Greenwashing And Canada's Increased Regulation Of Environmental Claims: The Latest Amendments To The Competition Act

On June 20, 2024, the Canadian federal government enacted Bill C-59, amending the *Competition Act* (the "**Act**") by granting royal assent to Bill C-59. Most of the amendments are now in effect, with the exception of some that come into force later in 2024 and in 2025. This bulletin discusses the increase in regulation of greenwashing from an environmental perspective and its impact on Canadian businesses by virtue of these amendments. For a discussion of the other the amendments to the Act, read our bulletin here.

"Greenwashing" is when a business, intentionally or inadvertently, makes false or misleading positive claims or downplays negative qualities about the environmental or sustainability attributes of its business, products or services. Claims can relate to products and materials, or elements of the supply chain, including production, packaging, distribution, use or disposal, as well as business practices and processes. As with other types of false or misleading claims, greenwashing has the effect of deceiving or influencing consumers into purchasing from "green" businesses or to purchase "green" products or services because of

supposed environmental benefits.

The primary source of liability in the area of greenwashing in Canada at this time is the Act which prohibits the making of "false or misleading" representations to the public. As noted in our previous bulletins on the topic, Net Zero Plans Deserve Closer Attention Than They Are Getting, Squeaky "Clean": Competition Bureau Combats Greenwashing and Green or Grey: Regulators Target Greenwashing, Misleading Environmental, Social and Governance (ESG) Claims, the Competition Bureau has ramped up greenwashing enforcement in recent years.

The amendments to the Act expressly target greenwashing claims instead of relying on the Act's existing (and more general) false or misleading claims provisions. Representations can take the form of statements, warranties or guarantees and can be in written, oral or other media form. Specifically, the amendments provide that a person who makes either of the below representations to the public for the purpose of promoting, whether directly or indirectly, the supply or use of a product or any business interest where the form of purported warranty, guarantee or promise is materially misleading or if there is no reasonable prospect it will be carried out:

1. A representation of a product's benefits in protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change that is not based on adequate and proper testing; and
2. A representation with respect to the benefits of a business or business activity in protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change that is not based on adequate and proper substantiation in accordance with internationally recognized methodology.

Note, however, that neither of the above representations would be considered false or misleading if the basis for the

representation is an adequate and proper test or substantiation conducted in accordance with internationally recognized methodology to confirm the accuracy of the representation. In other words, any business making any kind of "green" representation must verify its accuracy through these methods *before* making such a representation to the public.

Unfortunately, the phrases "adequate and proper substantiation" and "internationally recognized methodology" are not defined in the Act and have not yet been considered by the courts. The Competition Bureau has issued some general guidance on when testing is considered "adequate and proper". In particular, testing must be conducted prior to a performance claim being used, be completed in a controlled environment to eliminate external variables and eliminate subjectivity as much as possible, reflect the real-world environment of a product or service, and support the general impression created by the marketing claim. However, at this time, the guidance relevant to greenwashing and environmental claims remains limited and industry best practices regarding environmental practices, procedures and methodologies are varied and inconsistent. Moreover, other legal and regulatory regimes have requirements that also need to be considered with respect to such representations (such as industry requirements, securities laws, or those applicable to regulated industries).

The Competition Bureau has indicated that it will develop green marketing guidelines to clarify which standards of testing and substantiation are acceptable (specifically, "adequate and proper") in the Canadian context. To assist in this regard, on July 22, 2024, the Competition Bureau launched a public consultation period with respect to such provisions and the considerations and challenges of businesses and advertisers in complying with these provisions. Interested parties are invited to provide comments by September 27, 2024

and can be done so through the contact information provided here.

In the interim, the Competition Bureau has published the Deceptive Marketing Practices Digest – Volume 7 here which provides some guidance for businesses. Of note, it includes information on the complaints most often received by the Competition Bureau as well as high-level tips to help businesses avoid engaging in greenwashing in compliance with the Act. The Competition Bureau reports that most complaints fall into the categories of claims listed below:

- Composition of products and packaging, including what is (e.g., that a product contains "recycled materials") and is not (e.g., that a product contains no PFAS) in the composition. Complaints can also arise where numerical values are used but cannot be verified (e.g. "100% recycled content" or "3 times as healthy for the environment");
- Production process of products, such as what resources, energy or materials are used (e.g. "made using solar power", or "100% carbon neutral");
- Disposal of products (e.g., "fully compostable");
- Comparisons to past versions of products or services, or those of competitors (e.g., "now made using 50% less water);
- Vague or overly generalized (e.g., "good for the environment"), or using images, logos, or other media that implies an eco-friendly benefit or detracts from negative qualities of a product (e.g., using nature scenes or nature-type fonts on packaging or using a layout that may deceive a consumer); and
- Future plans, without a credible plan for delivery or that are minimal in comparison to the business' operations (e.g., "investing in a healthy future" or "working towards carbon-neutrality").

In addition to the above, it is similarly useful to review

what is being done in jurisdictions such as the European Union (the "**EU**") where greenwashing regulation is more advanced than in Canada. We expect that cases filed in the EU under their greenwashing directives will be the start of what is likely going to be a growing body of "internationally recognized" methodologies and standards in this area. For example, the EU is already considering banning the use of common "green" terms such as "carbon neutral ", an extraordinarily difficult and controversial claim to make. It is also considering similar prohibitions on making claims about specific emission reduction targets, which tend to be aspirational, or at least forward-looking (without making that clear), or just plain misleading in the absence of a baseline calculation of a company's actual emissions. The EU also implemented its Ecolabel regime over three decades ago, which identifies consumer products with reduced environmental impacts based on scientifically sound criteria. It is anticipated that the Canadian Government will draw on this experience in developing regulatory standards for the new generation of greenwashing claims in Canada and to help inform businesses and consumers trying to address their role in climate change and its impacts.

To meet the new federal requirements, a business, which may be the manufacturer, distributor, provider, retailer or advertiser of a business, product or service, would do well to follow best practices such as those suggested below:

- All statements of fact should be clear, precise, true, accurate, complete and amply supported, ideally by independent data and sources. Having an internal or external expert and/or legal counsel with the right expertise vet the green claims being made, and any underlying tests or substantiation, is also recommended. The Competition Bureau recommends that businesses ask themselves "Am I overpromising and underdelivering when it comes to environmental claims"?

- Comparative claims should be specific about the comparison used and why the comparison is being used (i.e., the comparison should be relevant and any differences between what is being compared should be provided).
- Businesses can use fine print or disclaimers to provide clarification or additional information, but if the fine print or disclaimer is hidden or if it contradicts the more prominent message on a product or packaging, it can be problematic and lead to complaints.
- Testing must be relevant and be conducted before a performance claim is made. It should be conducted (a) in controlled circumstances, (b) with little to no subjectivity (as much as possible), (c) reflect real-world usage, and (d) in support the general impression created by the claims used. Utilizing test results that only happened by chance or that are based on similar products or services or hypothetical scenarios or information would not be sufficient. All such supporting testing data and other information should be preserved so that they can readily be accessed (and as applicable, provided) in the event of a legal challenge or regulatory action.
- Some representations made to the public may be forward-looking. Careful attention should be paid to the use of firm commitments or expressions such as “we will” or “we promise” where it may be more appropriate to instead use expressions such as “we plan to” or “we anticipate”. However, all such forward-looking claims must above all be reasonable and achievable in light of the business’ current knowledge and technology and the context of the wider industry.
- When a claim is being made about a business or its product or services, it should be clearly distinct from the business’ affiliates, partners or suppliers about whose practices full information may not be available or reliable. For this reason, realistic and specific claims

are preferred to aspirational vague claims and businesses with operations through multiple entities and jurisdictions should make sure that any claims are particular only to the applicable business, products or services, as opposed to making generalized claims. In addition, while businesses may be well-intentioned in their future goals, providing for too aggressive commitments or timelines could lead to complaints if the business is not able to meet these goals. Any future claims should be supported by a meaningful plan with concrete steps to achieve the goals.

- Consider the categories of alleged greenwashing complaints received by the Competition Bureau (as identified above), as these types of claims are most likely to raise concern and may lead to enforcement.
- Consider what other municipal, provincial and federal laws may be applicable to a business or its products or services, as the advertising and labelling requirements in these laws may overlap with the Act or provide for additional types of claims and consumer information. For example, the federal Consumer Packaging and Labelling Act is applicable to prepackaged non-food consumer products and requires accurate and meaningful labelling information for consumers and the Textile Labelling Act and Textile Labelling and Advertising Regulations provide labelling requirements for consumer textile products.
- Undertake a legal risk assessment with a focus on the legal risks inherent for “green” claims. Such a legal risk assessment should identify, assess and manage potential or actual risks for claims related to the business, its products or services. The assessment should consider how each of the Competition Bureau, public and competitors may perceive such claims in order to mitigate any risks and should be forward-looking in its approach.

These best practices are particularly important today as not only regulators across different areas but also stakeholders and competitors are now paying close attention to greenwashing thereby increasing the risk of a complaint to the Competition Bureau. As a reminder, any interested person can file a complaint with the Competition Bureau. Businesses should therefore assess their "green" business claims and claims related to products and services from a regulatory standpoint (as opposed to through only a marketing and sales lens) in order to mitigate the risks associated with greenwashing allegations or violations of the Act.

Green claims are nothing new. Environmental lawyers have for decades assisted clients in evaluating and developing technologies, methodologies, products and know-how in support of sustainability and in ensuring compliance with regulatory regimes. What is new is the importance and attention that such claims are now attracting from nearly everyone but particularly the average consumer, who is increasingly focused on the impacts of climate change.

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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