *Rev Intl Political Economy* 505 at 506 [Meckling & Nahm].

¹³⁸ See "Committees – INDU Bill C-244" (22 November 2021), online: *Parliament of Canada* <<https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=11850295>> [perma.cc/36PC-KTZP] ["Committees – INDU Bill C-244"] (includes a list of briefs before the Committee) (many briefs reflect these sentiments including those of the Association of Equipment Manufacturers, National Marine Manufacturers of Canada, Association of Home Appliance Manufacturers, Tesla Motors Canada ILC, Conservative Caucus, Electronics Product Stewardship Canada, Global Automakers of Canada, Canadian Vehicle Manufacturers Association, and the Entertainment Software Association of Canada).

¹³⁹ "Policy Brief from the Association of Equipment Manufacturers to the Standing Committee on Industry and Technology" (25 October 2022), online (pdf): *House of Commons* <<https://www.ourcommons.ca/Content/Committee/441/INDU/Brief/BR11995455/br-external/AssociationOfEquipmentManufacturers-e.pdf>> [perma.cc/549Z-4SXP].

¹⁴⁰ House of Commons, Standing Committee on Industry and Technology, *Evidence*, 42-1 (31 October 2022) (David Adams).

¹⁴¹ *Ibid* (Brian Masse).

¹⁴² Bill C-231, *An Act to amend the Competition Act (vehicle repair)*, 1st Sess, 44th Parl, 2022.

manufacturers to provide independent repair providers with access to diagnostic and repair information as well as the necessary parts. It is premised on the notion that not doing so would allow producers to monopolize the vehicle repair market. Since undergoing its first reading, the bill has been outside the order of precedence, meaning that, as a private member's bill, it will not be subjected to debate.

While attempts at legislation in Canada have been unsuccessful thus far, they are an indication that right to repair is on Canada's legal horizon. To overcome political challenges and create enforceable legislation, the purpose and scope of right to repair legislation becomes particularly important. Narrowly framed, legislation like Bills 72 and C-244 do not address underlying environmental issues and overconsumption behaviours. Further, addressing the right to repair from a single area of law contributes to both regulatory capture and jurisdictional challenges.

A broad environmental purpose is crucial at the outset of the drafting process. As The Honourable Senator Rosa Galvez describes, the general principle of a bill is decided on during its second reading—before the committee stage.¹⁴³ This means stakeholder recommendations that fall outside the agreed upon principle cannot be implemented. This was the case with the *Canadian Net-Zero Accountability Act*, where the expert recommendations to include carbon budgets were found to be beyond the scope of the *Act's* purpose to mandate five-year milestone targets.¹⁴⁴

2. Overcoming Industry Influence

i. Evidence of Regulatory Capture

Attempts at legislating the right to repair in Canada indicate a state of regulatory capture surrounding this issue. Although difficult to conclusively identify, regulatory capture generally occurs where: (1) there is an identifiable and feasible public interest; (2) policy shifts from serving this public interest toward industry interests; and (3) industry purposely and actively pursue this policy shift, thereby materially contributing to it.¹⁴⁵

First, the right to repair addresses a clear public interest, be it consumer protection or environmental sustainability. Second, no right to repair bill has

¹⁴³ "Navigating the Legislative Process" (October 2021), online: *Senator Rosa Galvez* <<https://rosagalvez.ca/en/senator/navigating-the-legislative-process/#EarlyConc>> [perma.cc/MYB2-CUN6].

¹⁴⁴ *Ibid.*

¹⁴⁵ MacLean, *supra* note 110 at 120.

successfully passed into law, indicating a shift away from the public interest in creating a right to repair towards private interests in the status quo. Third, Hansard, industry submissions, and third-party journalism demonstrate industry efforts to defeat the right to repair in each of these legislative circumstances. The extent to which industry action has materially contributed to the killing or weakening of these bills is unclear, but its consistent rhetoric is undeniably influential.

Industry submissions and witness statements to the committee regarding Bill C-244 demonstrate a clear rhetoric in which industry groups claim to support the right to repair, just not *this* right to repair.¹⁴⁶ In this instance, industry opposes the right to repair through the circumvention of TPMs for many of the same reasons it opposed the right to repair through tools, documentation, and information under Ontario's Bill 72. Groups highlight the potential negative consequences of the bill, including consumer safety and security concerns and threats to companies' trade secrets and intellectual property rights. Next, industry groups leverage attempts to undermine the efficacy of the legislation by claiming that it does not actually facilitate the right to repair in the grand scheme of things—a sentiment that is often echoed by policymakers in the form of jurisdictional concerns.¹⁴⁷

Global Automakers of Canada's submissions before the committee regarding Bill C-244 exemplify this rhetoric, stating "we are on board with right to repair that will benefit consumers without creating dangerous safety and cybersecurity vulnerabilities."¹⁴⁸ The industry group, which represents car giants including Toyota, Honda, and Hyundai, claims that allowing the circumvention of TPMs would enable users to alter vehicle speed and emissions limiters, thereby creating safety and environmental risks.¹⁴⁹ It also argues that systems would be vulnerable to hacking, increasing the risk of theft or larger cyberattacks.¹⁵⁰ Electronics Products Stewardship Canada, echoes these concerns while contending that Bill C-244 "stifles innovation by putting hard earned intellectual property in the hands of hundreds if not

¹⁴⁶ See Committees – INDU Bill C-244, *supra* notes 138.

¹⁴⁷ House of Commons, Standing Committee on Industry and Technology, *Evidence*, 42-1 (31 October 2022) (David Adams) (The President of Global Automakers Canada argued that amendments to the *Copyright Act* would not enable the right to repair because consumers would still lack the know-how and resources for repair).

¹⁴⁸ "Policy Brief from Global Automakers Association to the Standing Committee on Industry and Technology" (25 October 2022), online (pdf): *House of Commons* <<https://www.ourcommons.ca/Content/Committee/441/INDU/Brief/BR12178532/br-external/GlobalAutomakersOfCanada-e.pdf>> [perma.cc/VB59-MW3Q].

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

thousands... and compromises public safety by providing technical information to potentially unqualified individuals or criminals.”¹⁵¹

Industry claims that such legislation dampens innovation is an attempt to hold onto the status quo. There is evidence that government intervention spurs industrial transformation and innovation by requiring change and paving the way for industry disruptors.¹⁵² Regarding intellectual property concerns, allowing for electronic and software repair does not necessitate access to entire programs or trade secrets, nor does access to parts and information thrust repairers into the position to build new products.¹⁵³ TPMs run contrary to the purposes of the *Copyright Act*, which exists to protect works from being unlawfully copied while prompting creativity and the exchange of ideas.¹⁵⁴ The circumvention of TPMs for the purpose of repair is unlikely to be an infringement under the *Copyright Act*, which generally requires an act of copying or fixation.¹⁵⁵ While user safety and cybersecurity concerns appear to be valid, a 2021 report of the U.S.A.’s Federal Trade Commission on the right to repair found that there was little evidence to support these claims.¹⁵⁶

ii. *Overcoming Regulatory Capture*

Regulatory capture is a deep-rooted systemic problem—one that this paper does not seek to solve. Industry influence thrives where there is political coordination: where symbiotic relationships between industry groups and policymakers mean these institutions work together to design policy at the expense of non-industry interests.¹⁵⁷

¹⁵¹ “Policy Brief from Global Automakers Association to the Standing Committee on Industry and Technology” (25 October 2022), online (pdf): <<https://www.ourcommons.ca/Content/Committee/441/INDU/Brief/BR12168095/br-external/ElectronicsProductStewardshipCanada-e.pdf>> [perma.cc/U7E9-YEMN].

¹⁵² Meckling & Nahm, *supra* note 137 at 507.

¹⁵³ *Rosborough*, *supra* note 112; Working Together to Make Repair-Friendly Public Policy, *supra* note 49.

¹⁵⁴ Canadian Intellectual Property Office, “A guide to copyright” (10 January 2023) online: *Government of Canada* <<https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/guide-copyright>> [perma.cc/93RR-D4C5].

¹⁵⁵ *Copyright Act*, RSC 1985 c C-42, s 2 [*Copyright Act*].

¹⁵⁶ US, Federal Trade Commission, “Nixing the Fix: An FTC Report to Congress on Repair Restrictions” (May 2021) at 31, online (pdf): <https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf> [perma.cc/V94Y-V2Z5].

¹⁵⁷ Hugh G Thornburn, “Interest Groups and Public Policy in Canada” (1987) 12:3 *Queens LJ* 444 at 445.

Seemingly exemplified by the committee study of Bill C-244, political coordination tends to occur where limited avenues of policymaking (few government actors) coincide with the overrepresentation of industry groups in the bargaining process.¹⁵⁸ The multifaceted approach to a comprehensive right to repair can help in overcoming this type of regulatory capture as it balances industry power through decentralized and participatory law making.

Studies conducted on government intervention for disruptive policy indicate that decentralized law-making processes and the coordination of non-industry interests can overcome the dynamic of political coordination.¹⁵⁹ Put simply, the more government actors and non-industry interests involved in policymaking, and the more they cooperate, the more industry faces opposition. Legislators in Quebec took this approach when drafting Bill 97. The approach also proved successful in the U.S.A., where five separate government actors, with the support of environmental and national security stakeholders, engaged in parallel negotiations with unsympathetic automotive companies to enact ambitious electric vehicle policy.¹⁶⁰

Participatory law-making invites citizens to actively contribute to the legislative process.¹⁶¹ Not only does this increase the legitimacy and transparency of the legal process, but public participation improves the quality of its outcome. This is true in the environmental context, where public participation has played a role balancing industry power in the law-making process and adoption of stringent environmental regulation in Canada.¹⁶² France employed an ambitious participatory law-making strategy in the formulation of the *Energy Transition and Green Growth Act*, which banned planned obsolescence and paved the way for 2020's *AWCE* legislation.¹⁶³ As part of the National Debate on Energy Transition, a council of expert groups of employers and employee unions, environmental NGOs, non-environmental NGOs, local representative associations, government representatives, and parliamentarians

¹⁵⁸ Meckling & Nahm, *supra* note 137 at 522.

¹⁵⁹ Huo Jingjing & Feng Hui, "The Political Economy of Technological Innovation and Employment" (2010) 43:3 *Comp Pol Stud* 329 at 334–335; See also Meckling & Nahm, *supra* note 137 at 507.

¹⁶⁰ Meckling & Nahm, *ibid* at 517–521.

¹⁶¹ "Promoting participatory law-making for recognition of legitimate tenure rights" (July 2021) at 1, online (pdf): *Food and Agriculture Organization of the United Nations* <<https://www.fao.org/3/cb4490en/cb4490en.pdf>> [perma.cc/B7YK-C4Y6].

¹⁶² Andrew J Green, "Public Participation and Environmental Policy Outcomes" (1997) 23:4 *Can Pub Pol'y* 435 at 453.

¹⁶³ Loi n°2015-992 du 17 aout 2015 relative a la transition energetique pour la croissance verte (18 August 2015) NOR DEVX1413992L.

synthesized information gathered from the greater French public to make recommendations to parliament regarding France’s energy transition for climate change.¹⁶⁴

Though regulatory capture weakened some aspects of the final *Energy Transition for Green Growth Law*, several of the issues identified by the council are reflected in the law.¹⁶⁵ Increased transparency played a role in weeding out the overrepresentation of nuclear industry interests on the oversight committee for the National Debate—ultimately forcing the government to work against accusations of cultural regulatory capture.¹⁶⁶

Canada regularly engages in participatory law-making, especially when it comes to the environment.¹⁶⁷ Given the comprehensive right to repair’s application to environmental, economic, and social interests, participatory law-making is integral to the legitimacy and quality of its outcome. Drafting and implementing the comprehensive right to repair, then, should be approached in a manner like that of the *Impact Assessment Act*, which canvassed public opinion and engaged with industry, environmental NGOs, non-environmental NGOs, academic, political, union, and individual interests in the committee process. Following Quebec, U.S.A., and France the incorporation of these stakeholders into the drafting process garners cross-partisan support, non-industry participation, and ultimately balances industry input in policymaking for the comprehensive right to repair.

3. Legislating a Comprehensive Right to Repair at the Federal Level

Transitioning to a circular economy and the associated right to repair is essential in combating climate change and fulfilling Canada’s obligations under the *Canadian Net-Zero Emissions Accountability Act* and the *Paris Agreement*.¹⁶⁸ Given this urgency—and provincial inaction or inability in passing right to repair legislation—there is a clear need for federal leadership.

Looking to France and circular economy recommendations, banning planned obsolescence serves as a necessary foundation for meaningful right to repair

¹⁶⁴ Romain Mauger, “Promoting Public Participation in the Energy Transition: The Case of France’s National Debate” (2019) 22 PER/PELJ 2 at 3.

¹⁶⁵ *Ibid* at 18–22.

¹⁶⁶ *Ibid* at 10–11.

¹⁶⁷ See “Consulting with Canadians” (27 January 2022), online: *Government of Canada* <<https://www.canada.ca/en/government/system/consultations/consultingcanadians.htm>> [perma.cc/E9D2-NYF8] (215 of 887 public consultations relate to the environment).

¹⁶⁸ *CNZEAA*, *supra* note 11; *Paris Agreement*, *supra* note 10.

legislation. Following the *AWCE*, comprehensive right to repair legislation should also include a clear environmental purpose, prohibition and penalties, open source and closed loop policy approaches, and enable a secondary repair market. It follows that environmental, economic, and social aspects must be targeted through many legal avenues. Like the *AWCE*, the federal government could launch the comprehensive right to repair by amending the *Canadian Environmental Protection Act*, *Copyright Act*, *Competition Act*, and *Energy Efficiency Act*, all of which include prohibitions and penalties and or regulatory schemes to allow enforcement.¹⁶⁹ Potential opt-in schemes for repairability could begin to address matters falling under provincial jurisdiction.

Any bill or legislation in support of the comprehensive right to repair should include a clear environmental purpose for both efficacy and federalism purposes. Grounding legislation in the environment enables federal authority to touch on aspects of provincial jurisdiction to serve a greater environmental purpose.¹⁷⁰ It also enables the application of open source, closed loop, and overall market regulation for repair to achieve circular economy goals where the right to repair for economic purposes may not.

Beyond extrinsic evidence, courts generally look to preambular language and purpose provisions to determine a law's pith and substance. Following the *Greenhouse Gas Pollution Pricing Act*, the *Canadian Net-Zero Emissions Accountability Act*, and the *Canadian Environmental Protection Act*, comprehensive right to repair bills and legislation should include a preamble that outlines Canada's international and national climate change and sustainable development commitments, and any other related environmental commitments.¹⁷¹ Purpose statements should communicate the ultimate environmental goal of the comprehensive right to repair: to fight climate change by enabling a circular economy transition.

i. Canadian Environmental Protection Act, 1999

The primary purpose of the *Canadian Environmental Protection Act, 1999* ("CEPA") is to "contribute to sustainable development through pollution prevention."¹⁷² In its preamble, the Act recognizes the federal government's role in setting national

¹⁶⁹ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [GGPPA]; *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 [CEPA]; *Copyright Act*, RSC 1985, c C-42; *Competition Act*, RSC 1985 c C-34 [Competition Act]; *Energy Efficiency Act*, SC 1992, c 36 [EEA].

¹⁷⁰ See *R v Hydro-Quebec*, [1997] 3 SCR 213, 151 DLR (4th) 32 [Hydro-Quebec]; GGPPA, *ibid*.

¹⁷¹ GGPPA, *ibid*; CNZEEA, *supra* note 11; CEPA, *supra* note 169.

¹⁷² CEPA, *ibid* at Declaration.

environmental standards and the responsibility of users and producers in mitigating waste.¹⁷³ *CEPA* empowers the federal government to gather information about areas of environmental concern and to use market mechanisms to regulate waste and toxic substances.¹⁷⁴

The waste reduction ideals of the circular economy align with the purpose of *CEPA*. Further, *CEPA*'s enforcement mechanisms to prohibit the introduction of toxic substances into the environment have been upheld under the federal criminal law power.¹⁷⁵ Amending *CEPA* to outlaw planned obsolescence would provide an environmental foundation for aspects of right to repair legislation in Canada and enable effective criminal prohibitions and penalties. While *CEPA* is mainly concerned with toxic substances, the broad purposes of the act provide a platform for such an amendment.

In its current state, it is unclear whether *CEPA* could target broad consumer goods at the federal level. Schedule 1, however, lists “plastic manufactured items” as a toxic substance for the purposes of the *Act*, examples of which include electronic and electrical equipment, packaging, toys, and household furniture.¹⁷⁶ The Governor in Council, then, can regulate many aspects of plastic manufactured items, including the commercial activity in which they may be released and conditions on the manufacture, use, processing, and sale of anything containing such products.¹⁷⁷ In 2022, this type of regulation banned single-use plastics in Canada.¹⁷⁸ With the power to regulate plastic manufactured items, *CEPA* presents a possible avenue for both open source and closed loop regulation for repair of a variety of goods.

CEPA mandates reporting mechanisms and supports scientific research regarding environmental and health risks of pollutants and the development of further prevention and control measures.¹⁷⁹ In these respects, *CEPA* is an ideal parent for the comprehensive right to repair, as these elements could support repairability and sustainability databases (like those in the *AWCE*) and the implementation of EPR

¹⁷³ *Ibid* at Preamble.

¹⁷⁴ *Ibid*.

¹⁷⁵ *R v Hydro Quebec*, *supra* note 170.

¹⁷⁶ *CEPA*, *supra* note 169 at sched 1; *Order Adding a Toxic Substance to Schedule 1 to the Canadian Environmental Protection Act, 1999*, SOR/2021-86, C Gaz II, 155:10.

¹⁷⁷ *CEPA*, *supra* note 169, s 93.

¹⁷⁸ *Single-use Plastics Prohibition Regulations*, SOR/2022-138.

¹⁷⁹ *CEPA*, *supra* note 169 at s 44.

related repair funds. Further, scientific research and innovation is recognized as an integral part of enabling the circular economy in North America.¹⁸⁰

ii. Copyright Act

Amendments to the *Copyright Act* allowing the circumvention of technological protective measures for the repair of electronic goods and software systems is an integral part of the right to repair.¹⁸¹ This is an important step in providing the necessary tools, parts, and information for open source approaches to right to repair. It also allows for the growth of the secondary repair market, as it would empower consumers to bring products to third party repairers in lieu of the original producer. It remains to be seen whether Bill C-244 will achieve such an amendment.

iii. Competition Act

When information, tools, and parts are not readily available for the repair of goods, producers may be monopolizing the repair market, an anti-competitive practice under the *Competition Act*.¹⁸² Amendments to the *Competition Act* could require producers to make information, tools, and parts available to consumers and third-party repairers, similar to section 19 of the *AWCE*.¹⁸³ This too would support open source approaches, foster the secondary repair market, and guarantee access to necessary parts for repair for a specified period of time.

Planned obsolescence could also qualify as a deceptive marketing practice under Part VII.1.¹⁸⁴ Section 74.01 holds that anyone who, in pursuit of any business interest, makes a representation regarding the performance, efficacy or product lifespan without proper proof engages in reviewable conduct under the Act.¹⁸⁵ In many ways, this captures planned obsolescence in the traditional, deliberate, sense. An amendment to explicitly include planned obsolescence, and its nuanced aspects, would strengthen this notion. Additional amendments to mandate product lifespan, guarantees of compatibility, and availability and access to repair would again contribute to open source policy mechanisms.

¹⁸⁰ Circular North America, *supra* note 8 at 43.

¹⁸¹ *Copyright Act*, *supra* note 155.

¹⁸² *Competition Act*, *supra* note 169, s 45.

¹⁸³ Law n°2020-105, *supra* note 82, s 19.

¹⁸⁴ *Competition Act*, *supra* note 155 at part VII.1.

¹⁸⁵ *Ibid*, s 74.01.

in. Energy Efficiency Act

A big part of France’s *AWCE* is sustainability and repairability labelling. Providing consumer education and awareness is an important part of the open source approach. An exercise of the federal trade and commerce power, Canada’s *Energy Efficiency Act* mandates performance labelling standards for “energy using products that are imported into Canada or shipped across provincial borders for the purpose of sale or lease.”¹⁸⁶ While the scope of this act may be too narrow to incorporate environmental and repairability labelling, it is evident that the federal government has the power to impose labelling requirements for environmental purposes. Similar legislation could mandate labelling for circular economy and repair for all interprovincially or internationally traded goods. Provincial cooperation would be required to address the labelling of products sold exclusively within a province.¹⁸⁷

4. Provincial Cooperation

The federal government can amend legislation to outlaw planned obsolescence and properly frame the right to repair as an environmental issue. There is also potential for the implementation of open source, closed loop, and general market regulation for repair under federal legislation, mainly *CEPA*. Full integration of the comprehensive right to repair—and the beginning of a circular economy transition—requires provincial cooperation to integrate these methods.

The Supreme Court’s decision in *GGPPA* appears to recognize broad federal powers to address climate change by setting “minimum national standards” to influence the behaviour of Canadians.¹⁸⁸ In actuality, the residual powers of Peace, Order and Good Governance (“POGG”), under which the impugned regulation was upheld in *GGPPA*, are narrow. They do not allow significant encroachment on provincial interests.¹⁸⁹ The regulation in *GGPPA* do not compel provincial actors to change their behaviour, instead they can choose to do so in response to the minimum national standards for greenhouse gas emissions pricing.¹⁹⁰ In this regard, POGG powers are ill-suited to the right to repair, which would compel provincial action through market regulation regarding availability of repair and associated labelling and

¹⁸⁶ *EEA*, *supra* note 169, s 4.

¹⁸⁷ Federal trade and commerce power is restricted to international and interprovincial trade. See *Dominion Stores v The Queen*, [1980] 1 SCR 844, 106 DLR (3d) 581.

¹⁸⁸ *GGPPA*, *supra* note 169; Paul Daly, “The Administrative State after the Carbon Tax References” (2021) 26:1 Rev Const Stud 33 at 37.

¹⁸⁹ *GGPPA*, *supra* note 169 at para 117.

¹⁹⁰ *Ibid* at para 76.

EPR schemes—much of which are provincial matters of consumer protection and taxation. Instead, drafting a provincial opt-in scheme for repairability under the federal trade and commerce power, like that in *Reference re Pan-Canadian Securities Regulation* is a possible first step in inspiring such cooperation.¹⁹¹

There are also several inter-provincial agreements that support multiple elements of the comprehensive right to repair. In 2009, the Canadian Council of Ministers of the Environment implemented the Canada-Wide Action Plan for Extended Producer Responsibility.¹⁹² The agreement seeks to implement robust EPR frameworks for numerous industries, with the ultimate goal of a national harmonized approach.¹⁹³ While the Action Plan calls upon producers to design products for ease of repair, the EPR policy framework does not subsidize product repair in the same way as the *AWCE*.¹⁹⁴ Still, the foundation for integrated repair and EPR schemes exists at the provincial level.

Additionally, several provinces have passed legislation that explicitly supports the circular economy. Nova Scotia and Prince Edward Island have incorporated circular economy initiatives into their respective climate change legislation.¹⁹⁵ As noted above, Ontario has an independent *Resource Recovery and Circular Economy Act*.¹⁹⁶ Waste reduction principles are incorporated into many other provincial acts, like Manitoba's *Waste Reduction and Prevention Act*.¹⁹⁷

Several other federal-territorial initiatives support the circular economy, including the Canada-wide Strategy on Zero Plastics Waste, the Canadian Minerals and Materials Plan, and the Forest Bioeconomy Framework for Canada. A federal thrust to legislate the right to repair and an associated provincial opt-in scheme could inspire formal provincial cooperation with the comprehensive right to repair and other circular economy initiatives. At a minimum, removing federal barriers to a comprehensive right to repair negates jurisdictional arguments related to the efficacy of right to repair legislation at the provincial level.

¹⁹¹ *Ibid.*

¹⁹² “Canada-Wide Action Plan for Extended Producer Responsibility” (October 2009), online (pdf): *Canadian Council of Ministers of the Environment* <https://ccme.ca/en/res/cap-epr_e.pdf> [perma.cc/G79G-2ZYY].

¹⁹³ *Ibid* at 6.

¹⁹⁴ *Ibid* at 37.

¹⁹⁵ *Environmental Goals and Climate Change Reduction Act*, RSNS 1989, c 20; *Net-Zero Carbon Act*, SPEI 2020, c 90.

¹⁹⁶ *Resource Recovery and Circular Economy Act*, *supra* note 114.

¹⁹⁷ *Waste Reduction and Prevention Act*, CCSM 1990 c W40.

CONCLUSION

Fighting planned obsolescence through comprehensive right to repair legislation is essential to enable a transition to a circular economy in Canada and to meet Canada's climate goals. France has provided a legislative example that is workable in the Canadian context to integrate approaches to addressing planned obsolescence and implement the right to repair. Moving beyond the confines of unique legislative action, amending multiple federal statutes can institute a national comprehensive right to repair policy, which could spur provincial cooperation and action to further the cause. This cooperative approach would move Canada beyond the "take-make-waste" economy, towards circularity, ultimately closer to its necessary environmental goals.