

Positioning Online Consumer Reviews (OCRs) as a Form of Regulatory Governance and Exploring
Methods for Addressing OCR Limitations

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Lukas Parker, B.Comm. Ryerson University, Toronto, Ontario, Canada, 2012

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Author's Declaration

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Lukas Parker

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Abstract

This thesis investigates the online consumer review (OCR) mechanism and process by positioning OCRs within the existing state and non-state regulatory structure, identifying limitations and problems of OCRs from multiple perspectives, and suggesting possible ways of addressing these limitations and problems. It examines the OCR mechanism to understand where it fits as a regulatory tool within the existing government and non-state set of regulatory arrangements, using the sustainable governance (Webb, 2005) concept and framework as a lens for analysis. The thesis suggests that OCRs are a new non-state way of regulating business behavior in which an online platform is created by a firm, and this platform provides a structured process for individual consumers to make and publish reviews of individual businesses, who then respond to these reviews in an effort to maintain or increase their profitability. The thesis then identifies key problems with the OCR approach and explores how conventional state-based approaches to consumer information (e.g. laws) and non-state approaches (e.g., multi-stakeholder standards) can address these problems, and by so doing, move from the current ad hoc state/non-state approach for the dissemination of consumer information about businesses to a more systematic and coordinated approach, in keeping with the concept of sustainable governance. The thesis draws on a literature review as well as surveys and semi-structured interviews to support its analysis.

The potential contribution of this research to the scholarly literature is an improved understanding of how (a) OCRs regulate business conduct; (b) OCRs are part of a broader interconnected ensemble of state and non-state regulatory arrangements all targeting the provision of reliable and accurate consumer information concerning businesses, in keeping with the concept of sustainable governance; and (c) various state and non-state mechanisms and approaches can addressing some of the current limitations associated with OCRs.

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Dedication

I would like to dedicate this thesis to my wife Michele Parker. Without your support and motivational words, I would not be where I am today. She has encouraged me to take chances and strive to be a better person.

I would also like to dedicate this to my parents, Mary-Ann and Greg Parker for their support and guidance throughout my life. Specifically, I would like to thank you for all the support you provided me throughout my educational pursuits. Your kind words allowed me to search for excellence in everything I do.

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Chapter 1: Introduction

This thesis positions OCRs within the existing state and non-state regulatory structure pertaining to the provision of accurate and reliable consumer information about businesses. It examines OCRs to understand where they fit within the existing state and non-state set of regulatory arrangements, using the sustainable governance concept and framework as an analytical lens. It identifies problems with the OCR approach and explores the applicability of conventional legal/regulatory approaches (e.g., misleading advertising provisions, defamation, criminal fraud), as well as new approaches (e.g., private certification standards, and/or dedicated customized platform approaches) to address these problems, and by so doing, transition from the current ad hoc state/non-state approach to a more systematic and coordinated approach to the dissemination of reliable and accurate consumer information about businesses, in keeping with the concept of sustainable governance, drawing on both state-based law techniques and non-state techniques. In its analysis, the thesis draws on a literature review, surveys and semi-structured interviews. Key points about OCRs, as well as the basic structure and approach undertaken in the thesis are described in this chapter.

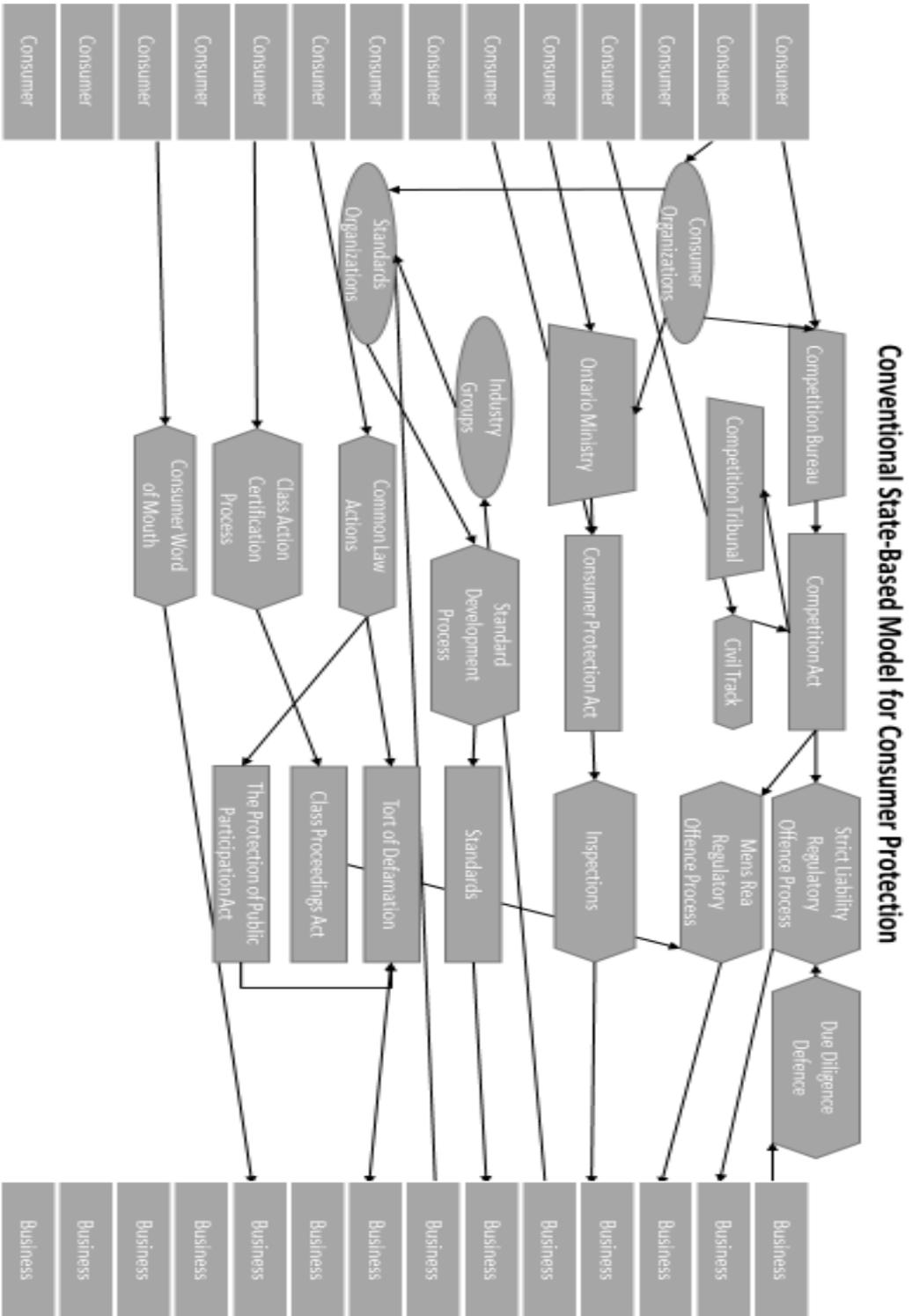
Online consumer reviews (OCRs) represent a potentially powerful way for consumers to make known their perspectives concerning products and services, to both the purveyor of the product or service, and to those who might be considering purchasing those products or services. A 2017 KPMG study found that 14% of Canadian consumers used OCRs when making a purchasing decision.¹ This was more than double the number of consumers that used peer recommendations.² Only price (37%), brand (18%), and product features (18%) were ranked as higher key considerations for consumers.³ Surveys conducted as part of this thesis also indicated that online consumer reviews are widely used, with 74%

of respondents in sample 1 indicating that they use OCRs for online purchases most of the time, and 64% of respondents in sample 2.

While not a conventional state-based regulatory mechanism (such as a command-and-control law), OCRs are considered in this thesis to be an important tool to regulate business behaviour through the publication of information from consumers concerning business activity that has the effect of rewarding good performance and revealing sub-standard business activities, thereby potentially encouraging firms to improve their performance so that firms receive positive reviews. In a way, consumers become inspectors every time they purchase a product or service and provide feedback on the experience in the form of a review. This feedback can then be used by prospective consumers to make more informed product or service purchasing decisions. The ability of thousands of consumers to make reviews concerning thousands of products and services every day can potentially incentivize businesses on a large scale to ensure high quality performance on a continuous basis.⁴ For example, through OCRs of a particular hotel, any issues concerning noise, smells, poor service and so on are capable of being reported on by customers on a daily basis, incentivizing an attentive hotel and its staff to stay "on its toes" by quickly responding and addressing problematic behaviour. To appreciate the magnitude of consumer review information that is now available through OCRs, it has been reported that since Yelp started in 2005, consumers have contributed 127 million reviews to this one OCR platform alone.⁵ In effect, these reviews provide a continuous and ongoing stimulus for businesses to provide a positive experience to consumers. At the same time, there is a possible market penalty incurred by businesses that do not actively respond to negative online comments: it has been shown that negative reviews about a product or service can influence a consumer to reconsider purchasing the product from one brand or firm over another.⁶ Given the impact of OCRs on the actions and decision-making of consumers and businesses, they are here characterized as a non-state regulatory mechanism.

In this thesis, OCRs as non-state regulatory instruments are regarded as part of a broader set of state and non-state regulatory governance arrangements pertaining to the provision of consumer information about businesses. When taken together, this broader set of arrangements involve interactions and inter-relationships among an ensemble of regulatory approaches. To understand the nature of the interactions and inter-relationships among the regulatory arrangements, and their strengths and weaknesses when acting as an ensemble, it is helpful to have a broader frame of reference concerning the concept of governance. In this thesis, the sustainable governance (Webb, 2005) framework is employed for this purpose. The sustainable governance framework starts from the understanding that both state and non-state actors have unique regulatory capabilities. Put differently, to remedy harms that can occur within society, governmental actors as well as private sector and civil society actors all have the ability to develop and/or take part in the implementation of regulatory mechanisms and approaches (rule instruments, institutions and processes) intended to address and rectify particular harms. Governance as used here refers to endeavours, mechanisms and approaches designed to systematically change the behaviour of individuals towards an intended goal.⁷ Governance as used here can refer to the use by both state and non-state actors of both conventional approaches (e.g., command and control laws) as well as non-conventional approaches (e.g., certification programs, OCRs) to influence behaviour.⁸ The sustainable governance concept highlights the limitations of relying exclusively on the state for regulation and recognizes that actors other than the state can be involved in regulation in distinct ways that in some respects may address the limitations of an exclusively state-based approach to regulatory governance.⁹

Figure 1 below depicts the conventional state-based model applying to consumer information dissemination (please note that a more detailed discussion of OCRs and sustainable governance, including discussion of the diagrams provided here, is provided later in the thesis.



General visual depiction approach and legend draws on M. Martin and K. Webb, "Water Quality Protection of the Canada-U.S. Great Lakes: Examining the Emerging State/Worstate Governance Approach," in *International Journal of Progress in Industrial Ecology*, forthcoming.

Figure 1

Webb (2005) suggests that exclusive reliance on conventional state regulation mechanisms is potentially problematic due to certain limitations associated with public policy implementation, such as budgetary pressures constraining the ability of regulators to identify and respond to incidents of non-compliance.¹⁰ According to Webb (2005), non-state actors such as businesses, non-governmental organizations and individual consumers may be able to undertake certain regulatory functions and target particular activities that for one reason or another have not been fully addressed by state actors using conventional regulatory approaches. Figure 2 attempts to depict the combined state and non-state regulation of consumer information, including the use of the OCR mechanism. Drawing on the sustainable governance framework, this figure highlights the number of interactions and inter-relationships among actors, institutions, instruments and processes all involved in the regulatory activity associated with the provision of consumer information about businesses.

For OCRs to function properly, it is important that the information provided is accurate and reliable and represents the authentic experiences of consumers. While the OCR mechanism is considered here to be an important regulatory instrument, there are nevertheless many possible "mischiefs" (e.g. drawbacks or deficiencies) that can detract from proper OCR functioning, including the use by competitors of false reviews to denigrate other firms/products/services, the use by companies of false reviews to falsely inflate the value of their products or services, the ability of consumers to "blackmail" businesses in exchange for a good review or withdrawal of what would have been a negative review, rogue/non-authentic reviews by persons who have not used a product or service or are otherwise malicious in their intentions, and manipulation of the order and content of consumer reviews by online consumer review administrators. The practice of businesses trying to deceive consumers has been given many names such as undercover promotion¹¹, astroturfing¹², stealth marketing¹³ and opinion spamming.¹⁴ These are discussed in greater detail later in the thesis, as are the challenges listed below.

Two other challenges associated with OCRs are: (1) the fact that the platform for consumer reviews may operate in a transnational (cross-border) manner, thus making it more difficult for a conventional state-based regulator in a single jurisdiction to address any particular online consumer review issue or problem that has cross-border dimensions; and (2) the fact that consumer reviews can not only be undertaken from a dedicated online consumer review platform (e.g., TripAdvisor), but also from any online platforms such as YouTube or a social media platform (e.g., Facebook, Twitter), or an individual company's website, and these latter non dedicated platforms may lack any particular structure around consumer reviews, thus detracting from the ability of consumers to engage in comparative reviews with common metrics. For this thesis, the author will focus on structured OCR platforms and processes such as associated with Yelp and TripAdvisor and not unstructured platforms such as Facebook, Twitter or Youtube.

In Chapter Two, the thesis examines in more depth what OCRs are and how the information provided assists consumers in making purchasing decisions and influences business behaviour. Chapter Three is devoted to exploring how the OCR as a regulatory tool fits within the broader set of state and non-state rule instruments, processes and institutions pertaining to the provision of accurate and reliable consumer information about businesses, using the sustainable governance framework as a lens of analysis. With this background, Chapter Four then examines the main problems or mischiefs associated with OCRs, and how existing laws are being used to address these problems. Chapter Five sets out the key insights about OCRs and their operation based on the surveys and semi-structured interviews undertaken for this study. Possible approaches for strengthening or improving OCR operation are discussed in Chapter Six. On this basis, conclusions are provided.

Research Methods

The research methodologies employed for this thesis include: (1) a review of the relevant regulatory and other laws (e.g. common law actions), case law, and other regulatory methods that could be applied to online consumer reviews, and a review of relevant academic literature pertaining to online consumer reviews and the concept of sustainable governance that is applied in this thesis. This literature review provides the basis for the discussions in Chapters 2, 3 and 4; (2) exploratory online surveys to understand consumer use and perceptions concerning online consumer reviews and consumer trust in their reliability, providing supporting information concerning consumer practices and attitudes about online consumer reviews ; and (3) semi-structured interviews with a small selection of officials from government , the private sector, and civil society (e.g. a consumer organization) in order to gain insights from and better understand how OCRs are regarded by state and non-state individuals with considerable experience concerning OCRs. Discussion of the online surveys and semi-structured

interviews forms the basis for Chapter Five of the thesis. A description of the literature review, surveys and semi-structured interviews methodologies and methodological limitations are provided below.

Literature Review

The literature review consists of analysis of legal material and academic literature pertaining to OCRs. It includes an examination of legislation affecting OCRs, as well as common law actions of relevance to OCRs and case law concerning the same. Generally, the focus is on laws, regulatory approaches and case law applicable in Canada, but some reference to non-Canadian laws is also provided.

Academic literature pertaining to OCRs is also reviewed, to better understand OCR impacts and issues and problems with the current systems. Both reports and academic articles are used to identify gaps and challenges associated with current approaches and to assist in developing recommendations on possible improvements. Initial findings suggest that there is a fairly robust regulatory framework in place, but there are gaps that state and non-state rule instruments, processes and institutions may be able to fill.

Online Surveys

To better understand current consumer practices and attitudes concerning online consumer reviews, two small surveys were conducted (one of Ryerson students, one of a wider sampling of individuals). The following is a description of the survey methodology, as well as the limitations of the surveys.

With respect to the survey of Ryerson students, 100 participants were drawn from the Ryerson Student Research pool. Students who participated received a credit towards a course they were taking. The student research pool consists of Ted Rogers School of Management Marketing Students. Communication with the students was conducted through the Sona system and the survey was hosted

on Qualtrics. To conduct the survey “in person” sessions were established where participants assembled in a Ryerson computer lab to complete the survey.

A second survey of 300 participants using the same questions was conducted using Amazon Mechanical Turk to provide a preliminary indication of key differences when compared with the results from the Ryerson Student Research Pool sample. Using this method, a larger sample was possible. Each participant was provided with a small reward (\$.10) for their participation.

A consent form was presented at the beginning of the surveys and included wording that indicated that the participant could withdraw from participation in the survey at any time. It also provided guidance to participants that if they did not feel comfortable answering a question, then they were able to decline to answer these questions. If the survey was not submitted at the end, then the questionnaire was not used for analysis.

The participation in the online survey was confidential and no participant was personally identifiable. Participants were provided with an identification number from the Sona system or from Amazon Mechanical Turk for all communication. The identification numbers were used to assign participation marks or to verify participation for Amazon Mechanical Turk to pay the reward. However, the student researcher was present during completion of the survey for students and was aware of the students that participated by appearance. This information however will not be used or documented.

With a confidence level of 95%, standard deviation of .5 and a margin of error of +/- 5% the sample size for this survey would require 385 respondents for each sample ($((1.96)^2 \times .5(.5)) / (.05)^2$). However, since the main purpose of the surveys was to support and supplement the literature and provide a better indication of user views. Therefore the information will be used to support arguments made throughout the thesis but the views will not be generalized to be the views of all Canadians.

Conducting more comprehensive surveys would be more appropriate for further research such as in support of a PhD.

The same set of questions was used for the survey of Ryerson Marketing students and through the Amazon Mechanical Turk process. The survey was designed with 36 questions that tested a variety of views on participant use of online consumer reviews (see appendix). The survey also looked at how much trust the respondents have with online consumer reviews. Respondents were also asked to provide their opinion on the usefulness of a third-party standard or certification for OCRs.

Semi-Structured Key Participant Interviews

A third methodology undertaken for this thesis consisted of conducting semi-structured interviews with key participants from government, private sector and NGO actors related to OCRs. The participants consisted of a federal government participant, a provincial government participant, an OCR platform executive, and a consumer organization participant. The purpose of the interviews was to obtain further insights from individuals that had direct knowledge on the regulation of OCRs that can support and supplement the information found in the literature. Interviews were preferred over other methods for obtaining information from key participants because of the amount of information that can be provided during an interview and the flexibility needed to address the nuances in information that could be provided. The semi-structured interviews allowed for flexibility in responses. This was used rather than a structured interview as it was anticipated that the different sectors would have a range of different views that are more relevant to the current role of their sector. The interviews were either conducted in person or over the phone and took approximately 1 hour to complete. A copy of the questions used during the interviews is provided in the appendix.

The interview participants were asked questions based on several themes closely related to the concept of sustainable governance. The themes discussed were:

1. What is the current and future role of the State in regulating online consumer reviews?
2. What is the current and future role of the private sector in regulating online consumer reviews?
3. What is the current and future role of review sites in regulating online consumer reviews?
4. What is the current and future role of consumers in regulating online consumer reviews?
5. What are the benefits of online consumer reviews?
6. What role could a 3rd party certification play in the regulation of online consumer reviews?

Limitations

There are some limitations associated with the research undertaken for this thesis. First with respect to laws reviewed, the decision was made to focus on the laws and regulations pertaining to OCRs within Canada (and when provincial laws are considered, Ontario). On occasion, laws and approaches in other jurisdictions are referred to, where they provided additional insights.

The surveys undertaken were limited in nature, and intended to provide preliminary information concerning attitudes and practices. The Ryerson student survey employed non-probability sampling techniques and only Ryerson University Marketing students were used for the initial sample. For the second survey using Mechanical Turk the participants may not have been Canadian and not limited to students. It is understood that neither sampling is necessarily reflective of the attitudes and practices of all Canadians. The surveys were used to support and supplement the understanding of the practices and attitudes towards OCRs and the trust that consumers have in them found through analysis of the literature.

With respect to the semi-structured interviews, due to time and resource constraints only a limited number of key stakeholder interviews were completed. Thus, it should be emphasized that no assertions are made here that the interviews were in any way representative of all government, private sector, and civil society officials involved in OCRs. Rather, the information is providing a preliminary

indication of some positions taken by certain government, private sector and civil society actors towards OCRs.

In summary, the purpose of this research is to position OCRs as a regulatory instrument using the sustainable governance framework as the analytical lens and then to examine potentially problematic issues associated with online consumer reviews (OCRs) as a regulatory instrument and explore possible ways of addressing these problematic issues. To better understand the role and value of OCRs as a regulatory mechanism the research applies a sustainable governance analytical lens to the online consumer review mechanism (identifying the roles of the government, the private sector, and civil society, involving various public and non-state regulatory instruments, institutions, processes and actors).

The research can potentially be of benefit to both state and non-state actors playing roles associated with OCRs, through its analysis of how OCRs can be made as effective as possible as a regulatory mechanism. In keeping with the sustainable governance approach, and through identified adjustments to state and non-state instruments and approaches intended to assist in improving overall state and non-state regulation of consumer information to move from the current ad hoc approach, moving towards a more systematic and coordinated overall approach. This thesis may also be a point of departure for more in-depth academic research on OCRs in Canada and in other jurisdictions, using a variety of research methodologies.

Chapter 2: Online Consumer Reviews: Their Operation and Impact

This chapter explores what OCRs are, the important role they play for consumers to obtain information prior to making a purchasing decision, and their impacts on consumer and business behaviour. OCRs have become an increasingly important tool for consumers to build a trust relationship with businesses prior to making a purchasing decision. The chapter looks at the importance of OCRs through an examination of relevant literature, supplemented as appropriate by references to survey and interview results. The chapter provides support for the proposition that businesses have an incentive to change their actions in response to OCRs and to maximize the likelihood that they will receive positive reviews. As will be discussed, OCRs have been found to impact sales positively for positive reviews and negatively for negative reviews. Therefore, businesses desiring increased sales are likely to have an incentive to change their behaviour to increase positive reviews and to reduce or address negative reviews.

Online Consumer Reviews: Background

Electronic commerce has grown in recent years with the rise in use of the internet for online shopping. Electronic commerce or e-commerce refers to the use of electronic methods to shop for and purchase goods and services. Within Canada e-commerce sales by retailers was \$7.7 billion in 2012 compared to \$6.6 billion in 2011.¹⁵ The increase in online consumerism may be correlated with the amount of online advertising. Within Canada internet advertising revenue increased 11% to \$3.8 billion in 2014, from 2013.¹⁶ The e-commerce marketplace has grown within Canada as consumers gain trust in the products and services they are receiving.

An important foundation for a well-functioning marketplace is trust between sellers and buyers. Prior to the use of online consumer reviews trust was largely built through personal contact, traditional word of mouth relationships and advertising. A consumer may ask close family and friends for

recommendations when purchasing a product or service. This type of trust building is still used and relied upon today, but the introduction of the internet and online marketplaces has given rise to the use of online consumer reviews (OCRs) as a way for consumers to gain greater trust of a business and the quality of its products and services. An OCR can be defined as “recorded information made publicly available by a consumer (who is now deemed to be a review author about a specified product or service offered or sold by a supplier).”¹⁷ In effect, the OCR platform creates a structured online process for the review of businesses by individual consumers and the dissemination of these reviews to other consumers and to businesses.

Research suggests that OCRs are used by other consumers to assist in making informed purchasing decisions. A 2014 study found that 88% of American and Canadian respondents would trust OCRs as much as personal recommendations.¹⁸ Consumers are also influenced by the relationship or perceived relationship they have with the reviewer.¹⁹ When shopping online, consumers frequently look for information to assist in making their purchasing decision. Survey respondents for this thesis indicated that they use OCRs for online purchases most of the time (73% of respondents for sample 1 and 64% of respondents for sample 2). Prior to the internet this information was typically in the form of advertisements from retailers and word of mouth such as from family and friends. However, since the introduction of the internet there have been a growing number of consumers that read and rely on OCRs prior to making a purchasing decision. It has been reported that on average there are 26,380 reviews posted every minute on Yelp.²⁰ As noted earlier, a study in 2017 by KPMG found that a larger number of consumers are relying on OCRs for information on products and services.²¹ The study found that 14% of Canadian consumers used OCRs when making a purchasing decision²² -- more than double the number of consumers that used peer recommendations.²³ The surveys undertaken for this thesis also supports the conclusion that OCRs are an important source of information used by consumers in their decisions.

By preparing and publishing their reviews via OCR platforms, consumers act like non-state inspectors of business performance every time they purchase a product or service and provide feedback on the experience. This feedback can then be used by prospective consumers to improve their decision making concerning a product or service. Given the large amount of reviews that are generated each day, OCR platforms can become important sources of information for consumers that are considering making a purchasing decision.

Effect of OCRs on Consumers and Businesses

As previously mentioned, OCRs can provide prospective consumers with a way to gather useful information concerning a business and its products and services, while also providing feedback to businesses about their performance. Studies show that negative reviews about a product or service can influence a consumer to reconsider purchasing the product from one brand over another.²⁴ The surveys conducted for this thesis also support the conclusions of these studies: most of the survey respondents indicated that negative reviews impacted their decision to purchase a product or service most of the time (55% of respondents for sample 1 and 34% of respondents for sample 2). When online consumer reviews are used appropriately this can facilitate effective marketplace activity by reducing online asymmetric information relationships.²⁵

Given the potential pro-competitive benefits of online consumer reviews, some OCR platforms that are connected to online purchasing sites such as Amazon are also realizing the value of OCRs.²⁶ Amazon currently utilizes an approach of both traditional and social media to influence sales on its website.²⁷ In a recent study conducted to analyze the relationship between traditional media and social media approaches, the researchers found that both approaches influence sales.²⁸ This same research also indicated that the use of OCRs can have a similar effect on sales to traditional media approaches.

Companies are now taking a new approach to marketing their products. This involves the use of both traditional media and “earned media.” Earned media is said to be achieved through the form of electronic word of mouth. Electronic word of mouth refers to positive or negative statements made by consumers about products or services that are offered via the internet.²⁹ This gives businesses a strong incentive to generate positive OCRs that influence consumers to choose their brand over the competition. The desire to generate positive reviews can also provide an incentive for businesses to engage in deceptive marketing practices such as false OCRs (discussed in further detail later in the thesis).

Recent research studies have tried to further understand a company’s use of earned media (this includes OCRs) in generating sales. These studies have researched media strategies using online consumer reviews or earned media. Based on the current research it is suggested that four reasons contribute to the use of consumer reviews or earned media.³⁰ The first is that there are multiple benefits from using alternative approaches in comparison to only using traditional media. The authors in a recent study found that traditional advertising works effectively at an early stage of the product lifecycle but later word of mouth becomes more important.³¹ This can be applied to the use of OCRs as they act as an online form of word of mouth advertising. Businesses have an incentive to use electronic word of mouth advertising such as OCRs to generate positive advertising for their products. They want to ensure that consumers are reacting positively to their brand.

The second reason is that since both traditional media and earned media approaches distribute product knowledge to consumers, there is a cost incentive for firms to transition from paid advertising to earned media.³² This means that companies have a financial incentive to rely on OCRs for positive marketing. Therefore, it may be possible for businesses to generate better returns if they rely on earned media such as positive OCRs.

The third reason is that there is a synergy effect when multiple approaches are used simultaneously.³³ This synergy effect means that one type of media is enhanced using another form of media. Online consumer reviews provide synergy with other forms of media by providing additional information from consumers that can assist with the message being conveyed by the other forms of media. For example, if consumers cannot properly comprehend the technological concepts that are being conveyed in traditional media, then it is possible that OCRs can assist by providing additional user generated content that the consumer can relate to. This point has also been demonstrated by the survey results. Most survey respondents indicated that it is extremely likely that they will use OCRs when they have limited knowledge on a product or service (59% of respondents for sample 1 and 38% of respondents for sample 2). The last reason is that traditional media can encourage earned media activities.³⁴ Traditional media can encourage consumers to try a product. This can then result in the consumer providing an online review. For example, reviewers on YouTube can provide a long user generated review of a product after traditional media makes them aware of the new product.

Studies have shown that electronic word of mouth can influence consumer behaviour in areas such as hotel online bookings³⁵, restaurants³⁶, movies³⁷, and books³⁸. For example, researchers found that online consumer reviews change consumer behaviour for restaurant selection by providing additional information and affecting their perception of competition.³⁹ The surveys conducted for this thesis also indicate that positive reviews influence consumer behaviour. Most survey respondents indicated that positive reviews impact their decision making most of the time (59% of respondents for sample 1 and 58% of respondents for sample 2). In relation to businesses, researchers have found indications of a significant relationship between online consumer reviews and hotel room sales.⁴⁰ This provides further indication that earned media and OCRs can generate a financial incentive to businesses to influence positive results.

In summary, this chapter has reviewed the rise in prominence of OCRs, and their impact on consumer and business decision-making. With this background, we are now in a position to examine OCRs as regulatory mechanisms, and position OCRs within a broader state and non-state ensemble of regulatory approaches addressing the provision of accurate information about businesses and their products and services, for use by consumers.

Chapter 3: Positioning OCRs as a Form of Regulatory Governance

We have seen that OCRs have become an increasingly important tool used by consumers to assist in making informed purchasing decisions. It has also been discussed how in response to the publication of OCRs, there is evidence to suggest that some businesses are stimulated to change their behaviour: firms that want to increase sales will have an incentive to improve their behaviour and thereby increase the opportunities to receive positive reviews and firms will have an incentive to address and correct problematic behaviour in an effort to reduce the likelihood of negative reviews.

This chapter applies the sustainable governance concept and framework (Webb, 2005) to assist in understanding the position OCRs play as a non-state regulatory instrument operating in the overall combined state/non-state governance system addressing the issue of consumer information dissemination. If governance can be considered to be the sum of the many ways that individuals and institutions, public and private, manage their common affairs (Webb, 2005), consisting of various regulatory approaches that are designed to change behaviour towards an intended goal, then OCRs can be characterized as a non-state approach among others that are designed to regulate business behaviour (consumers providing information about firms to improve consumer decision making, and by providing such information, influencing business behaviour). To understand how OCRs play a key role in regulating business behaviour within a sustainable governance framework, this chapter will also examine the ensemble of state and non-state approaches to regulating the provision of consumer information. It will examine both government and non-state regulatory instruments, institutions, processes and actors. This chapter will also outline some key limitations of the regulatory approaches discussed. In identifying the limitations, the goal is to highlight the cumulative governance effect of having multiple actors and regulatory approaches, with diverse interactions and inter-relationships, variously targeting consumer information.

The Sustainable Governance Approach

This thesis draws on the concept of sustainable governance to assist in understanding the position of OCRs as a non-state regulatory tool that is part of a broader grouping of state and non-state regulatory governance approaches addressing consumer information about businesses. Regulatory governance approaches can be considered to be endeavours, mechanisms and approaches intended to systematically change the behaviour of actors towards an intended goal.⁴¹ Both state and non-state actors can potentially develop and/or participate in regulation using a variety of approaches designed to influence behaviour.⁴² The sustainable governance approach highlights the limitations of relying exclusively on the state for regulation and recognizes that a more comprehensive combination of state and non-state actors performing regulatory functions may be advantageous.⁴³ Sustainable governance involves more than the use of command and control regulation, financial-incentive instruments such as tax deductions and common law actions (although these conventional state-based approaches remain of central importance). The approach recognizes that there are different actors that can address issues through innovative non-state rule instruments (e.g., standards) and processes (e.g., certification and OCR platforms) beyond conventional state-based regulatory instruments and procedures. The actors involved in regulatory governance consist of the state (government), the private sector (individual businesses and industry groups), and civil society (non-governmental organizations, consumer groups and individual consumers).⁴⁴ The approach suggests that the combination of these three categories of actors all engaging in regulation in relation to consumer protection (or some other goal) can potentially provide a more resilient and sustainable regulatory regime than the state acting alone, potentially being more capable over the long term of responding to varying pressures and challenges. Applying this analytical approach to the issue of information dissemination could be fruitful because it allows for a

more nuanced tri-actor approach to regulation that could perhaps capture the challenges and limitations of each regulatory actor performing alone as well as in combination.

There are a number of conventional state-based approaches to the regulation of consumer information that focus on misleading/false advertising representations by businesses. Figure 1 provided earlier in this thesis attempts to depict these conventional state-based approaches intended to protect consumers through ensuring that representations are not misleading or false.

Later in the chapter, the applicability of the conventional state-based approaches identified in this figure is explored in some depth. We will now turn our attention to positioning OCRs within the sustainable governance framework. Using the sustainable governance approach to address policy issues can be beneficial because it involves multiple actors and regulatory approaches, and therefore it has the potential to be more robust, responsive, efficient, effective and flexible than relying exclusively on conventional, state-imposed regulatory approaches.⁴⁵ The use of multiple actors and approaches allows for a degree of collaboration but also creates a potentially useful competitive or check and balance dynamic among the parties.

One limitation of a conventional state-based regulatory approach is that it does not take in to consideration the fact that there may be breakdowns in public policy implementation as the result of various types of public policy failures. For example, there are rarely enough financial resources provided for implementation of regulations, rarely inspectors available to detect incidents of non-compliance, enforcement actions tend to be infrequent, and it is challenging for government to keep regulatory regimes up to date to address evolving public policy problems.⁴⁶ Government-enforced rule instruments (i.e., laws and regulations) are vulnerable to political upheavals at any given time and the resources provided to any problem can vary. As economies rise and fall the priorities and resources given by government to address consumer issues can be impacted.⁴⁷ Webb suggests that conventional

government regulation can be negatively impacted by factors⁴⁸ such as: the growing importance of evolving international factors, inter-state economic interdependence, low public trust in government and private corporations, changing new technological innovations and jurisdictional challenges associated with addressing globalized problems.⁴⁹

While the sustainable governance approach potentially involves non-state actors devising and implementing regulatory tools, Webb (2005) also points out that for such regulatory activity to take place, non-state actors need motivation to engage in regulation. For individual companies, this incentive could be that there is a profit to be made in regulating other companies (i.e., there is a market for OCR platforms that allow for the dissemination of consumer reviews). For NGOs and civil society (i.e., consumer organizations and individual consumers), the lack of confidence in governmental capability to regulate may be an incentive for them to participate in non-state regulation.

Utilization of non-state approaches has its own limitations. For example, a non-member of an industry association may “free ride” on the industry’s self-regulatory program (e.g., companies that do not subscribe to a standard but benefit from the overall good image of an industry’s self-regulatory program) when there is no mandatory reason for participation as there is with government regulation. Non-state approaches may have lower credibility than conventional state-based regulatory approaches. There is also the possibility that a non-state standard (e.g., an industry association self-regulatory standard) may be a less rigorous standard than one developed by government regulation.⁵⁰

The sustainable governance approach does not in any way deny the central role for the state in regulation. For example, it is clear that the state is the only actor that can impose mandatory, sector-wide regulation, and attach penalties such as imprisonment for situations of non-compliance. And the sustainable governance approach does not suggest that there aren’t significant limitations associated with non-state regulatory approaches. For example, non-state regulatory approaches can potentially be

less accountable, transparent or democratic than state-based approaches. The sustainable governance approach maintains that the state should remain the central and most powerful actor in regulating for public interest.

As noted above, the sustainable governance approach also often involves multiple regulatory approaches employed by multiple actors. One reason why non-state approaches may be employed is because government regulatory processes may be slow and cumbersome in terms of responding to a problem. For example, conventional state-based regulatory processes such as law development, administration and adjudication can have these characteristics. In contrast, non-state regulatory processes may have greater flexibility in rule development of processes, and those processes may allow diverse actors to initiative and develop regulatory approaches more rapidly than government regulatory agencies. Innovative non-state process improvements can be seen through information access programs and approaches that allow parties access to decision making on issues of concern to them.⁵¹ However, in the interests of an overall effective aggregate regulatory approach, there may be a need for a level of coordination among both state and non-state actors and regulatory mechanisms, including use of public and private rule making, implementation, enforcement and certification, class action lawsuit mechanisms, alternate dispute resolution processes and private prosecutions.

A key objective of the sustainable governance concept is to potentially make the aggregate regulatory approach more robust and responsive than any single government, private sector or civil society regulatory approach could be. The approach often involves having government, private sector and civil society all variously involved in the development and implementation of regulatory instruments, and processes. By considering the full range of instruments, institutions, actors and processes that can potentially be utilized to address an issue, the sustainable governance model may

assist in identifying under-utilized or over-utilized mechanisms and resources. Webb (2005) identifies eight main tenets of sustainable governance.⁵²

1. In a sustainable governance system, the responsibilities, costs, and learning associated with governance involve the public sector, private sector, and civil society organizations.
2. The energies and capabilities of these public sector, private sector, and civil society actors are variously harnessed via the rule instruments, processes & institutions that contribute to the resolution of particular public policy issues.
3. Private sector and civil society initiatives often complement, rather than detract from conventional state-based rule instruments, processes, and institutions.
4. In a sustainable governance system, the value of multiple centres of authority is recognized.
5. The value of multi-sectoral collaborations is recognized.
6. A potential for healthy rivalry or check and balance dynamics between actors/instruments may exist.
7. In a fully evolved sustainable governance system, public, private, and civil society sector initiatives interact in a systematic, coordinated way to achieve a common public policy goal, often moving from a more ad hoc, less coordinated state and non-state set of governance approaches.
8. A fully realized polycentric sustainable governance model tends to be more complex than a model that relies exclusively on conventional state-based regulatory governance mechanisms (e.g., laws and policies).

These points will be drawn on below to assist in understanding the benefits and potential of a sustainable governance approach to addressing activities associated with the provision of consumer information about businesses. In the next section the position of OCRs within the sustainable governance framework is discussed, with OCRs performing a key regulatory role through the provision of information to assist consumers in their purchasing decisions.

Online Consumer Reviews in the Context of Sustainable Governance

We will now consider the tenets of sustainable governance as applied to OCRs and the dissemination of consumer information about businesses. In a sustainable governance system, the responsibilities, costs, and learning associated with governance involve the public sector, private sector, and civil society organizations. The regulation of business behaviour using OCRs spreads the responsibilities, costs and learning associated with the provision and regulation of consumer information. The use of OCRs as a feedback mechanism reduces the cost of inspectors that the state would need to employ to have the same amount of feedback to ensure good consumer transactions in the marketplace. OCRs also reduce the cost of traditional media for the use of advertising good consumer behaviour. As mentioned above, consumer reviews are a form of earned media that allows businesses that provide good products and services to earn benefits from this good service. There is also currently some sharing of cost and responsibility in relation to ensuring that OCRs are accurate. As will be discussed below, there are a number of techniques that can be used by both the private sector and civil society to ensure that OCRs are not deceptive.

In the sustainable governance model, the energies of these public sector, private sector, and civil society actors are harnessed via the rule instruments, processes and institutions that contribute to the resolution of a public policy issue. Online consumer reviews harness the energy of the marketplace and the need for trust in transactions. Consumers seek to find indicators of trust for providers of a

business or service. Many consumers are also eager to communicate their experience with a product or service. This energy is harnessed by OCR platforms by providing a structured avenue for consumers to regulate the conduct of businesses through the availability of information. Businesses also have an incentive to have accurate information posted to the reviews sites as this information has a direct impact on sales and the expense of traditional advertising to create trust. The review platforms provide a regulatory function to ensure that the reviews that are posted about their business are accurate and that they provide a good experience to consumers. Energy from the marketplace is also harnessed in the creation of OCR platforms as the use of these services demonstrates a market (consumer) demand for these services. However, if a review platform is not considered to provide an accurate representation of reviews, then consumers may choose to not use that service. In the semi-structured interviews conducted as part of this thesis, the private sector interview respondent (who developed a successful OCR platform) indicated that this is a key factor in the regulatory function of OCR platforms. This is because review platforms are a business and need consumer traffic to ensure their business is successful. Therefore, OCR platforms have some incentive to provide accurate reviews and leverage platform mechanisms that enforce accuracy.

Arguably, private sector and civil society initiatives complement, rather than detract from conventional state rule instruments, processes, and institutions in sustainable governance frameworks. As will be discussed later in the thesis, there are current regulatory processes that are available for private sector and civil society do complement conventional rule instruments used through the Competition Act. Provisions within the Competition Act (e.g., s. 36) allow both the private sector and civil society to bring actions to address harms in situations where the government may not have the resources or inclination to address problematic activity. Class proceedings legislation and legislation to restrict the possibility of strategic lawsuits against public participation (anti-SLAPP laws) are further innovations that allow civil society and private sector marketplace functions to operate efficiently. The

inspection function that consumers play when they write reviews also significantly complements the regulatory function (inspections) that government plays with respect to conventional state-based command and control regulation.

In a sustainable governance system, the value of multiple centres of authority is recognized. The value of multiple centers of authority can be seen in the different issues that can occur with OCRs. The semi-structured interviews conducted as part of this thesis revealed that a primary concern of government regulation is to ensure that businesses are not misleading consumers when they advertise. The ability of conventional state-based laws to address certain misleading communications published on OCRs represents an example of the value of having multiple centres of authority to address a particular issue or problem (i.e., both non-state techniques associated with the OCR process, and state based regulatory approaches).

The value of multi-sectoral collaborations is recognized in the sustainable governance framework. As found through the semi-structured interviews conducted for this thesis, there is a recognized role to be played by many different actors when regulating OCRs. The private sector has a role to play in ensuring that they establish policies and procedures to address the potential misuse of OCRs and to present consumers with fair and accurate information when making a purchasing decision. Consumers need to participate in regulating behaviour as well by acting as 'inspectors' when they use a product or service. The state also has rule instruments for civil society to use to obtain remedies from online consumer reviews, such as through s.36 of the Competition Act.

A potential for healthy rivalry between actors and instruments can exist. One of the main areas where online consumer review governance regimes create friction is through the OCRs themselves. When a consumer posts a review, a business can challenge its accuracy, and other consumers can disagree with the position taken in a review. These systems are 'designed in' civil society and business

checks and balances that were developed by businesses (OCR platforms). There can also be competition between OCR platforms that has the effect of inducing OCR platforms to continuously improve.

In a fully evolved sustainable governance system, public, private, and civil society sector initiatives act in a systematic way to achieve a common public policy goal. As is discussed later in this thesis, at the moment, this tenet of sustainable governance is not fully achieved as there does not seem to be a coordinated and systematic approach to the use of public, private and civil society initiatives. While comments from the interview participants indicate that there is awareness of the approaches by each stakeholder, there is no indication of direct coordination of efforts to ensure appropriate systematic coverage.

A fully realized polycentric sustainable governance model tends to be more complex than a conventional state-based regulatory governance approach. As discussed throughout this section, the utilization of OCRs as a regulatory tool in ensuring business provide good products and services leads to a more complex approach to governance. However, the use of OCRs when relied upon as a regulatory tool has created other issues that still needs to be addressed to fully realize the potential of OCRs as a regulatory tool.

Figure 2 provided previously in the thesis, attempts to depict the combined state and non-state regulation of consumer information, including the use of the OCR mechanism. Drawing on the sustainable governance framework, this figure highlights the number of interactions and inter-relationships among actors, institutions, instruments and processes all involved in the regulatory activity associated with the provision of consumer information about businesses.

Applying Conventional State-Based Approaches to the Regulation of Consumer Information

At the federal level, the Competition Bureau is a key regulatory body using the Competition Act in an attempt to ensure that the information that businesses provide to consumers is accurate. There are other conventional legal tools such as defamation law and contract law, which may also apply to consumer information contexts. Government bodies are not the only regulator that is monitoring the industry regarding deceptive practices. Both industry and consumer groups have weighed in on the use of deceptive information as well.

Competition Act

The most directly relevant federal legislation that applies to the accurate dissemination of information to consumers is the Competition Act, specifically the sections regarding misleading advertising or deceptive practices.⁵³ The Competition Act includes two particularly relevant groupings of provisions concerning consumer misrepresentations.⁵⁴ Sections 74 (74.01, 74.02, 74.03 and 74.1) provides civil liability for misleading representations (no requirement of intention) while section 52(1) provides criminal liability for knowingly/intentional misleading representations to consumers. When choosing between the use of civil and criminal prosecution for misleading advertising, claims there are a few differences. One major difference is the burden of proof required for each. Under section 74.01(1)(a) the burden of proof is the balance of probabilities. To establish this, it must be proven that (i) a representation has been made, (ii) the representation was made to the public, (iii) the representation was to promote a product or business interest, (iv) the representation is false or misleading, and (v) the representation is material.⁵⁵ Criminal offences under section 52(1) must prove intent with the burden of proof being beyond a reasonable doubt.⁵⁶ Therefore, successful criminal actions may be more difficult to pursue and obtain. When utilizing the civil track, there is no

requirement to prove intent or recklessness. However, it is not necessary to prove that any person was misled.⁵⁷

If a company is found guilty of a civil offence the court can order that the infringing conduct is stopped, issue a public notice, freeze assets, or require payment of administrative penalties.⁵⁸ Individuals can be ordered to pay up to \$750,000 for a first offence and \$1 million for subsequent infringements.⁵⁹ Corporations can face fines up to \$10 million for the first offence and \$15 million for subsequent infringements.⁶⁰ With respect to criminal provisions of the Competition Act, such as s. 52, if a company is found guilty of violating the provision, then the persons responsible can incur a maximum fine of up to \$200,000 and/or a maximum of 1 year jail sentence for summary convictions.⁶¹ If the action is pursued as an indictable offence then there is no upper limit to the fines and the maximum jail time is 14 years.⁶²

Within Canada the Competition Bureau is an independent federal law enforcement agency that regulates competition.⁶³ Part of the Competition Bureau's scope is to investigate and act against any misleading representations made under the above acts. The Competition Bureau has started to recognize the importance of OCRs to the marketplace through its Deceptive Marketing Practices Digest.⁶⁴ The Competition Bureau has also started to investigate fake online reviews. The Bureau has also recently brought charges against companies for engaging in deceptive practices. The Competition Bureau has specifically identified that the issue of "astroturfing" is problematic, and defines it as the "practice of creating commercial representations that masquerade as the authentic experiences and opinions of impartial consumers."⁶⁵

However, the Competition Bureau addresses non-competitive business behaviour more generally, and as such is not exclusively a consumer protection agency (such as the Ontario and Quebec consumer protection offices) and does not act on behalf of individuals to resolve disputes between two

parties.⁶⁶ The Competition Bureau will accept complaints about anti-competitive behaviour and will investigate if the alleged actions are in contravention of the Competition Act. If the Competition Bureau determines that there is infringement of a provision, then the Competition Bureau can bring legal action against the infringing party. For criminal provisions, the Competition Bureau will refer the case to the Attorney General of Canada.⁶⁷ If civil action is pursued, then the Competition Bureau can launch a case before the Competition Tribunal, the Federal Court, or a provincial Superior Court.⁶⁸

The Competition Tribunal is an adjudicative body that operates independently of any governmental department.⁶⁹ The Competition Tribunal hears all applications made under parts VII.1 and VIII of the Competition Act.⁷⁰ This includes the civil misleading advertising provisions discussed above. The tribunal is composed of up to six judicial members from federal court judges.⁷¹

Beyond actions taken by the Competition Bureau for misleading advertising claims discussed above, the private sector and civil society can use legal instruments to bring actions against infringing businesses. Consumers or competitors can bring a private legal action based on s.36 of the Competition Act. This section allows private parties to use the misleading criminal offences within the Competition Act to sue for damages. Research by Webb (2013), suggests that the most common form of action taken under this section is competitor to competitor action. Even though s. 36 allows for actions by one competitor against another using offences such as s. 52 the burden of proof in a s. 36 private action is on a balance of probabilities rather than beyond a reasonable doubt.⁷² This means that in competitor to competitor actions regarding misleading OCRs, the plaintiff only needs to prove that on a balance of probabilities a reasonable consumer would be misled in terms of the authenticity of a consumer review that was influenced by the defendant. Using s.36 of the Competition Act one firm can utilize the provisions within the Competition Act to act against a competitor when the competitor engages in anti-competitive behaviour. A major example of this was demonstrated in the case of Bell Alliant Regional

Communications Ltd. v. Rogers Communications Inc.⁷³ In this case Bell brought allegations of misleading advertising against Rogers for claiming it was the fastest and most reliable internet service provider.⁷⁴ The court found that Rogers did knowingly make a false representation to consumers.⁷⁵

Ontario Consumer Protection Act

Within Ontario, consumers have the availability under the Ontario Consumer Protection Act (OCPA) to address the use of false or misleading statements. Section 14 of the OCPA states that, “It is an unfair practice for a person to make a false, misleading or deceptive representation.”⁷⁶ Actions that contravene section 14 of the OCPA are enforceable in civil courts under section 18. If a consumer enters in to an agreement after or while a business has engaged in a deceptive practice, they can rescind the agreement, and recover damages.⁷⁷ If a business engages in deceptive or misleading review practices, then consumers that entered into an agreement (purchased a product or service) with the business may be able to seek damages. This may also be applied to review operators if they engage in deceptive review behaviour such as inaccurately hiding bad reviews. This information could impact the consumer’s decision making. It would need to be shown that there is an agreement between the consumer and the review site, such as the terms of service. The OCPA also grants courts the ability to award exemplary or punitive damages in addition to any other remedy awarded.⁷⁸ Pursuant to s. 116, a violation of s. 14 is also an offence, for which fines and imprisonment are potential penalties.

Class Action Legislation

A mechanism that may be used to ensure that groups of consumers can seek remediation for deceptive practices is the availability of those suffering similar harms to pursue class actions. The harm to an individual consumer may be minimal in individual consumer transactions, but it can be a large amount when aggregated against all impacted consumers. To address this issue, consumers can use class action lawsuits to seek remedies. For this section, the Ontario Class Proceedings Act will be the focus of discussion, but it should be noted that class proceedings legislation exists for all Canadian

provinces except Prince Edward Island and there are also rules for class proceedings in at the federal level through the Federal Court of Canada.⁷⁹ There are no class action or proceedings acts within the 3 territories.

The Ontario Class Proceedings Act allows the plaintiffs or defendants to submit a request to certify a class for a claim.⁸⁰ Class action lawsuits can be utilized for many different claims but as outlined above for issues associated with the accuracy of information the most important claims would probably be in relation to s.36 of the Competition Act (working in conjunction with other deceptive practices provisions in the Act) or S.14 of the OCPA. Once the request has been made to the court, the judge will determine if the case can proceed as a class action and if it will certify the class.⁸¹ Once certified, notice will be given to all class participants and participants have the option to 'opt out' and not participate in the Class Action.⁸² Those that opt out can still bring an individual action on their own behalf.

The Protection of Public Participation Act

Ontario has passed an anti-SLAPP law in an effort to curtail the practice of individuals and companies engaging in Strategic Litigation Against Public Participation (SLAPP) lawsuits.⁸³ SLAPP lawsuits are a strategic tactic that is used by both individuals and companies in an attempt to suppress criticism. The intent of a SLAPP lawsuit is to intimidate a non-wealthy individual that has engaged in some sort of public communication so that the individual withdraws the communication through the threat of expensive and protracted litigation. SLAPP lawsuits are commonly filed in courts under claims of defamation, libel, or slander and are often not pursued to trial. The Ontario anti-SLAPP provisions provide the ability to fast-track a lawsuit within the court system to dismiss SLAPP cases quickly. The court then will apply a test to determine the validity of the lawsuit. The test consists of asking the below 3 questions⁸⁴:

1. Is the lawsuit about a matter of public interest?

2. Does the case of the plaintiff have substantial merit?
3. Is the harm suffered, or likely to be suffered, by the plaintiff serious enough to justify stopping public expression?

Anti-SLAPP legislation is important to the free flow of information as it protects individuals when they are being unfairly targeted for statements they make about a business, such as may occur when consumers post OCRs.

Common Law Torts

Businesses can also bring claims against other competitors using tort law-based actions. Use of the tort of interference with economic relations, defamation or other civil damages lawsuits can also be pursued.⁸⁵ The tort of interference with economic relations “allows a plaintiff to sue a defendant for economic loss resulting from the defendant’s unlawful act against a third party.”⁸⁶ To establish a claim the plaintiff must demonstrate that the defendant used unlawful means to interfere with the plaintiff’s business and that the defendant intended to harm the plaintiff.⁸⁷ In the context of supporting OCRs and ensuring accurate information dissemination, if a competing business intentionally interferes with another business by posting an OCR or any other statement that would contravene provisions within the Competition Act outlined above, then a successful claim could possibly be established. However, the plaintiff would need to establish that the unlawful activity was directed at the third party that caused damage to the plaintiff.⁸⁸ If the infringing business posted a deceptive review that misled consumers and it can be shown to have intentionally cause damages to a competing business, then a successful action may be possible.

Businesses can also use defamation to bring legal action against both consumers and other businesses for defamatory statements or inaccurate statements. Defamation actions try to balance the values of freedom of expression and of reputation.⁸⁹ The balancing of these values could be

demonstrated in online consumer review cases because these cases would need to balance the value of a consumer to express themselves through an online consumer review, while also protecting the reputation of a business. In Canadian defamation cases, the plaintiff must prove on a balance of probabilities “that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff’s reputation in the eyes of a reasonable person; that the words in fact referred to the plaintiff; and that the words were published, meaning that they were communicated to at least one person other than the plaintiff.”⁹⁰

There are also defences to defamation actions that attempt to further balance the competing values of reputation and freedom of expression. If the criteria for a successful defamation action are satisfied then the defendant must prove either that the comments were true, fair comment, privilege or responsible communications on matters of public interest. The fair comment defence consists of the following four elements “the comment must be on a matter of public interest; the comment must be based on fact; the comment, though it can include inferences of fact, must be recognizable as a comment; the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?”.⁹¹

The usefulness of a defamation action in relation to regulating information dissemination and OCRs is the availability to apply them both to consumers and businesses. The criteria for a successful defamation action can be applicable to infringing OCRs if they include defamatory statements about a specific business. OCRs by their nature in most cases would satisfy the third criteria as they are published on the internet. Consumers posting reviews may also be protected by defamation law using a valid defence. The underlying balancing of values in defamation law, in theory, should allow both consumers’ freedom of expression values and businesses’ reputational values to be appropriately

upheld. However, there is limited evidence within Canada of companies using defamation to address deceptive reviews.

Industry Codes/Standards

Within Canada there are private sector industry groups that work to regulate the conduct of their member organizations in relation to advertising and deceptive practices. Some of the industry groups include, the Advertising Standards Council (ASC), The Council of Better Business Bureaus (CBBB), and The Better Business Bureau (BBB),

The Advertising Standards Canada (ASC) is the national self-regulatory body for Canadian advertising. The ASC is a volunteer membership organization with members that include advertisers, advertising agencies, media organizations, and suppliers to the advertising sector.⁹² Their mandate is to “[foster] community confidence in advertising and [ensure] the integrity and viability of advertising in Canada through responsible industry self-regulation.”⁹³

Among other functions, the ASC administers the Canadian Code of Advertising Standards (CCAS). In relation to online consumer reviews the standard provides guidelines on the use of testimonials.⁹⁴ The standards outline that “Testimonials, endorsements or representations of opinion or preference, must reflect the genuine, reasonably current opinion of the individual(s), group or organization making such representations, and must be based upon adequate information about or experience with the product or service being advertised, and must not otherwise be deceptive.”⁹⁵ While the language does not directly address the situation of online consumer reviews, the language provided by the standards allows for the possibility. Previous reports have mentioned consumers concern regarding OCRs.⁹⁶ However, even if the standards are used to regulate behaviour there is a limitation in the recourse that the ASC can take. If an advertiser fails to follow procedures or comply with a decision, then the ASC may

request that the media remove the advertisement from distribution or post the company and advertisement information within a public notice.⁹⁷

Like the ASC, the Council of Better Business Bureau's (CBBB) and Better Business Bureau (BBB) in both Canada and the United States assist to create a mutually beneficial relationship between consumers and businesses.⁹⁸ The BBB's have an interesting position as they act as both a regulator of behaviour and a disseminator of consumer reviews. In relation to consumer reviews, in 2014 the BBBs published 88,000 verified customer reviews.⁹⁹ The BBBs also processed and closed 873,208 complaints.¹⁰⁰ The BBB gathers customer complaints and works with the consumer and business to resolve the issue.

Limitations

As initially outlined earlier, there are several challenges associated with regulating behaviour on the internet using conventional state based approaches. The internet by design is multi-jurisdictional in nature. Therefore, the communication and interactions taking place on the internet can cross borders. This may raise questions of coordination in enforcement among government agencies of independent sovereign states, each with different laws applying in different ways.¹⁰¹ However, to remediate some of the jurisdictional issues associated with state based rule instruments and enforcement actions, government agencies establish international co-ordination agreements such as agreements between the Competition Bureau and regulators in other jurisdictions. The Competition Bureau has memorandums of understanding (MOUs) with their counterparts in other jurisdictions.¹⁰² MOUs are intended to facilitate cooperation between governmental enforcement groups to efficiently share information and coordinate enforcement efforts. Regarding misleading or deceptive practices such as online consumer reviews the Competition Bureau has an agreement with the Federal Trade Commission in the US to coordinate enforcement activities in appropriate cases.¹⁰³

Canadian courts initially only exercise jurisdiction and proceed with a case occurring in another jurisdiction if there is “real and substantial connection” with the subject matter discussed within the case.¹⁰⁴ This means that Canadian courts could refuse to exercise jurisdiction for transnational issues, such as online consumer review issues, through the doctrine of forum non-conveniens. Forum non-conveniens was first cited in common law by the Supreme Court of Canada in *Antares Shipping Corp. v. The Ship "Capricorn"*.¹⁰⁵ The court stated, “In my view the overriding consideration which must guide the Court in exercising its discretion by refusing to grant such an application as this must, however, be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice.”¹⁰⁶ The court found that the doctrine will apply when there is a more appropriate jurisdiction to hear the case. The courts will normally indicate the jurisdiction in which they feel the action should be taken.

In online transactions, it may be common for businesses to include forum selection clauses to determine the appropriate forum to hear an action. This provides additional complexity to regulating behaviour across borders. Canadian courts have outlined a 2-part test to determine if the forum selection clause should be enforced if there is no explicit language within the enforceable legislation.¹⁰⁷ The first step is that the clause must be determined to be valid, clear and enforceable and that it applies to the action before the court.¹⁰⁸ For the second step the plaintiff must demonstrate that there is strong cause not to enforce the forum selection clause.¹⁰⁹ The Supreme Court of Canada found in *Douez v. Facebook Inc.* that an important factor in determining if a forum clause will be not enforced is in cases of consumer contracts with a large corporation where there is a gross inequality of bargaining power.¹¹⁰ While this case was brought in relation to privacy claims, this decision may be used by Canadian Courts to justify hearing actions for information dissemination such as actions under s. 14 of the Ontario Consumer Protection Act.

In summary, this chapter has attempted to position OCRs as a regulatory instrument operating within a broader constellation of state and non-state regulatory approaches addressing consumer information about businesses. Both conventional state-based approaches such as command and control regulation and common law actions as well as non-state approaches including notably the online consumer review mechanism perform important roles in addressing the provision of consumer information about businesses, with considerable inter-connections and complementary among state, private sector and civil society roles.

Chapter 4: OCR Deficiencies and Limitations (Mischiefs)

Chapter 3 explored where OCRs fit within the existing government and non-state set of regulatory arrangements, using the sustainable governance concept and framework as a lens for examination. Using the sustainable governance approach, it was shown that OCRs are a new way (using consumer information) of regulating businesses behavior through businesses (OCR platforms) regulating businesses. Unlike conventional regulatory approaches (e.g., command and control laws, enforced by government regulatory agencies and common law actions), with OCRs, the structured provision and dissemination of consumer information is undertaken by private sector OCR platforms, channeling performance reviews provided by consumers, and as such it represents an innovative non-state regulatory approach.

This chapter will discuss the weaknesses and deficiencies with OCRs as a regulatory instrument. OCRs are an innovative regulatory instrument, but they are not as effective as they could be because of weaknesses and deficiencies in the creation, moderation and display of OCRs. OCR processes can be misused by businesses, consumers and OCR platforms to undermine the accuracy and effectiveness of OCRs for consumer decision making. This chapter will explore issues such as intentionally deceptive (fake) reviews, misleading reviews, consumer blackmail, OCR platform deception and disparagement clauses. This thesis does not suggest that these forms of mischief are of equal importance. This chapter will also demonstrate conventional laws can and do play a role in addressing some of these deficiencies, but in keeping with the tenets of the sustainable governance framework, a more comprehensive and systematic approach would lead to better results than the current ad hoc approach.

Types of Harm from Online Consumer Review Practices

As with many new advancements, the use of OCRs has created several new issues that are skewing the marketplace and preventing consumers from making information decisions on accurate information. The European Commission recently published a report identifying four sources of fake consumer reviews. The sources are consumers, service operators (businesses), review website operators, and e-reputation services.¹¹¹

Consumer 'Blackmail'

Consumers may generate fake reviews intentionally, for self-gain, as a form of blackmail of a business. For the purposes of this thesis, blackmail refers to the actions by some consumers who use OCRs to demand a benefit from the company that is not justified by the actual experience of the consumer with the business.¹¹² Consumers may engage in threatening behaviour, suggesting they will post a negative review unless a business provides them with a benefit. With consumer threats, there can be multiple issues. In some cases, the threat could be after a legitimate bad experience with the product or service provider and the consumer is trying to gain a benefit from the bad experience. While this may not constitute an issue that necessitates a new form of regulation, the such practices are ethically questionable. The greater harm comes from consumers that use threats in conjunction with the intention of leaving a misleading dishonest review.

Consumers use the threat of posting an OCR as blackmail if they do not receive their demands. Consumers may request room upgrades, free products or other demands in exchange for not posting a negative review. Businesses sometimes respond to these allegations because of the feared damages that a negative review can have to sales. As identified by the consumer protection agency respondent during the interviews, this can be significantly more damaging in the case of small businesses (who may not have a large volume of positive reviews to counter an aberrant negative review). Review sites may receive criticisms about their sites because of such blackmailing actions and so some are providing

guidance to businesses on how to deal with potential blackmail, such as reporting the blackmail and not giving in to the demands of the blackmailer.¹¹³ The surveys undertaken as part of this thesis provided supporting evidence that consumers may use of online consumer reviews to gain a benefit from companies through consumer blackmail. Most survey respondents strongly agree (31% of respondents for sample 1 and 21% of respondents for sample 2) or somewhat agree (33% of respondents for sample 1 and 39% of respondents for sample 2) that consumers will threaten businesses with a negative review unless they provide a benefit.

The most relevant Criminal Code legislation available to address consumers who attempt to extort from a business is s.346. This section states “everyone commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.”¹¹⁴ While the author could not find any examples of use of the Criminal Code to address an OCR situation, an argument could be made that it is capable of being so used. An argument could be made that a consumer would meet the legal threshold for extortion if they intended to obtain anything (money or benefits) from a business using a threat (of posting a bad review).

Businesses could also utilize the tort of intimidation to address any consumers who attempt to extort a business. For a business to establish an action for the tort of intimidation, they must demonstrate that “(i) a person threatened to commit an act or to use means unlawful against the interest of the threatened person, (ii) the threat caused the threatened person to do or refrain from doing something he or she was entitled to do, and (iii) the person making the threat intended to injure the threatened person.”¹¹⁵ This means that a business may have a successful action, if a consumer

illegally threatens them to provide a benefit (that the business was not entitled to do) with the threat of a negative OCR to injure the business financially.

Deceptive (Fake) and Misleading Review Practices

A fake review can be defined as a positive, neutral or negative review that is not an actual consumer's honest and impartial opinion or that does not reflect a consumer's genuine experience of a product, service or business.¹¹⁶ Fake OCRs have been described as one of the top ways for Canadians to be 'scammed'.¹¹⁷

The issue with a consumer relying on a fake online review is that the information may lead the consumer to make a purchasing decision based on inaccurate information that the consumer would not have made if accurate information had been provided.¹¹⁸ The consumer possibly would have chosen a different brand or otherwise altered his or her decision in the absence of the false information being provided to them. One survey report found that consumers are aware of the existence of fake reviews.¹¹⁹ However, they have inflated levels of confidence in their ability to detect fake reviews.¹²⁰ Based on a recent study 66% of consumers have confidence in consumer opinions posted online.¹²¹ This is a 2% decrease from 2013. Survey respondents for this thesis believed that OCRs can be trustworthy. Most respondents indicated that they somewhat or strongly agree that OCRs are trustworthy (77% in sample 1 and 68% in sample 2). However, studies have also found that individuals can have a false confidence because in truth they cannot effectively determine if a review is fake.¹²²

To determine the authenticity of an OCR, consumers look for cues to help them determine the authenticity of a review. There are certain cues that have been found to assist in indicating review credibility. One study has found that the availability of a "consensus view" can help to indicate review credibility.¹²³ A consensus view allows consumers to indicate if they agree with a consumer review. However, given the anonymity of reviewers on many review sites there may be potential for the

consensus information to be skewed by disingenuous individuals. If these cues can be used to assist in determining validity, then they could potentially be integrated into some form of regulation to assist consumers in determining the validity of a consumer review.

Fake reviews may come from consumers, but they can also be generated by business employees, freelance employees, or automated bots.¹²⁴ In recent years, there have been a number of cases and news articles discussing the prevalence of businesses requesting paid reviews or not revealing the relationship between the business and a consumer review publisher.¹²⁵ This not only impacts consumers but can cause problems for other firms as well because fake reviews detract from a level playing field among competing businesses.¹²⁶ Businesses may also attempt to stop consumers from expressing their views concerning a product or service, typically using two main strategies. The first is including non-disparagement clauses in their terms of service or contracts. The non-disparagement clauses are intended to stop a consumer from making negative public statements about the company (such as negative consumer reviews).¹²⁷ A second strategy used by businesses is to use strategic lawsuits against public participation (SLAPP) lawsuits. SLAPP lawsuits are strategic tactics that are used by both companies and individuals to suppress criticism.¹²⁸ The intent of the lawsuit is to have the defendant exhaust their financial resources and energy defending a case before it is taken to trial. In the context of OCRs, the intent of such lawsuits is to dissuade consumers from posting negative reviews. We discussed anti-SLAPP legislation intended to diminish the likelihood of this second business strategy in the last chapter.

In addition to intentionally misleading reviews, there is also harm to the marketplace when a consumer unintentionally posts a misleading or bad review that does not provide an accurate assessment of the overall experience. While consumers are not intentionally skewing the effective operation of the marketplace, these reviews have a similar effect on the marketplace to intentionally

false or misleading reviews. The information may lead to a consumer making a suboptimal purchasing decision and therefore skewing the marketplace transactional behaviour. OCR platforms can also unintentionally mislead consumers through review moderation or presentation. This is because the moderation or display of OCRs may not accurately capture all valid reviews and convey that information to consumers effectively. OCR platforms need to be aware of these issues and ensure they are accurate in their statements about the use of review filtering and accuracy.

While it is difficult to accurately estimate how many fake reviews are on the internet, there is anecdotal evidence of their existence. For example, there have been recent cases where companies have been found guilty of disseminating fake reviews regarding their products or services.¹²⁹ In fact, fake reviews can be purchased via websites that are designed to provide freelance work to many users.¹³⁰ Crowdsourcing sites allow anyone with a task that needs to be completed to tap in to an anonymous workforce that will complete small tasks.¹³¹ An example of this is the Amazon's Mechanical Turk website or Fiverr. In recent news articles, it has been found that these sites were allowing companies to request users to publish fake online reviews for a small fee.¹³² In addition, there are limitations in the detection of disingenuous online reviews. Studies indicate that consumers have difficulty determining if a review represents a genuine experience.¹³³ A recent study of the prevalence of fake reviews found that 16% of the reviews within Yelp were blocked for being fake.¹³⁴ However, this only captures the number of reviews that were blocked by Yelp's algorithm. Therefore, one can assume that the number could be higher as the algorithm may not capture all fake reviews.

Consumer protection regulation may be enacted to address market failures that impact consumers such as information asymmetry, or inadequate competition.¹³⁵ As discussed above, OCRs if used appropriately can be beneficial to the relationship between a business and a consumer. However, there are still issues that need to be resolved due to deceptive online consumer reviews. This means

ensuring consumers are adequately informed when making purchasing decisions. Consumer education and literacy is important to ensuring consumers can make informed decisions about the products or services that they are purchasing. For example, product literacy is intended to ensure that consumers are well informed about the products they are buying and consumer policy designers may determine the scope or degree of regulatory intervention based on the perceived level of consumer capability to make rational of consumer decisions.¹³⁶

Fake reviews can undermine the efficiency of the marketplace and adversely impact competition.¹³⁷ Regulation of OCRs should aim to enhance the trust within the business to consumer relationship created by online reviews. For example, certification to a standard may be useful for consumers so that they can have a higher level of trust for OCRs. This can be completed by implementing standardized good practices in the collection, moderation and delivery of OCRs. However, the evidence from current studies completed on the effectiveness of voluntary codes, standards or assurance seals are mixed.¹³⁸ There are a few reasons for this. Studies have found that they are not effective because consumers are not fully aware of assurance seals,¹³⁹ or do not understand them.¹⁴⁰ However, there have also been studies that indicate that assurance seals and standards underlying them can increase trust and the intention to purchase.¹⁴¹ We will discuss the use of certification standards pertaining to OCRs later in the thesis.

Current Activity to Address OCR Mischiefs

State Enforcement

Canada:

Bell Canada, one of Canada's largest telecommunications companies, was implicated in the most significant enforcement action to date in Canada concerning disseminating fake online reviews. The investigation was brought forward by the Competition Bureau. The Competition Bureau investigation

revealed that since November 2014 Bell employees were encouraged to provide positive reviews for applications owned by Bell on both the iTunes app store and the Google Play App Store.¹⁴² These reviews were posted to the app stores without the disclosure that the employees worked for Bell Canada. As discussed previously, the Bureau can bring actions under the Competition Act and found that the reviews gave the impression that they were from impartial consumers. The Bureau found that the information affected the overall rating of the apps and infringed section 74.12 of the Competition Act.¹⁴³

Bell Canada reached an agreement with the Competition Bureau filed with the Competition Tribunal “not to direct, encourage or incentivize its employees or contractors to rate, rank or review apps in app stores.”¹⁴⁴ This case provides an example of the ability of a current state regulator to act within its power to regulate negative behaviour in relation to the use of fake or deceptive online reviews. As per the agreement, Bell Canada agreed to an administrative monetary penalty of \$1.25 million and to change its corporate compliance program in relation to prohibiting the rating, ranking or reviewing of apps in an app store by employees or contractors.¹⁴⁵ The provisions that were outlined by the Competition Bureau, may have an impact on the behaviour of other companies within Canada. The provisions may reduce the issue of individual companies disguising the relationship of the reviewers to the company when trying to increase their reputation. While the information provided within the case documentation suggests that Bell knowingly engaged in the deceptive behaviour, there was no indication that criminal track was investigated. The reason for this may be that the burden of proof that is required by the criminal provisions may be too onerous to overcome.

Other Examples of State Based Enforcement from Other Jurisdictions

United States:

Within the US, the Federal Trade Commission (FTC) has been bringing cases against individuals and companies in relation to deceptive or misleading competitive practices under the Federal Trade

Commission Act. One of the cases brought forward by the FTC was against Reverb Communications for posting fake reviews for their clients on iTunes.¹⁴⁶ The reviews were being posted by employees using fake accounts that may mislead consumers in to assuming they had no association with the company or product.¹⁴⁷ The company was ordered to cease writing such reviews, delete the currently posted reviews and establish a reporting and compliance regime.¹⁴⁸ Another similar case was brought forward by the FTC against Legacy Learning Systems, a DVD guitar lesson company, for paying affiliates to post positive reviews about the company.¹⁴⁹ The affiliated company or reviewers did not state that they were associated with Legacy Learning Systems and therefore deceived consumers.¹⁵⁰ The company was fined \$250,000 and had to provide the FTC with monthly reporting on affiliates.¹⁵¹ These cases are similar to the Bell case within Canada as it demonstrates the availability of the State regulators to address fake online reviews with misleading or deceptive practices legislation. Like the provisions provided by the Competition Bureau in the case of Bell, the provisions required by the FTC may be effective in deterring large individual corporations from engaging in deceptive online consumer reviews.

In a major step forward regarding online consumer review regulation through state regulators, the New York State Attorney-General's Office entered in assurance of discontinuances with 19 companies for preparing or disseminating a fake review.¹⁵² The Attorney-General found that most reviews were written overseas by companies in Bangladesh, The Philippines and Eastern Europe, outside of United States jurisdiction for prosecution.¹⁵³ The Attorney General's office was pursuing the companies for the act of astroturfing which is deemed to be in violation of New York Executive Law § 63(12), and New York General Business Law § 349 and § 350.¹⁵⁴ New York Executive Law § 63(12) grants the Attorney General power to stop the fraudulent activity and seek restitution for any repeated fraudulent activity conducted by a business.¹⁵⁵ New York General Business Law § 349 prohibits deceptive practices when conducting business, trade or commerce or providing a service.¹⁵⁶ New York General Business Law § 350 prohibits "False advertising in the conduct of any business, trade or commerce or in

the furnishing of any service.”¹⁵⁷ The companies were made to cease the use of fake online reviews and to pay a total of \$350,000 in total penalties.¹⁵⁸

The assurance of discontinuances were a result of a yearlong undercover investigation named “Operation Clean Turf”.¹⁵⁹ The investigators posed as a yogurt shop and contacted many search engine optimization (SEO) companies to assist with negative reviews and the shop’s reputation.¹⁶⁰ The infringing companies offered to write fake reviews for the yogurt shop and stated they would post them on prominent consumer review websites.¹⁶¹ The Attorney-General’s office found that the SEO companies used advanced techniques to hide the identity of reviewers when posting reviews, such as hiding their IP address and establishing many fake online identities.¹⁶² However, the investigators also found that the consumer review sites are implementing filters to block reviews that are not representing a genuine consumer experience, citing Yelp as the most aggressive site.¹⁶³ One SEO utilized techniques such as using freelancers with existing accounts and an online reputation on the consumer review site in an attempt to circumvent the systematic blocking software used by online consumer review sites.¹⁶⁴

The cases highlighted the somewhat limited capability to fully prosecute all actors in relation to disseminating fake online reviews. As discussed above, most of the reviews were generated in jurisdictions other than the United States, but were commissioned by companies within the United States. As discussed previously, the challenges associated with addressing problematic cross border OCR activity detracts from government ability to prosecute bad actors in other countries without coordination efforts from governmental regulatory agencies. There also may be differences between the laws of different jurisdictions. These cases also suggest that disseminators of fake reviews are utilizing sophisticated cross border approaches to makes it difficult to be identified and successfully apprehended.

United Kingdom:

Within the United Kingdom the Advertising Standards Authority (ASA), a non-state body that works in coordination with governmental authorities, is attempting to address misleading or deceptive online consumer reviews through the existing power to enforce advertising codes. One of the major cases addressed by the ASA pertained to TripAdvisor, a US based website that provides travel consumer reviews around the world. TripAdvisor advertised that their reviews are “Reviews that you can trust”¹⁶⁵ and are “reviews from real travellers.”¹⁶⁶ Three companies brought forward the complaint to the ASA claiming that the statements were misleading and were not substantiated as the reviews on TripAdvisor were not verified.¹⁶⁷ The action was brought forward under the Misleading Advertising sections, 3.1 and 3.7, of the CAP code.¹⁶⁸ Section 3.1 of the CAP code states that “marketing communications must not materially mislead or be likely to do so”¹⁶⁹ and section 3.7 states “Before distributing or submitting a marketing communication for publication, marketers must hold documentary evidence to prove claims that consumers are likely to regard as objective and that are capable of objective substantiation. The ASA may regard claims as misleading in the absence of adequate substantiation.”¹⁷⁰

TripAdvisor in its defence tried to argue that the number of fake reviews is small and that the effect of these on consumer perception is negligible.¹⁷¹ TripAdvisor also outlined that consumers tend to read many reviews before making a purchasing decision and therefore the impact of the small amount of fake reviews would be limited.¹⁷² TripAdvisor acknowledged that consumer trust is an important component to the sites success and that they invested heavily in systems and processes to detect fake reviews.¹⁷³ TripAdvisor also has a policy in place that encourages companies to respond to the reviews publicly on the site.¹⁷⁴

However, the ASA stated that while there are declarations that need to be made by a consumer before providing a consumer review, such as no affiliation to the company, the controls that are put in

place by TripAdvisor are not sufficient enough to ensure that a fake review is not posted to TripAdvisor.¹⁷⁵ The ASA found that the declarations made by TripAdvisor indicated to consumers that they could be certain that the reviews posted were from genuine consumer experiences.¹⁷⁶ After reviewing the case the ASA stated that TripAdvisor should remove the claims, nor should they make any similar claims.¹⁷⁷

The ASA TripAdvisor case provides an example of the need for OCR platforms to ensure that the claims that they make about their sites and reviews are accurate and that they need to engage in considerable efforts to avoid misleading consumers concerning the validity of reviews in general. The case also demonstrates that review sites are responsible and can be held accountable for ensuring the authenticity of reviews made available on their website. However, the focus of the action was the fact that TripAdvisor made a claim found to mislead consumers that used the review website. If TripAdvisor had not made the claims outlined above, then misleading advertising provisions within the CAP code may not be applicable. Therefore, the use of misleading advertising provisions through the CAP code and ASA enforcement may have limited applicability toward online review sites. Within Canada, the Competition Act could have the same limited applicability to online consumer review sites.

Private Business Use of State Based Legal Instruments

Canada

Within Canada, there have been no major cases filed for the improper use of OCRs by the private businesses. However, there have been some smaller cases that highlight the ability to utilize the existing regulatory framework to monitor OCR review behaviour. The ability for small businesses to regulate their online review presence may be more significant as negative reviews can potentially ruin a small business.¹⁷⁸

Recently, a Canadian lawsuit in defamation was used to address an OCR. In *Singer v. Yorulmaz*, a lawyer brought a case against his former client after the client posted a consumer review on www.complaintsboard.com criticizing the quality of services offered by "immigration.ca" that is associated with Singer.¹⁷⁹ As described earlier, the three-part test to establish a successful defamation action needed to be established. When analyzing the statements to determine if they could be deemed to be defamatory, the court found that the statements in regards to being "cheated" by the defendant were defamatory.¹⁸⁰ The court further stated that if "the Defendant specifically and publicly [alleged] that the Plaintiff has personally 'cheated' her, the use of such word would have been defamatory."¹⁸¹ The court also found that the defence of fair comment or truth would not be applicable in this case.¹⁸² However, since the case was brought forward by Singer and the comment was directed at the website which is owned by a separate legal person, the case was dismissed.¹⁸³ The court found that there was no connection directly or indirectly to suggest that the comments were directed at Singer.¹⁸⁴ The court did not discuss the issue of publication as the action failed to establish a connection to the plaintiff. While this case was unsuccessful in establishing a defamation suit because of the insufficient connection between Singer and the comments, it demonstrates the ability to utilize defamation to bring an action for the use of online consumer reviews.

A successful lawsuit for defamation in regard to online consumer reviews taken by a business can be shown in the BC case of *WeGo Kayaking Ltd. v. Sewid*. In this case WeGo Kayaking Ltd. (WeGo) brought a defamation action against Sewid for posting negative comments on the internet.¹⁸⁵ Sewid operated a competing service within the same area as WeGo and published a tourist information website on which the comments were made.¹⁸⁶ The comments included a list of good and bad companies within the local area for consumers to choose when looking for kayak excursions.¹⁸⁷ These statements were presented to consumers as reviews of the competing companies, claiming to represent a genuine experience.¹⁸⁸

As outlined above the court assessed whether the three criteria required to establish a successful defamation action were present. Regarding the connection between the statements and the defendant the court found that “There is no question here that the impugned statements concern the plaintiffs”¹⁸⁹ and that they “all would likely injure the business reputation.”¹⁹⁰ Next the court considered whether the defendant was responsible for the communication of the defamatory statements on the internet. While the court found that the defendant, Mr. Sewid, did not publish the communications personally, he participated in “formulating, then communicating, authorizing and approving the publication of the statements”¹⁹¹

The court concluded that WeGo depended on the internet to generate a significant source of new customers and that the tourist information website was likely to be used when deciding to choose a tour operator in the area, and the court ultimately found that the comments were defamatory to WeGo.¹⁹² The court found that no defamation defences of fair comment, public interest or truth could be established.¹⁹³ The court ordered a permanent injunction and damages to be paid.¹⁹⁴ The case suggests that businesses can be held liable for their participation in the dissemination of defamatory comments.

These cases demonstrate that the tort of defamation can be used by businesses that suffer damages from OCRs if the reviews do not accurately represent an individual’s genuine experience with the business. However, this recourse is only available after the fact – after a review is published and the effects on the plaintiff’s reputation may not be fully restored. Restitution for smaller businesses may also not be swift enough for the business to withstand the effects of the negative review. The use of defamation also does not provide restitution to any consumer that relied upon the false information through the defamatory comments.

United States

Within the US there have been some several lawsuits taken by businesses involving the use of fake online reviews. These cases suggest that some U.S. businesses have undertaken a more concerted and systematic approach to addressing fake online reviews than is suggested by the Canadian lawsuits discussed above. Some of the most recent lawsuits for fake online reviews were initiated by Amazon. In 2005, Amazon filed a lawsuit against 1,000 people for posting fake online reviews.¹⁹⁵ Amazon is bringing the lawsuit against the reviewers for breach of contract and for violating Washington's consumer protection legislation.¹⁹⁶ Amazon's terms of use ban solicitation of fake reviews.¹⁹⁷ Similar approaches could potentially be utilized in Canada. Companies within Canada could bring actions against individuals for breach of contract using their terms of service with consumers or businesses as a basis for the action. The Competition Act also has similar provisions to the Washington Consumer Protection Act allowing businesses to take legal action against unfair and deceptive acts related to trade or commerce.

Civil Society Enforcement

As discussed throughout this paper, there are many parties that have a stake in ensuring that the marketplace operates efficiently and the harm from fake online reviews is mitigated. The stakeholders include civil society (e.g., consumer organizations) who are dedicated to the reduction of consumer harms. Consumers or consumer organizations may wish to act against a review site, business or other entity to recover damages that they experienced from deceptive practices. While it may be unlikely that a single individual would bring an action against a company if their individual loss was minimal, class action lawsuits provide a forum for similarly situated individuals to act as a group and more efficiently recover damages from harm such as fake online reviews. Within Canada, the author could not find evidence of a such a civil action pertaining to OCRs.

United States

In *Curry v. Yelp*, the plaintiff investors brought a securities class action lawsuit against Yelp in relation to a material misrepresentation regarding the authenticity of reviews hosted on Yelp.¹⁹⁸ The plaintiffs also brought allegations that regarding Yelp manipulated reviews for specific businesses.¹⁹⁹ The class action was certified for all persons who purchased or otherwise acquired the common stock of Yelp from October 29, 2013, through April 3, 2014, inclusive.²⁰⁰ The action sought damages because the stock price fell after information was disseminated by the Wallstreet Journal regarding Yelp`s review practices and the FTC released information claiming that 2046 consumer complaints were filed with the FTC against Yelp between 2008 and 2014.²⁰¹ The claim was made under section 10(b) of the Securities Exchange Act of 1934.²⁰² Section 10(b) prohibits acts or omissions that result in security fraud or deceit.²⁰³ This plaintiffs were seeking damages of approximately \$372,000 in losses due to the decline in stock price.²⁰⁴ To establish a successful claim the plaintiff are required to prove that the act or omission in question was both false or misleading and material.²⁰⁵ The court determined that the plaintiffs could not establish that the claims made by the Yelp were materially false and held that a reasonable investor would not believe that all reviews hosted on Yelp`s website were authentic.²⁰⁶

The significance of this case is that it illustrates the potential to address problematic fake online review practices using existing securities legislation. Similar legislation exists in Canada, such as the Ontario Securities Act. However, *Curry v. Yelp* also shows there are significant challenges associated with attempting to apply this legislation to address situations related to fake reviews. The case also provides information concerning potentially problematic procedures and policies that review sites such as Yelp have concerning the moderation of OCRs. The use of rule instruments such as a voluntary certification standard setting out good OCR practices could potentially assist in improving the transparency and operation of online review platforms. More will be said about this later in the thesis.

Company Specific Policies and Terms

Businesses and review platform administrators can self-regulate behavior through policies and terms of services. These rule instruments are agreed to by consumers and businesses in exchange for the use of the service. Many online review platform administrators have policies and guidelines that users of the service must adhere to. For example, Yelp,²⁰⁷ Homestars,²⁰⁸ TripAdvisor,²⁰⁹ Amazon²¹⁰ and Google²¹¹ all have policies relating to online consumer reviews. However, the policies differ from provider to provider and are not consistently applied. For example, Yelp specifically provides guidance on the use of recommended reviews on their website, but others do not.²¹² The Yelp guidance provides clarity to the consumers on the reviews that will be presented to them and ones that may not. However, this guidance and information is not provided by other review platforms.

A significant mechanism to assist in ensuring that OCRs are accurate is the ability of businesses to challenge reviews that have been posted to an OCR platform. Many dedicated OCR platforms have policies and procedures allowing individual businesses to challenge OCRs they feel are not authentic or otherwise problematic.

Individual businesses may also enact policies that discuss acceptable OCR behaviour. As indicated above in the Bell Online Consumer case, Bell was required to enact company policies that outline unacceptable deceptive practices in relation to OCRs. These policies are a private sector internal regulatory mechanism to ensure that employees do not engage in bad behaviour. The possible benefits of self-regulation are that scarce government resources can potentially be better employed to investigate systemic breaches of consumer trust. The private sector through self-regulation has more resources to monitor all reviews and handle complaints from both businesses and consumers. There may be an incentive for online consumer review websites to establish policies and procedures to regulate online consumer reviews: from a business perspective if consumer's have more trust in the information that they receive on an online consumer review website in comparison to the competition

then it may lead the consumer to use that site more frequently. However, the survey undertaken for this thesis suggests that not many survey respondents bother to examine the policy and procedure information for online consumer review sites. There is also evidence suggesting that while consumers may have intentions gravitating towards ethical firms, consumer behaviour does not necessarily follow these intentions.²¹³

In summary, this chapter has identified a number of problematic practices and activities associated with the online consumer review platform that can detract from their effectiveness and the amount of trust that consumers and businesses have in the reviews found on OCR platforms. The chapter also reviewed a number of state and non-state approaches being used to address these practices. On the whole, these approaches have been somewhat but not completely successful.

Chapter 5: Survey and Key Stakeholder Interview Insights

The analysis of laws, court decisions, academic literature and other information concerning OCRs that was undertaken for this thesis was supported by two small surveys and a limited number of semi-structured interviews with key state and non-state stakeholders. This chapter discusses the results of these supplemental research activities that were conducted for this thesis. The two surveys were undertaken in an effort to get a better understanding of current consumer practices and attitudes concerning online consumer reviews: one survey was taken by Ryerson marketing students and the second one was a wider sampling of individuals. The key stakeholder interviews included two government regulators, one OCR platform operator, and one civil society (consumer organization) representative with considerable expertise concerning online consumer reviews. While some of the results and insights emerging from the surveys and interviews were referred to earlier in the thesis, in this section the findings will be reviewed in a more comprehensive manner. An overview discussion of the survey and semi-structured interview methodologies and limitations was provided in the introduction. A summary table of the survey results can be found within the appendix.

Insights from Online Surveys

The survey provided a number of interesting insights concerning the use of OCRs that support and supplement the information found in the literature that was reviewed earlier in the thesis. As discussed, OCRs are becoming increasingly more important for consumers when making a purchasing decision. From the surveys, most respondents considered OCRs to be very important to decision making and used OCRs most of the time when making a purchasing decision (73% of respondents for sample 1 and 64% of respondents for sample 2). To further demonstrate the rising importance of OCRs to decision making, while most indicated that family and friends would be their main source of information, OCRs

were second highest in reliance for both samples. Most respondents also indicated that OCRs are at least very important to making a purchasing decision (62% of respondents for sample 1 and 61% of respondents for sample 2).

The surveys also provide further support for the idea that negative reviews play an important role in consumer decision making. Most of the survey respondents indicated that negative reviews impacted their decision to purchase a product or service most of the time (55% of respondents for sample 1 and 34% of respondents for sample 2). This provides further evidence there is a possible market penalty incurred by businesses that do not actively respond to negative online comments and thereby manage their online image. At the same time, most survey respondents indicated that positive reviews impact their decision making most of the time (59% of respondents for sample 1 and 58% of respondents for sample 2).

The surveys also provided insights concerning the behaviour of consumers who post reviews. Consumers are more likely to post reviews when they have a positive (31% sometimes for sample 1 and 31% sometimes for sample 2) negative experience with a business (23% most of the time for sample 1 and 26% sometimes for sample 2). This demonstrates that it is important for businesses to make a positive impression on consumers. However, they are unlikely to post a review when they have a neutral experience. Consumers in both surveys indicated that they post reviews for consumer products (44% of respondents for sample 1 and 64% of respondents for sample 2), restaurants (44% of respondents for sample 1 and 40% of respondents for sample 2) and hotels (30% of respondents for sample 1 and 34% of respondents for sample 2) the most.

The two survey samples both indicated that most users found that online consumer reviews are trustworthy (75% of respondents for sample 1 and 80% of respondents for sample 2). When looking for reviews the samples diverged in the responses for the most trustworthy sites. Sample 1 indicated that

AirBnB (28%), Uber (25%), Rotten Tomatoes (25%) are the most trustworthy. Sample 2 indicated that Google Reviews (22%), BBB (15%) and AirBnB (12%) are the most trustworthy. Further research should be conducted to identify the reasons why the samples diverged and the reasons they identified the OCR platforms as trustworthy. One theory could be that the respondents indicated the review sites they were familiar with were the ones they trusted. The difference then could possibly be explained by geographical location difference between the samples as the respondents from the second sample are from North America and not just Canada (and so the Toronto-based HomeStars OCR would not be familiar to respondents in the second sample). However, one indication of trustworthiness is that most respondents in both samples either strongly agreed (47% of respondents for sample 1 and 35% of respondents for sample 2) or somewhat agreed (36% of respondents for sample 1 and 46% of respondents for sample 2) that it is beneficial to have a closed system where only verified purchasers can post OCRs.

Survey respondents somewhat agreed (47% of respondents for sample 1 and 49% of respondents for sample 2) or strongly agreed (40% of respondents for sample 1 and 20% of respondents for sample 2) that businesses manipulate reviews by posting false reviews to have a more positive image. This information supports the evidence that has been shown for businesses using astroturfing to promote their business. However, less respondents strongly agree that there is an issue of businesses posting negative reviews about a competitor (15% of respondents for sample 1 and 15% of respondents for sample 2). The evidence also supports the issues related to OCR platform deception. Most respondents strongly agree (31% of respondents for sample 1 and 15% of respondents for sample 2) or somewhat agree (46% of respondents for sample 1 and 43% of respondents for sample 2) that online consumer review sites will manipulate reviews.

Survey results provided supporting evidence that consumers may use online consumer reviews to gain a benefit from companies through consumer blackmail. Most survey respondents strongly agree (31% of respondents for sample 1 and 21% of respondents for sample 2) or somewhat agree (33% of respondents for sample 1 and 39% of respondents for sample 2) that consumers will threaten businesses with a negative review unless they provide a benefit. Respondents confirmed that they have used the threat of a negative review when they had both a negative and positive experience with a product or service. This underscores the issue that some consumers will use the threat of a review to gain a benefit even though it is not truthful. There may be a perception that this does not harm businesses and is not a big issue. However, this can be detrimental to small businesses if they do not give in to these requests when it is not accurately representing the consumer's experience.

The survey results also provide interesting information concerning the governance of OCRs to ensure the information provided on the sites is accurate. Survey respondents provided indications that OCR policies are limited in the impact they have on ensuring there are no deceptive reviews. Most survey respondents indicated that they never review OCR platform review policies (65% of respondents for sample 1 and 32% of respondents for sample 2). This is important because this means consumers are not aware if review policies are effective at removing deceptive reviews and therefore it will not change their behaviour and to reward OCR platforms that use effective policies. Most respondents indicated that they believe the government is neither doing an adequate or inadequate job at regulating OCRs (47% of respondents for sample 1 and 36% of respondents for sample 2). This could be because they are not aware of what the government is doing regarding the regulation of OCRs.

Survey respondents indicated that a third-party certification would be useful for OCR platforms. Most respondents indicated that they would somewhat agree (36% of respondents for sample 1 and 47% of respondents for sample 2) or strongly agree (47% of respondents for sample 1 and 31% of

respondents for sample 2) that a visible OCR certification logo would be useful to convey trustworthiness. Specifically, the survey asked if a third-party marking such as 'fair-trade' would be beneficial for consumers' perceived trustworthiness of an OCR on review sites that display them. This is important as a third-party certification would ensure that best practices would be followed for the collection, moderation and removal of online consumer reviews. Certification could bridge the gap if consumers knew the policies that should be in place for best practices outlined by the certification.

Interview Key Findings

As noted earlier, semi-structured interviews were undertaken with a small number of key participants from government, private sector and NGO actors with knowledge concerning OCRs (see appendix for interview questions). The author interviewed a federal government, provincial government, online review platform operator (private sector) and consumer organization respondent. When discussing the findings for the interviews, the key participants will be referred to by the category name only. The findings from the key participant interviews have been aggregated and will be discussed based on the 6 themes from the interview questions. The themes discussed were:

1. What is the current and future role of the State in regulating online consumer reviews?
2. What is the current and future role of the private sector in regulating online consumer reviews?
3. What is the current and future role of review sites in regulating online consumer reviews?
4. What is the current and future role of Consumers in regulating online consumer reviews?
5. What are the benefits of online consumer reviews?
6. What role could a 3rd party certification play in the regulation of online consumer reviews?

What is the current and future role of the government in regulating online consumer reviews?

Throughout this thesis the literature has supported the view that there is an important role for the government in regulating OCRs using conventional rule instruments. The government can use conventional law such as, the Competition Act or Ontario Consumer Protection Act to ensure that OCRs accurately represent consumers' genuine experiences with a product or service. The interview respondents in this section further support this analysis by affirming that there is a role for the government in regulating OCRs. However, they noted that there are limitations in this role and the government should only enact new laws in certain situations.

Both the government and consumer organization interview respondents believe that government has a role in regulating online consumer reviews. Perhaps not surprisingly, the government respondents expressed a strong belief in their ability to regulate misleading claims. One government representative found that there is no need to expand the current federal laws to cover other areas of harm beyond misleading claims from businesses. While the consumer organization interview respondent thought that the government can be more proactive in using the current legislative resources that the government must regulate bad behaviour. Both the private sector and consumer organization respondents noted that there are issues associated with cross-border enforcement of laws by the government. They also highlighted the challenges for governments trying to regulate a fast evolving technological field such as OCRs.

The private sector respondent was the most reluctant to indicate support for a role for the Government, indicating that with competition the market will correct any bad behaviour as consumers choose the good actors. The private sector respondent believed that market forces and competition are the tools that will promote a fair marketplace for OCRs. Market forces and competition will ensure that

users can choose the best actors based on who they trust the most. The private sector respondent expressed support for the idea that companies need to maintain trust or they will not do well. This respondent expressed reluctance to support government action for OCR regulation, suggesting there are bigger issues for the government to focus on.

Both government respondents indicated that government intervention is important because once the pool of information (OCRs) is contaminated with misrepresentations, then consumers will not use the information that is beneficial to them. From a governmental perspective, the goal is not for consumers to no longer trust information available to them; rather the goal is to take steps to ensure that the information is trustworthy. The federal government respondent provided further support that there are possible gaps in regulation at the federal level for the mischiefs related to OCRs and that therefore there is value to having multiple centres of authority governing OCRs. According to this respondent, if a consumer is trying to wrongfully obtain a benefit from a business by threatening with a negative review then the Competition Act does not apply, because for the Act to apply, the representations must promote the supply of a product or promote a business interest.

The federal government respondent indicated that OCRs are material to consumer decision making, and if the reviews are false or misleading in a material respect, then it falls within federal jurisdiction. The provincial government respondent agreed that the issue with misleading online consumer reviews is that they distort the proper functioning of the marketplace, and impact the ability of consumers to make informed choices, because consumers don't know which reviews are authentic. This results in asymmetric information between consumers and advertisers.

The position taken by the federal government respondent is that the government should use information dissemination on the types of actions that might contravene Canadian law and use enforcement actions as needed. Both actions are within the realm of what the government should do.

However, they also indicated that there are limitations with government intervention. The detection of misleading reviews relies on parties to come forward with the information. As with other issues that rely on whistleblowers, the people with the relevant information tend not to come forward with the required information.

As highlighted throughout this thesis jurisdiction can be another issue for the government. The federal government respondent supported this by confirming that if the alleged infringement involves a Canadian entity then action would be taken but if it is foreign then they would need to rely on a foreign jurisdiction to act. As discussed previously, the government relies on working relationships with other countries governmental entities. The Competition Bureau has a constructive working relationship with the FTC. The government respondents agreed that it is hard for the state to enforce across borders. If the government was contemplating new regulations, then they would have to consider can they reduce the harm from people that they could not identify and determine if this would be efficient. If regulation is not efficient then it may be more important to use education or other non-conventional rule instruments rather than regulation. These statements from the federal government respondent support the point throughout this thesis that there are roles for the government, the private sector and civil society. The government is only one actor that can enact regulation.

Both government respondents believe we will continue to see intervention by the government in the marketplace when it is in the public interest, but they do not foresee that there needs to be further government action beyond the current powers. They believe that no further government action or introduction of new legislation needs to be done to address the harm from OCRs. There is more than enough flexibility to address the issues in the marketplace at a federal Level. As more international organizations address the issues around OCRs they will work to align with best practices internationally.

The provincial government respondent did not see reason to introduce new regulations to address OCRs as all issues are addressed by current laws. For example, the major harm in the marketplace for consumers is from misleading claims by businesses and these are covered by the Competition Act. However, the government at the provincial level has been paying attention to the current discourse around the harms and regulation of online consumer reviews and indicated that it could possibly intervene at some later point.

The provincial government respondent indicated awareness of the possible harm to businesses from consumer extortion but also indicated that they are not considering any changes as extortion is covered legally at the criminal level. The foundation for this relates to the fact that Consumer policy at the provincial level tends to be focused on the protection from the harm to consumers rather than the harm to businesses. The respondent reiterated that there are other policy areas that cover other harms to society such as criminal law. However, the stance was taken that if the government was to enact further legislation, then it would more than likely be at the provincial level.

The provincial government respondent maintained that there should be a free and open marketplace. For this to occur there needs to be competition. If there is a free and open marketplace, then consumers will be able to exercise choice within the marketplace. However, when consumers make a choice they need to be choosing based on honest and non-misleading representations. It is when the information is misleading and consumer choice is impacted that the government should step in. The government will enter the marketplace to remedy harm from businesses towards consumers. The provincial government respondent expressed concern about harm occurring on a regular basis that departs from how a free and open marketplace should operate. However, the government should only use regulations when they are the most efficient way to deal with the harm. To determine if the government should be involved they will look at whether they have enough evidence of the harm and if

it is serious enough (scale, number, etc.) that government intervention is appropriate. The government should be hesitant to regulate the marketplace too much as markets change and develop. Some new markets go through growing pains and take some time to develop the best practices. As time goes on consumers establish expectations and these expectations will shape the marketplace.

What is the current and future role of the private sector in regulating online consumer reviews?

Throughout this thesis the literature has supported that there is a role for the private sector in regulating OCRs using both conventional and non-conventional rule instruments. The private sector can use conventional law such as, section 36 of the Competition Act or common law tort actions to ensure that OCRs accurately represent consumers' genuine experiences with a product or service. They can also use non-conventional regulatory instruments such as policies and procedures or industry codes. The interview respondents in this section further support the literature in stating that there is a role for the private sector in regulating OCRs.

From the perspective of the consumer organization respondent, the private sector needs to take a proactive effort to weed out deceptive OCRs. Businesses could use sentiment mining to detect problem reviews (confusing or unintentionally misleading) and intentionally deceptive OCRs. Sentiment mining is the use of computer algorithms to detect if an OCR is possibly fake. OCR platforms and other websites that host OCRs need to have appropriate and transparent rules in place to guide and moderate reviews. While they do not want to remove positive reviews, they need to make sure the process is fair and rational. If a standard is appropriate for the company, then they should adopt that standard to ensure they are operating with industry best practices. They need to ensure they disclose and give the opportunity for any conflict or relationship to be disclosed clearly. It is also important to have many companies involved so that there is competition. This will allow consumers to choose the best actors

including actors that do not mislead consumers regarding online consumer reviews. However, there is also an issue with mutual reviews and choice as the more choice you have the more times you can be a bad actor as a consumer without much recourse.

The private sector respondent outlined that online retailers have a responsibility to reduce any conflicts of interest for OCRs when they can be posted on their website. They should ensure that any review that is published on their website uses a 3rd party to collect and moderate this information. The reason that this is required is because businesses rely on consumer trust and if they do not use independent 3rd parties to monitor reviews then they put their reputation on the line. While the marketplace can resolve some issues, the government needs to be present to ensure that the marketplace operates properly.

Government respondents indicated that the government needs to be there to set guide posts for the marketplace and to ensure that they stay within the bounds of acceptable practices. They are not convinced that the marketplace can self-regulate entirely and that enforcement examples demonstrate to the industry unacceptable behaviour. Once this is demonstrated then businesses start to understand the consequences and get onboard with acceptable practices in general. Businesses foundationally need to ensure that they conduct themselves ethically in the marketplace and this includes the use of OCRs. The review sites are also seen as having the exact same responsibilities as the private sector businesses.

One government respondent indicated that the government does not try to provide any direction concerning whether businesses should provide the opportunity to provide online consumer review platforms. For example, government would not put in place programs to ensure all reviews are completed on only verified purchases. This should be a marketplace function. If consumers expresses preferences for businesses to only use verified reviews, then the marketplace will most likely start to

implement these changes. It would be their choice to harness the unearned media or other advertising to promote the business.

What is the current and future role of the online review platforms in regulating online consumer reviews?

Online platform can use non-conventional regulatory instruments such as policies and procedures or industry codes. The interview respondents in this section further support the literature in this regard. In the opinion of the consumer organization respondent, review sites are not doing a good enough job at identifying bad reviews -- both reviews that do not represent a true experience and reviews that do not provide any substantive information for consumers to rely upon for trustworthiness. Review sites for the most part do not make it easy or intuitive to provide a review. They lack the incentive to provide a review with useful information. There is a lack of customization in the way that consumers can sort and sift the data to personal preferences. They should provide opportunities to remove some reviews based on criteria or show only reviews for a specific criterion. There is a conflict of interest where review sites need to make revenue from companies that are being reviewed on their site. There should be openness on the advertising revenue for a review site and the policies to keep this independent from the moderation of reviews.

The private sector respondent highlighted the importance of online consumer reviews is that they allow users to make well informed decisions when considering a purchase. This enhances the trust relationship between a business and a consumer. The more accurate information that consumers have the more trust they will have in the performance of the products or service from that company. Therefore, the main goal for review sites is that they should make sure that the end users have authentic information. This can be facilitated using technology and policies to ensure a closed system.

Closed systems ensure that only verified purchasers of a product or service can write reviews on the review site. However, this is not possible for all review platforms.

Review platforms need to ensure they work to remove bias from how they present information and are transparent with the policies they have regarding review moderation. For example, reviews sites can use an algorithm that produces a better rating system for consumers to rely on. Review sites need to be aware of bias and issues that come from paid advertising from businesses. They need to ensure that the processes are independent and that there is no change when compared to a business that does not pay for advertising. Teams that are selling the advertising should be separate from the teams that are moderating reviews. Review sites should also present a more balanced picture across competition. This means that you should allow reviewers to provide reviews for companies that do not advertise on the website as well. If a review platforms mandate is not true to the goal of accurate information and promoting trust, then they will end up not having a thriving business and could possibly fail.

According to the private sector respondent, review platforms should use technological advances to ensure that consumers can trust the reviews they see. For example, a company rating may not be accurate if a company had all good reviews for a long time and then recently started to have very bad reviews. This could be an issue because if the rating system of a review site only uses averages, then the average will not convey the recent dip in performance and consumers may not get what they were expecting. The review site should work to change the review algorithm to address the gap that failed consumers. However, while there needs to be transparency in the process that the review sites use to moderate reviews and present information, there needs to be a balance between transparency and keeping the trade secrets from competition. There also must be a balance between the use of technology and making the moderation process easy for consumers to understand. If the consumers cannot understand the process, then they may lose trust in the site or they may be misinformed.

What is the current and future role of the consumers in regulating online consumer reviews?

Analysis undertaken earlier in the thesis supported the view that there is a role for consumers and consumer organizations in ensuring the OCRs provide accurate information, using both conventional and non-conventional rule instruments. Consumers can draw on provisions within the Class Proceedings Act, Competition Act or Ontario Consumer Protection Act to ensure they have recourse when relying on deceptive information. They also can use the Protection of Public Participation Act to ensure they are not intimidated for sharing a valid negative experience about a business. The interview respondents in this section further support the literature in stating that there is a role for the consumers in regulating OCRs.

The perspective of the consumer organization respondent is that the goal is to have the marketplace be balanced and OCRs contribute to ensuring this balance. Consumers have rights to get accurate information for purchasing decisions but they also have a responsibility to read and provide reviews to have better information when making a purchase. Consumers should leave a review but only when appropriate and accurate information is given. Consumers should provide information such as what you like and what you do not like but also make sure to leave a reason why they came up with the score. Consumers should not sandbag the companies and should not always go to complaints first. Give businesses the opportunity to make the experience right. If not resolved, then go to reviews to inform consumers of the experience. Customers need to be engaged with the OCR process, if you expect to use OCRs then you should also contribute with personal experiences.

The private sector respondent indicated that consumers have responsibilities when interacting in the marketplace. They should read the reviews that are published rather than just reviewing ratings. If possible, consumers should not use just a single source for information. This applies to both online

consumer reviews and other sources of information. Consumers should also use other consumer information and best practices to protect themselves within the marketplace.

One government respondent also indicated that consumers have a responsibility to seek out sources to make informed purchasing decisions. They should ask other consumers or other sources for information for advice when deciding. OCRs help to facilitate this information gathering. However, consumers also need to understand that there is a different reliability within the range of information sources (family or friends compared to consumer reports, etc.). Consumers also need to be active in the marketplace by providing information if it would be useful to other consumers. However, there also needs to be accountability for consumers when they are posting online consumer reviews and they should make sure they fully understand the issue before posting.

The Importance of Online Consumer Reviews

As discussed throughout this thesis OCRs have become a frequently used way for consumers to obtain and share information regarding a product or service. Studies suggest that many businesses respond to these online reviews and change their behaviour. Using the sustainable governance concept and framework (Webb, 2005), OCRs can be characterized as a new regulatory instrument in the overall state/non-state governance system addressing the issue of consumer information, that operates in addition to conventional state-based approaches. The interview respondents provided support for the notion that OCRs provide an important regulatory function in ensuring accurate information is provided to consumers prior to making a purchasing decision.

All the respondents indicated that the benefit of online consumer reviews is to reduce the asymmetry of information between consumers and businesses. The information builds upon the trust relationship between consumers and businesses. This allows good companies to benefit within the marketplace based on the information provided to consumers because of the increase in trust for the

product or services they provide. One government respondent noted that online consumer reviews help to perpetuate one of the fundamental basic premises for marketplaces in that they are more efficient with more information.

This information needs to be accurate and in an easily accessible form to maximise the benefits to consumers. OCRs have provided consumers with easily available information to make decisions within the marketplace. All the Participants highlighted that OCRs are a crucial source of information for consumers. It is important that consumers can now crowd source (harness the energy of the marketplace) information to decide if they are interested in a product. Prior to online consumer reviews consumers had limited information sources when deciding to purchase a product or service.

The consumer organization respondent indicated that OCRs are important when the reviews are accurate, and emphasized that there are issues that affect all sizes of businesses when inaccurate or bad reviews are provided, but there is a disproportionate amount of harm that can occur to small businesses. One bad review can make or break a small business and it may be possible that they are more susceptible to paying out to consumers than blackmail companies. The consumer respondent also indicated that the lack of mutual review systems (systems that allow both the consumer and provider to conduct a review in a transaction) allows for unfair criticisms. If both consumers and businesses can provide a review of the other party, then neither will want to act in bad faith for fear of reprisal.

The Use of 3rd Party Standards/Certifications for the Regulation of online consumer reviews

Throughout this thesis there was discussion on the deficiencies and weaknesses with OCRs in regulating business behaviour. Conventional laws can and do play a role in addressing some of these deficiencies. But in keeping with the sustainable governance framework, to more comprehensively address these deficiencies there could be a shift from the current ad hoc multi-actor/instrument/institution/process approach to a more systematic, coordinated approach, with

possible adjustments to law, and with possible use of multi-stakeholder standards that address key deficiencies. The interview respondents provided further support that a 3rd party certification could be useful in addressing mischiefs related to OCRs.

In the opinion of the consumer organization respondent, standards can be more adaptive and flexible in dealing with OCRs than conventional state based regulation alone. As discussed throughout this thesis there are currently standards used in other jurisdictions to provide guidance to business on what good practice is for OCRs. They indicated that if a standard is designed appropriately it would increase the trust between consumers and OCR platforms. If an organization has a standard in place and is accredited, then they can display the brand (e.g., ISO) and consumers may be aware of it and rely on it when they look for reviews. Standards can enforce best practices and the best approach to enforce trust. For example, standards can implement technological rules to check to ensure it is not a bot posting the review by verifying the individual and in many cases, and could ensure that there is a verified purchase. Companies should only moderate reviews that break the rules and should be following best practice. This would remove the concern that consumers have towards companies or review sites suppressing negative reviews. The rules would need to be stated and clear. Standards can also provide guidance on how to provide consumers with the most important reviews.

The private sector respondent indicated that standards are useful for issues such as the misuse of OCRs, but they need to ensure they are revisited regularly as technology advances. The private sector respondent acknowledged that a certification rule instrument would be better than a standard without certification because it would enforce the rules and could enforce trust between the business and consumers. Standards and certifications need to be set at a high enough level to drive excellence across the industry. They cannot be set too low so that more participants can meet the requirements.

However, there should be mechanisms designed to help companies elevate current procedures to meet the requirements.

The private sector respondent suggested that when standards are developed that there is also a technical committee created. This committee could help with providing technological information to companies that do not meet the standard and establish the baseline for meeting the requirements. For example, this could develop open source technology for OCRs as a baseline. They identified that an advantage of designing a certification is the process of bringing leaders together to discuss an issue. It has provided knowledge to key stakeholders and spurs debate to the issues. It allows participants to compare the processes and procedures to other members to gauge how well they are performing.

One government respondent noted that when enforcing an action, the government will sometimes want to make sure they have corporate compliance agreements. Compliance agreements are agreements by the business to establish policies and procedures in place to address the misleading statements and improper practices. The government will not rely on just company goodwill to change and a compliance program allows the company to better manage all the risks. However, they noted that it would be unlikely that the Competition Bureau will endorse a standard for OCRs, but they would probably indicate that this is the direction that the industry and actors are going. For example, they would provide guidance that if a company does not follow an industry standard or third-party certification then it is likely that you could run afoul of the Competition Act. However, the Competition Bureau has endorsed standards in the past. The endorsement is because standards can reflect best practices and anyone that follows these best practices would more than likely not contravene the competition legislation. The government would most likely not look to have 3rd party standards in place but would leave this to the business community or civil society to determine if this is important.

In summary, among other things, the survey results indicated widespread use of online consumer reviews, and suggested that consumer blackmail was not uncommon and that consumers have considerable confidence in their ability to detect fake reviews. The survey results also suggest that few consumers review OCR policies, that consumers have limited confidence in the ability of governments to regulate OCRs, and some support for a certification “seal” to signal OCRs adopting good practices. On the whole, the comments of key stakeholder interview respondents seemed to align with the idea that there are roles for government, the private sector and civil society in ensuring that OCRs are accurate. There was little support from any of the respondents for new government instruments to address problematic OCR practices, and more enthusiasm for non-state approaches including certification standards.

Chapter 6: Possible Approaches for Improving the OCR Mechanism

The purpose of this chapter is to review possible approaches for improving the operation of the online consumer review mechanism in Canada. This largely consists of an examination of some key innovations from other jurisdictions that could potentially be applied by Canadian actors to address some of the OCR mischiefs identified earlier in the thesis. When reviewing the possible changes to the regulation of OCRs a sustainable governance analytical lens will be used (i.e., drawing on state and non-state approaches). Existing laws can and do play a role in addressing some of these deficiencies. But in keeping with the sustainable governance framework, to more comprehensively address these deficiencies there could be a shift from the current ad hoc multi-actor/instrument/institution/process approach to a more systematic, coordinated approach, with possible adjustments to law, and with possible use of multi-stakeholder standards and other non-state approaches to address key deficiencies.

Insights from other jurisdictions:

Competition Authority Guidelines

Within Canada there is no direct enforceable guidance given beyond the use of misleading advertising provisions within the Competition Act.²¹⁴ However, other countries have provided some direct guidance on fake online reviews. Within the US the FTC has provided direct guidance for product endorsement and testimonials.²¹⁵ These guidelines have been shown to be applicable to online consumer reviews that are requested by the company from either employees or other individuals without the disclosure of their connection to the company. The guidelines outline that all material connections between a company and another individual must be disclosed.²¹⁶ The significance of the guidance published by the FTC is that it outlines “administrative interpretations of laws enforced by the Federal Trade Commission.”²¹⁷ This means that actions that are in contravention of the guidelines may result in actions taken by the FTC.

In Australia, the Australian Competition and Consumer Commission (ACCC) has provided non-binding guidance in relation to fake online reviews. The guidelines outline principles that both businesses and individuals should follow when managing or disseminating consumer reviews. The guidelines state that businesses must be open and transparent about any relationships that could mislead consumers when viewing a consumer review.²¹⁸ The principles also include the non-disclosure of filtering practices used for reviews.²¹⁹ This guidance outlines actions that would possibly violate competition legislation that is enforced by the ACCC.

Within the European Union the EU directive, 2005/29/EC, regulates unfair competitive behaviour by businesses in consumer transactions.²²⁰ These provisions are like the misleading and deceptive advertising sections within the Competition Act. However, Annex I of the directive outlines 31 commercial practices that are deemed to be considered unfair. In relation to online consumer reviews it is unfair to “Falsely [claim] or [create] the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.”²²¹ This means that all current European legislation prohibits the use of fake consumer reviews if the business writes consumer reviews for themselves or for another competitor while impersonating a consumer. The directive also prohibits “using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds [are] clearly identifiable by the consumer.”²²² Like the guidelines within the US this section prohibits any testimonials provided by other individuals that were paid by the company without the affiliation being disclosed. Within the UK, the Competition and Markets Authority further investigated the issues surrounding online consumer reviews by consulting with consumers, businesses and other interested parties.²²³ The investigation has generated a report that outlines a current state of consumer reviews within the UK and led to the CMA launching inquiries on possible deceptive practices by companies.²²⁴

Consumer Review Fairness Act

In the United States, the Consumer Review Fairness Act (CRFA) was recently enacted to prohibit companies from having non-disparagement clauses within their contracts or terms of service.²²⁵ Non-disparagement clauses are commonly found in employment contracts.²²⁶ However, non-disparagement clauses are being used by businesses to prevent consumers from posting negative information about that company instead of using defamation suits.²²⁷ The CRFA voids a contract if the contract prohibits consumers from engaging in “written, oral, or pictorial reviews, or other similar performance assessments.”²²⁸ The enforcement for the CRFA is a responsibility of the FTC.²²⁹ However, the law does not address any further concerns over limiting consumer’s ability to post consumer reviews.

Standards for OCR Platforms

Some European countries and standards organizations have begun to recognize the importance of accurate OCRs and developed voluntary standards. France’s National Association on Standardization and Certification (AFNOR) has published standards on the regulation of OCRs. These standards created a logo that is to be displayed by businesses when they adhere to the rules set out in the standards. While the standards are voluntary they do provide certification rather than just guidelines. Within France the mark that is used by AFNOR has an 85% awareness rate within the French population.²³⁰ In effect, OCR platforms that adopt the practices set out in the standard can signal to consumers that they are “good OCR actors.” This may provide an incentive for businesses to seek out certification if they wish to conduct business in France. In May 2015, the Danish Consumer Ombudsman published mandatory guidelines on the publication of OCRs.²³¹ From an international perspective, the International Organization for Standardization (ISO) is working on the development of a certifiable ISO international standard that sets out principles and requirements for the collection, moderation and publication of OCRs in a manner similar to the French standard.²³²

Suggestions to Strengthen the OCR Process

In keeping with the sustainable governance framework, to more comprehensively address any deficiencies, there could be a shift from the current ad hoc multi-actor/instrument/institution/process approach to a more systematic, coordinated approach, with possible adjustments to law, and with possible use of multi-stakeholder standards that address key deficiencies. Key support using legal enforcement, deceptive review detection and consumer awareness need to be addressed to accurately assist with appropriate regulation.²³³

A non-conventional solution to address the possible mischiefs with OCRs could be the creation of an OCR platform that is operated by a consumer organization within Canada. This innovation would possibly eliminate the possible bias that can be created by review platforms. As discussed throughout the literature and interviews, OCR platforms are a business that needs to generate revenue from other businesses. The revenue generation aspect can lead bias in the review process if there is preferential treatment given to businesses that provide money to the OCR platform. In theory, an OCR platform that is operated by a consumer organization could ensure this bias is eliminated. However, there should still be standardization in the operation of the OCR platform to ensure it operates with the best practices of the industry to ensure accurate information is provided to consumers.

Within Canada laws can address some of the mischiefs with OCRs. Other regimes demonstrate that there is the ability to enact legislation to address mischiefs. The federal government could enact legislation like the Consumer Review Fairness Act. This would ensure that consumers can post reviews within Canada and not be limited by disparagement clauses. However, the law does not address any further concerns over limiting consumer's ability to post consumer reviews. There is also a lack of evidence to suggest that companies within Canada are utilizing disparagement clauses to prevent consumers from providing OCRs. However, a law like the Consumer Review Fairness Act within Canada

could work effectively with the Protection of Public Participation Act to ensure consumers are confident then can post genuine negative reviews without unwarranted lawsuits from businesses.

To address the issue of misleading and deceptive reviews the Competition Bureau could either enact guidelines for OCR platforms or support certification to an international standard such as the ISO standard. The Competition Bureau could endorse a voluntary approach, such as French certification standards, or a mandatory approach similar to that used in Denmark. A mandatory legal certification standard would be the strictest rule instrument that the government could enact. However, a voluntary certification standard could also be effective in addressing the harm from mischiefs. The surveys conducted for this thesis indicated support for certification approach that allows the OCR platform to display a symbol to identify that they follow a set of rules to ensure reviews are posted, moderated and challenged fairly is wanted. The French voluntary standard has provided some evidence concerning the effectiveness of these regimes as within France the mark that is used by AFNOR has an 85% awareness rate within the French population.²³⁴

A report from the European Union found that review sites can benefit from regulation and standardization.²³⁵ The report found that the key issues were transparency regarding the conduct around reviews, the structure of the reviews, review verification, and complaints handling.²³⁶ The adoption of an international voluntary standard would provide a standard and set of agreed upon rules for OCRs. These rules can then be relied upon by local governments or businesses in relation to traditional legal rule instruments. For example, within Canada for strict liability offences a company may rely upon a due diligence defence. The court or the business may rely on the use of a voluntary code to establish whether a due diligence defence is to be successful.²³⁷

There are several issues that need to be considered when looking at enacting a standard or certification. One issue with addressing standardization using only conventional rule instruments at the

country level is that it may not lead to the most effective outcome because of the jurisdictional and enforcement issues outlined throughout this thesis. OCR review platforms are not all hosted within one jurisdiction and conventional law can have barriers when trying to address issues across borders. This may also lead to a lack of uniform rules throughout jurisdictions or the lack of coverage from jurisdictions if left to each individual country. This could then lead to OCR platforms moving operations to countries that have the least restrictive rules.

Governments should also have a framework for implementing new legislation to cover any gaps in regulation or can endorse the use of the international code. Utilization of non-state approaches has its own limitations. For example, a non-member of an industry association may “free ride” on the industry’s self-regulatory program (e.g., companies that do not subscribe to a standard but benefit from the overall good image of an industry’s self-regulatory program) when there is no mandatory reason for participation as there is with government regulation. Voluntary codes and standards by definition are not mandatory and therefore no company is required to follow them. This could lead to low adoption rates of the voluntary standard or code.

Regardless of the approach that the federal government could take regarding standardization or certification, there are key components of the review process that should be included within the rule instrument that allows OCRs to operate efficiently and reduce any misleading or deceptive reviews. The next section outlines key considerations for the review process.

Regulating the Review Process

As discussed previously throughout the literature and primary research, deceptive review practices, both intentional and unintentional, can undermine the efficiency of the marketplace and adversely impact competition.²³⁸ Therefore there needs to be a way to reduce the likelihood of false or misleading online reviews. However, given that individuals are not effective at identifying deceptive

reviews during decision making, it is important to ensure the entire review process can assist in ensuring accurate reviews. The suggestions that follow in this section can be enacted using rule instruments of the state, the private sector or civil society. However, as demonstrated by the sustainable governance approach, they should be utilized in a systematic and strategic way to ensure appropriate coverage across all actors and issues.

The OCR process encompasses review submission, review processing, and publication of the review. During the review submission process, consideration needs to be given for the regulation on whether the transactions are verified or not. Currently, OCR platforms' practices are not standardized to ensure they are only accepting verified consumer reviews. A verified purchase system in theory would ensure that only genuine consumer experiences are provided and there would be no need to remove possible deceptive reviews using systematic approaches. However, this is not possible for all platforms as they do not facilitate purchases and do not have the means to accurately verify a purchase. Some review platforms (e.g. Google Reviews, Yelp, etc.) do not facilitate any purchases and only act as a platform for users to provide feedback. Therefore, it should not be expected that these review platforms must obtain methods to gather verified purchase evidence. This is also true for non-dedicated review platforms such as social media sites. Therefore, the utilization of a guidance approach through standards or certifications may be the best approach to address review submission rather than explicit legislated rule instruments. However, to regulate bad behaviour by review platforms, if a review platform states that they only allow verified purchases and they are found to not reasonably verify purchases, the state, private sector or civil society may bring an action under misleading advertising provisions.

Regarding review processing, it has been shown that an automated approach can be quite effective at detecting fake reviews.²³⁹ Studies have demonstrated that an automated approach using specific models can be used more effectively to detect fake reviews in some cases than individuals.²⁴⁰

However, there are still limitations as it will not detect all fake reviews. Companies have been employing these automated detection systems to ensure that there is legitimacy within their internal review systems. For example, Yelp has been utilizing software to look at consumer reviews and will filter reviews that are perceived to be fake or deceptive.²⁴¹ The use of a system to detect reviews can be beneficial but it can also filter out legitimate reviews. Therefore, it is also important to provide transparency in the rules employed by review sites to ensure that reviewers understand how reviews are being filtered.

Yelp provides some information regarding its filtering software. This includes a statement explaining that “reviews that reflect perfectly legitimate experiences are sometimes filtered out by the review filter’s algorithmic processes.”²⁴² While companies are utilizing these systems, there is no standard practice to employ these systems. There are also many different types of consumer review platforms such as Facebook and twitter that may cause issues and gaps with the standard employment of automated review filtering systems. Consumer protection regulation should take this into consideration when choosing an effective approach to reduce the negative impact of OCRs. Using legal rule instruments such as an international voluntary certification standard, these standardized rating systems and transparency rules may be able to more effectively regulate dishonest reviews.

The regulation for the publication of OCRs on review platforms also needs to be considered. Rule instruments such as standards could provide guidance on how reviews should be presented. Reviews should be presented to consumers without bias and there should be transparency in the way OCRs are presented to ensure they are not unintentionally deceptive. Both the French and Danish review guidelines require that reviews are presented in chronological order.²⁴³ However, it may not be best for regulatory approaches to prescribe a certain approach for review presentation as this will limit consumer choice. It may be a better approach for a guideline to ensure that the rules for presentation of

OCRs is clear and transparent to consumers at the time of reading the review. As initially indicated by the survey results and other studies, consumers need the information to be apparent as they do not frequently review policies.

A key consideration of review publication for regulation is to also ensure that businesses can reply to OCRs and to challenge the validity of a review. However, the review and challenge process needs to be transparent to consumers and allow for a fair process. Review platforms need to design a stringent process as they are acting as the arbiter in the consumer and business relationship. This role has a great amount of responsibility as false consumer reviews can be very impactful to businesses and the removal of a legitimate consumer review is damaging to consumer rights. As outlined by the consumer organization interview respondent this is extremely important for small businesses as one false negative review could be extremely damaging to their business.

In summary, this review of developments in other jurisdictions suggests that there are a number of approaches that governments, the private sector and civil society organizations in Canada could employ to improve the operation of OCRs. Government support for a non-state certification standard such as that currently being developed by ISO could be an important development, as would be the operation of an OCR platform by a consumer organization. If key state and non-state actors in Canada worked together to develop a combined response, this could potentially move Canada from its current ad hoc approach to the provision of consumer information, to a more systematic approach in keeping with a fully realized and mature version of the sustainable governance model.

Conclusions

OCRs have become a frequently used way for consumers to obtain and share information regarding a product or service. Before OCRs this was done primarily using family and friends, and

advertising. OCR platforms provide a structured process for the collection and publication of consumer reviews that is accessible online by other consumers and by businesses. Consumers are increasingly relying on OCRs to improve their decision making, reducing their asymmetric information relationships with businesses and increasing the likelihood that they will receive the product or service that matches their needs. This increasing reliance on OCRs incentivizes businesses to provide good products and services and thereby increase the likelihood that they will receive positive reviews, and to respond promptly to negative reviews.

OCRs are characterized here as a new regulatory tool that stimulates businesses to provide better outcomes for consumers through the structured publication of consumer feedback concerning the performance of individual businesses. Unlike conventional regulatory approaches (e.g., laws, enforced by government regulatory agencies), with OCRs, the structured provision and dissemination of consumer information is undertaken by private sector OCR platforms, and as such it represents an innovative non-state regulatory approach. OCRs allow consumers to become de-facto inspectors every time they purchase a product or service by allowing them to provide feedback on the experience. This feedback can then be used by prospective consumers to make a better product or service purchasing decision.

Using the sustainable governance concept and framework (Webb, 2005), OCRs can be characterized as a new regulatory instrument in the overall state/non-state governance system addressing the issue of consumer information, that operates in addition to conventional state-based approaches. If governance can be seen to be the sum of the many ways that individuals and institutions, public and private, manage their common affairs (Webb, 2005), consisting of approaches that are designed to change behaviour towards an intended goal, then OCRs can be seen as a non-state approach to regulating behaviour (consumers providing information about businesses to improve

consumer decision making, and by providing such information, influencing business behaviour) that operates with other state and non-state approaches. Current laws such as the Competition Act and Ontario Consumer Protection Act regulate misleading/false advertising, but generally do not require that information about the quality of businesses and their products and services be provided on a day to day basis the way OCRs do.

OCRs are new and innovative because they are operated by businesses, and because they depend on consumers providing the information that forms the reviews. Currently, OCRs have developed in an ad hoc way by businesses. As per the sustainable governance concept, OCRs are cooperative (e.g., the OCR platform and consumers work together to produce the information) but also involve rivalrous check and balance aspects (e.g., consumer reviews have the effect of challenging businesses to improve their behaviour, and businesses can challenge the accuracy of reviews). OCRs have deficiencies and weaknesses (referred to here as “mischiefs”) that are not fully addressed by current laws, although these laws can and do play a role in addressing some of these deficiencies. But in keeping with the sustainable governance framework, to more comprehensively address these deficiencies there could be a shift from the current ad hoc multi-actor/instrument/institution/process approach to a more systematic, coordinated approach, with possible adjustments to law, and with possible use of multi-stakeholder standards that address key deficiencies.

To address weaknesses, the importance of the accuracy of OCRs has increasingly been identified by government agencies around the world, including Canada, and some jurisdictions are providing guidance or regulation for OCR processes. There have been some advances in the regulation of OCRs in other jurisdictions and at the international level. It should be recognized that there are not just laws regulating business behaviour, there are also important non-state roles and instruments involved. However, the sustainable governance model is not at the current time fully realized. To become a fully

evolved sustainable governance model there needs to be coordination and further collaborative exploration by the state and non-state actors to close the gaps and address problematic aspects. Use of voluntary non-state certification standards such as that currently developed by ISO, endorsed or supported by the Competition Bureau, the development and implementation of an OCR platform by a consumer organization, along with use of conventional state based rule instruments and approaches (statutes and common law) may lead to the most effective approach to address OCRs and increase consumer confidence in the use of online reviews.

Some adjustments to laws and support for the use of non-state approaches such as adoption of the non-state ISO OCR standard (in development) could assist in addressing the deficiencies discussed in the thesis. By doing so, this would represent a shift from the current ad hoc multi-actor/instrument/institution/process model to a more systematic, coordinated approach, in keeping with the sustainable governance concept. It is hoped that the thesis contributes to understanding of how a non-state regulatory approach can play a role in overall governance concerning consumer information, with roles for state and non-state instruments, institutions, processes and actors. Further research could examine in greater detail how other regimes operate and do more extensive survey and semi structured interviews.

Appendices

A1: Semi-Structured Interview Questions

1. In your opinion, what role does the government currently play in regulating online consumer reviews?

2. In your opinion, what role could the government organizations play in regulating online consumer reviews?
3. In your opinion, what role does the private sector currently play in regulating online consumer reviews?
4. In your opinion, what role could the private sector play in regulating online consumer reviews?
5. In your opinion, what role does civil society currently play in regulating online consumer reviews?
6. In your opinion, what role could civil society play in regulating online consumer reviews?
7. In your opinion, what role does the consumer organizations currently play in regulating online consumer reviews?
8. In your opinion, what role could the consumer organizations play in regulating online consumer reviews?
9. In your opinion, what benefits to society do online consumer reviews provide?
10. In your opinion, how can the government regulate businesses and consumers alike regarding online consumer reviews? Are there weaknesses in government regulation?
11. In your opinion, what role does your organization play in the regulation of online consumer reviews?
12. In your opinion, what issues do you see with the current way online consumer review sites operate?
13. In your opinion, what are the risks to society if the no action is taken to address the misuse of online consumer reviews?
14. In your opinion, what effect would a 3rd party standard for online reviews have on the misuse of online consumer reviews?

15. In your opinion, what controls should be in place to ensure that online consumer reviews are not misused?

16. In your opinion, what role do businesses have in regulating online consumer reviews?

A2: Survey Instrument

Consent to Participate in Research Online Consumer Reviews - Do You Trust Them?

INTRODUCTION AND PURPOSE

My name is Lukas Parker. I am a Graduate Student at Ryerson University working with my supervisor Professor Kernaghan Webb in the Department of Law and Business. I would like to invite you to take part in my research study, which revolves around understanding how consumers perceive and use online consumer reviews. Approximately 100 participants will be involved within this study. This study is part of broader research concerning regulation and online consumer reviews.

WHAT YOU ARE BEING ASKED TO DO

You are being asked to voluntarily complete this on-line survey. It involves questions about online consumer reviews and should take about 10 minutes to complete. In order for all of your answers to be collected you must go to the end of the survey and click 'submit survey'. This will demonstrate your full consent to participation.

POTENTIAL BENEFITS

There is no direct benefit to you for taking part in this study. It is intended that the research will help to better understand how online consumer reviews are used and how they could be regulated.

WHAT ARE THE POTENTIAL RISKS TO YOU

Some of the survey questions may make you uncomfortable or upset or you may simply wish not to answer some questions. You are free to decline to answer any questions you do not wish to answer, or stop participating at any time by closing your browser. If you close your browser before getting to the

end of the survey and do not confirm your consent to participate at the end of the survey by clicking the 'submit' button your information collected up to that point will not be used.

YOUR IDENTITY WILL BE ANONYMOUS

The survey is anonymous and as such will not be collecting information that will easily identify you, like your name or other unique identifiers. Although your Internet Protocol (IP) address can be tracked through the survey platform, the researcher/s will not be collecting this information. Your IP address may be observed only to ensure that one individual is not completing the survey multiple times.

HOW YOUR INFORMATION WILL BE PROTECTED AND STORED

This survey uses Qualtrics which is a United States of American (USA) company. Consequently, USA authorities under the provisions of the Patriot Act may access the survey data. If you would rather participate with an email or paper-based survey please contact the researchers. Please note email or paper-based surveys may allow your identity to be known to the researcher/s but if you select this option your information will be kept confidential. To further protect your information, data stored by the researcher will be password protected and/or encrypted. This will only be accessible on a Ryerson University share drive. Only the researcher/s named in this study will have access to the data as collected. Any future publications will include collective information (i.e., aggregate data). Your individual responses (i.e. raw data) will not be shared with anyone outside of the research team. When the research is completed, the researcher/s will keep the data for up to 1 year after the study is over.

INCENTIVE FOR PARTICIPATION

You will receive the outlined participation mark for your participation in the survey. Each respondent can only participate in this survey once.

YOUR RIGHTS AS A RESEARCH PARTICIPANT

Participation in research is completely voluntary and you can withdraw your consent at any point up to clicking the submit button at the end of the survey by closing the browser. However, because the survey is anonymous, once you click the submit button at the end of the survey the researchers will not be able to determine which survey answers belong to you so your information cannot be withdrawn after that point. Please note, that by clicking submit at the end of the study, you are providing your consent for participation. By consenting to participate, you are not waiving any of your legal rights as a research participant.

QUESTIONS

If you have any questions about this research, please feel free to contact the researcher/s. Lukas Parker at lukas.parker@ryerson.ca or Dr. Kernaghan Webb at 416-979- 5000 x 2478 or kernaghan.webb@ryerson.ca. This research has been reviewed and approved by the Ryerson University Research Ethics Board. If you have any questions about your rights or treatment as a research participant in this study, please contact the Ryerson University Research Ethics Board at rebchair@ryerson.ca (416) 979-5042.

Please print a copy of this page for your future reference.

Q2 Do you use online customer reviews when making a potential purchasing decision?

- Sometimes
- About half the time
- Most of the time
- Always
- Never

Q3 When making a purchasing decision what information sources do you use to help make the decision?

Please rank the following information sources by importance by placing the most important first.

_____ Family/Friends (word of mouth)

_____ Celebrity endorsement

_____ News Articles

_____ Expert Reviews

_____ Advertisements

_____ Online Consumer Reviews

_____ Other

Q4 When using online consumer reviews to make a purchasing decision, how often do negative reviews impact your decision not to purchase a product?

- Sometimes
- About half the time
- Most of the time
- Always
- Never

Q5 When considering making a purchase online, on average, how many online consumer reviews do you read prior to making your decision?

- 0 - 5
- 6 - 10
- 11 - 15
- 16 - 20
- More than 20

Q6 In your opinion, how important are online consumer reviews to your decision to purchase?

- Slightly important
- Moderately important
- Very important
- Extremely important
- Not at all important

Q7 When you use online consumer reviews, are you more likely to use them when you have limited product knowledge?

- Extremely likely
- Somewhat likely
- Neither likely nor unlikely
- Somewhat unlikely
- Extremely unlikely

Q8 When using online consumer reviews, how often do positive reviews impact your decision to purchase a product/service?

- Sometimes
- About half the time
- Most of the time
- Always
- Never

Q9 When using online consumer review sites and investigating a product/service do you focus on the score / rating only or the words and comments of reviews, or both?

- Look at the score or product rating only
- Read the review only
- Look at both the reviews and the product rating

Q10 If you use online consumer reviews, what category of products/services do you use online consumer reviews for ? (Choose all that apply)

- Hotels / Accommodations
- Restaurants
- Consumer Products
- Transportation (eg. Flights, Train, Taxi, Uber)
- Banking / Financial Services
- Other

Q11 If you yourself have provided online consumer reviews, what product/services have you provided reviews for? (Choose all that apply)

- Hotels / Accommodations
- Restaurants
- Consumer Products
- Transportation (eg. Flights, Train, Taxi, Uber)
- Banking / Financial Services
- Other
- I have not provided online consumer reviews

Q12 In deciding whether or not to purchase a product or service, do you tend to use online consumer reviews when the products/services are more expensive? For example, you may be more inclined to look at online consumer reviews for products that are very expensive (>\$1000) and not use them for small purchases (<\$10).

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Q13 When using online consumer reviews, do you trust that they are a reliable source of information?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Q14 Rate the following online consumer reviews sites, in terms of whether they are trustworthy? Note:
 If you do not use a website then you do not need to provide an answer for that website.

	A great deal	A lot	A moderate amount	A little	None at all	Never heard of them
Homestars	<input type="radio"/>					
Yelp	<input type="radio"/>					
Better Business Bureau	<input type="radio"/>					
Uber	<input type="radio"/>					
Airbnb	<input type="radio"/>					
Rotten Tomatoes	<input type="radio"/>					
Google Reviews	<input type="radio"/>					
Reviews found on Business websites (For example, reviews posted on the product pages on	<input type="radio"/>					

Walmart website)						
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Q15 When using online consumer review sites, do you consider that an online consumer review is more trustworthy if reviewers have to first provide proof of purchase?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Q16 When you are purchasing from an actual physical store (not an online website), how often (if at all) do you use online consumer reviews before making the purchase at the physical store?

- Sometimes
- About half the time
- Most of the time
- Always
- Never

Q17 Do you use online consumer reviews for online purchases?

- Sometimes
- About half the time
- Most of the time
- Always
- Never

Q18 When you use online consumer reviews, do you ignore some reviews if you do not feel they are honest?

- Always
- Most of the time
- About half the time
- Sometimes
- Never

Q19 In your opinion, do you think that businesses post false positive reviews to improve their ratings on online consumer review sites?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Q20 In your opinion, do you think that businesses post false negative reviews to tarnish the reputation of competitors on online consumer review sites?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Q21 In your opinion, do you think that online consumer review sites manipulate the reviews (for example, change the order of reviews or remove some reviews, etc.) of businesses in exchange for money or other benefits?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Q22 In your opinion, is it acceptable for firms to provide benefits to consumers in exchange for positive reviews, even if their experience may not have been a positive one?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Q23 How much do you agree with the following statement: There are situations where consumers threaten businesses that they will post negative online reviews unless businesses provide a benefit to the consumer

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Q24 After you have used a product or service, how often do you post online consumer reviews for the product/service that you have used?

- Always
- Most of the time
- About half the time
- Sometimes
- Never

Q25 After you have used a product or service, where have you posted a review (choose all that apply)?

- Homestars
- Angie's List
- Airbnb
- Individual Business Websites
- Uber
- TripAdvisor
- Yelp
- Better Business Bureau
- Google Reviews
- Other
- none

Q26 After you have used a product or service, how often (if at all) do you provide a consumer review when you have had an overall:

	Always	Most of the time	About half the time	Sometimes	Never
When I have a Positive Experience	<input type="radio"/>				
When I have a Negative Experience	<input type="radio"/>				
When I have a Neutral Experience	<input type="radio"/>				

Q27 How often (if at all) have you used the threat of a bad review to obtain a benefit from a company in which you had an overall:

	Always	Most of the time	About half the time	Sometimes	Never
Bad Experience	<input type="radio"/>				
Positive Experience	<input type="radio"/>				
Neutral Experience	<input type="radio"/>				

Q28 In your opinion, do you agree that online review sites are capable of identifying and weeding out false reviews?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Q29 How much do you agree with the following statement: I check to see what policies online review websites have regarding hiding, reordering, or modifying consumer reviews?

- Always
- Most of the time
- About half the time
- Sometimes
- Never

Q30 In your opinion, do you think that government regulation of online consumer reviews is adequate?

- Very adequate
- Somewhat adequate
- Neither adequate nor inadequate
- Somewhat inadequate
- Very inadequate

Q31 Many products and services subscribe to certifications from 3rd party organizations. Certifications are designed to signify that a product or service is meeting specified criteria. For example, coffee companies can be certified to have “Fair Trade Coffee” and display the logo shown below. If there was a certification designed to signify that online consumer review sites were implementing policies and standards to enhance the reliability of online consumer review sites, would you be more likely to use the certified online consumer review sites over a site that did not have certification?

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Q44 How much do you agree with the below statement? Online consumer review operators should exercise care and put in systems and approaches to ensure that online reviews on their websites are accurate and are not manipulated or modified, and if such inaccuracies and manipulations do occur, so that viewers are misled about a product or service, such practice should be against the law. Unless the online review operators can show in court that they exercised reasonable care, a court should have the authority to sentence them to jail.

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Q45 How much do you agree with the below statement? Online consumer review operators should have online reviews on their websites that are accurate and are not manipulated or modified. If online operators intentionally allow inaccuracies and manipulations to occur, so that viewers are misled about a product or service, such practice should be against the law. Once it is proven that an online consumer review operator has intentionally allowed inaccuracies to occur, a court should have the authority to sentence them to jail.

- Strongly agree
- Somewhat agree
- Neither agree nor disagree
- Somewhat disagree
- Strongly disagree

Q46 There is a phenomenon in the business world known as "corporate social responsibility" (which is also sometimes referred to as "corporate responsibility", or "corporate sustainability" or "corporate citizenship"). In your opinion, which of the following most closely aligns with your understanding of corporate social responsibility (CSR), as exercised in the online consumer review context. CSR is:

- Where companies try to ensure that in everything they do, they don't harm people or the environment, and that they try to have a positive impact.
- A marketing practice where companies portray what they are doing in a positive light, but there is no real change in behaviour.
- Where companies donate to good causes or support good causes, but it does not refer to the day to day practices of the company.
- Where companies comply with laws, but are not expected to do anything more

Q32 What is your age range?

- Less than 18
- 18 - 24
- 25 - 34
- 35 - 44
- 45 - 54
- 55 and over

Q33 What is the highest level of school you have completed or the highest degree you have received?

- Less than high school degree
- High school graduate (high school diploma or equivalent including GED)
- Some college but no degree
- Diploma from college (2-year)
- Bachelor's degree in college (4-year)
- Master's degree
- Doctoral degree
- Professional degree (JD, MD)

Q34 What is your sex?

- Male
- Female
- Other

A3: Table of Key Findings

		Sample	
#	Ryerson Students	Amazon Mechanical Turk	
2	The majority (39%) of respondents use Online Consumer Reviews Most of the time or more.	The majority (37%) of respondents use Online Consumer Reviews Most of the time or more.	
3	Most respondents relied on Family/Friends for information when considering a purchase. They ranked Online Consumer Reviews as the second most important followed by Expert Reviews.	Most respondents relied on Family/Friends for information when considering a purchase. They ranked Online Consumer Reviews as the second most important followed by Expert Reviews.	
4	55% of respondents stated that negative reviews impacted their decision to purchase a product most of the time or more.	34% of respondents stated that negative reviews impacted their decision to purchase a product most of the time or more.	
5	Most consumers read between 6-10 consumer reviews prior to deciding.	Most consumers read between 6-10 consumer reviews prior to deciding.	
6	Most respondents consider OCR very (41%) important to making a purchasing decision.	Most respondents consider OCR very (39%) important to making a purchasing decision.	
7	Respondents confirmed that they are more likely to use online consumer	Respondents confirmed that they are more likely to use online consumer reviews when they have limited	

	reviews when they have limited knowledge with 59% considering it extremely likely.	knowledge with 38% considering it extremely likely and 43% considering it somewhat likely.
8	Positive reviews impact purchasing decisions 59% of respondents most of the time or greater.	Positive reviews impact purchasing decisions 58% of respondents most of the time or greater.
9	Most consumers (86%) review both reviews and the product rating when considering a product.	Most consumers (70%) review both reviews and the product rating when considering a product.
10	Respondents use online consumer reviews for Hotels (84%), Restaurants (83%), and Consumer Products (87%) the most.	Respondents use reviews for Consumer Products (82%), followed by Hotels (59%) and Restaurants (58%) the most.
11	Respondents provided online consumer reviews for Consumer Products (44%), Restaurants (44%), and Hotels (30%) the most.	Respondents provide reviews for Consumer Products (64%), followed by Restaurants (40%) and Hotels (34%) the most.
12	Most respondents somewhat agree (or greater) that they use online consumer reviews for more expensive items (77%).	Most respondents somewhat agree (or greater) that they use online consumer reviews for more expensive items (68%).
13	75% of respondents somewhat agree that online consumer reviews are trustworthy.	80% of respondents somewhat agree that online consumer reviews are trustworthy.
14	AirBnB (28%), Uber (25%), Rotten	Google Reviews (22%), BBB (15%) and AirBnB (12%)

	Tomatoes (25%) are the most trustworthy according to respondents.	are the most trustworthy.
15	Most respondents strongly agree (47%) or somewhat agree (36%) that reviews are more trustworthy if reviewer must have proof of purchase.	Most respondents strongly agree (35%) or somewhat agree (46%) that reviews are more trustworthy if reviewer must have proof of purchase.
16	Most respondents sometimes (41%) use online consumer reviews before making a purchase in a physical store.	Most respondents sometimes (35%) use online consumer reviews before making a purchase in a physical store.
17	Most respondents use online consumer reviews for online purchases (73%).	Most respondents use online consumer reviews for online purchases (64%).
18	Some respondents will ignore reviews if they do not feel they are honest.	Most respondents will ignore reviews if they do not feel they are honest.
19	Most respondents somewhat (47%) or strongly agree (40%) that businesses post false positive reviews to improve ratings.	Most respondents somewhat (49%) or strongly agree (20%) that businesses post false positive reviews to improve ratings.
20	Most respondents strongly agree (43%) or somewhat agree (15%) that businesses will post negative reviews for competitors.	Most respondents strongly agree (15%) or somewhat agree (37%) that businesses will post negative reviews for competitors.
21	Most respondents strongly (31%) or somewhat (46%) agree that online consumer review sites will manipulate	Most respondents strongly (17%) or somewhat (43%) agree that online consumer review sites will manipulate reviews.

	reviews.	
22	Most respondents strongly (34%) or somewhat (28%) disagree that it is acceptable for businesses to provide benefits to consumers for positive reviews.	Most respondents were split by either Strongly disagree (25%) and Somewhat agree (27%).
23	Most respondents strongly (31%) or somewhat (33%) agree that some consumers will threaten businesses to provide benefits or they will post negative online consumer reviews.	Most respondents strongly (21%) or somewhat (39%) agree that some consumers will threaten businesses to provide benefits or they will post negative online consumer reviews.
24	Most respondents only sometimes or never provide a review after using a product or service (80%).	Most respondents only sometimes or never provide a review after using a product or service (34%).
25	Uber (33%), Yelp (37%) and other sites (27%) are the most common sites for respondents to post reviews.	Google Reviews (37%), Individual Business Websites (29%) and Yelp (26%) are the most common sites for respondents to post reviews.
26	Most Respondents never post a review when they have a negative (30%) experience. Most Respondents sometimes post a review or positive (31%) experience. Most respondents never post a review	Most Respondents sometimes post a review when they have a negative (26%) or positive (31%) experience. The majority never post a review when they have a neutral experience (30%).

	when they have a neutral experience (83%).	
27	Most respondents will only use a threat when they have a bad experience and only sometimes (18%).	Most respondents will use a threat sometimes when they have a bad experience (48%), most of the time when they have a positive experience (42%) and about half the time when they have a neutral experience (46%).
28	Most somewhat agree (41%) that online consumer review websites are able to identify and remove false reviews.	Most somewhat agree (44%) that online consumer review websites are able to identify and remove false reviews.
29	Most respondents never review online consumer review site policies (65%).	Most respondents never review online consumer review site policies (32%).
30	Most respondents feel government regulation on OCR is neither adequate nor inadequate (47%).	Most respondents feel government regulation on OCR is neither adequate nor inadequate (32%).
31	Most somewhat (36%) or strongly (47%) agree that a visible 3rd party certification would be useful.	Most somewhat (47%) or strongly (31%) agree that a visible 3rd party certification would be useful.

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