CAPITAL MARKETS PODCAST: WHY BUSINESSES SHOULD CARE ABOUT GREENWASHING

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This podcast episode dives into the risks and impact of greenwashing on businesses. Ouvedi Rama Naiken and Patricia Chehadé, from our Capital Markets & Securities Group, speak with corporate commercial litigator and regulatory lawyer, Talia Gordner on the current regulatory framework of greenwashing.

Please note that the following provides only an overview and doesn’t constitute legal advice. Listeners are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

Transcript

Ouvedi Rama Naiken: Hello and welcome to our Capital Markets podcast, a series of episodes where we discuss current issues and topics in capital markets and securities law. My name is Ouvedi Rama Naiken.

Patricia Chehadé: And I am Patricia Chehadé. We are both associates in the Capital Markets Group at McMillan. We will be your hosts for today's episode.

Ouvedi Rama Naiken: We're so excited to welcome our special guests, Talia Gordner. Talia is an experienced corporate commercial litigator and regulatory lawyer with a focus on environmental law at McMillan. Hi, Talia, thanks for joining us.

Talia Gordner: Thanks so much for having me.

Patricia Chehadé: Our topic for this episode has been top of mind for stakeholders ranging from consumers, investors, to corporations. As we approach the holidays, many of us are looking to make environmentally conscious choices, but are faced with this mirage of green-friendly messaging. Actually, the Greenpeace has recently said that we are living in a "golden age of greenwashing". But what is greenwashing and how do we avoid greenwashing products. And so, to start us off today, Talia, can you please define for our listeners what the term greenwashing means?

Talia Gordner: Absolutely. So greenwashing occurs when a businesses disclosure, branding or marketing, intentionally or inadvertently contains false or misleading environmental or sustainability information. So this may appear as a claim that a product or company is green, it's clean. They might overstate their environmental credentials. They may mischaracterize an environmental initiative or understate their emissions from manufacturing of their products or the operations of their business.

Greenwashing might also include attempting to capitalize on the goodwill of a positive environmental image, while actually failing to take into account or to disclose negative environmental practices, for example, in its overseas supply chain. So maybe your product, when it gets to Canada and you're selling it, might be considered green, but the development that goes into making that product before it's imported to Canada might have some environmental impacts that a statement might not actually disclose. And so, if you're not really taking all that into account, that's a situation where you could possibly have greenwashing.

Ouvedi Rama Naiken: Thanks for that definition, Talia. I think we've all noticed that greenwashing has become increasingly common in the last decade. When thinking of greenwashing, for me, an example that comes to mind is the clothing recycling program that was offered by a highly recognized global brand in fast fashion, where essentially you would return your worn out clothes to be recycled at the store in exchange for discounts for new purchases.

So we think recycling as the epitome of eco-friendliness, right? At first look, the program looks like it's promoting sustainability. However, studies actually show that only a small percentage of the clothes that were returned were actually recycled. And if you think about it, if you think about the big picture, there's really little that is eco-friendly about the program. In reality, the discounts received on the new purchases in exchange for returning the discarded clothes actually increases and encourages consumption. So when we're thinking about greenwashing and this particular example, I think it highlights this tension and this clash that we see between what companies are marketing to us and the actual impact of their products and services on the environment.

Patricia Chehadé: Absolutely, Ouvedi. And to think of it, another really great example that comes to my mind is the Keurig Canada case, where Keurig Canada found itself offside the rules prohibiting misleading or unsubstantiated environmental claims under several pieces of legislation, including the Competition Act, when it made claims about the recyclability of the K-Cup packaging that were not accurate.

Talia, can you speak to us more about the Keurig Canada case and elaborate on what companies can do to prevent greenwashing claims?

Talia Gordner: Sure. So the Keurig case came about in 2019 from Ecojustice, which is a environmental advocacy group. They triggered a Competition Bureau inquiry and the issue was whether or not their coffee pods were actually recyclable. Keurig had modified their single use coffee pods to be made from recyclable plastic and to market this positive environmental change, and that it may actually be recyclable in the municipal recycling process.

They announced on their website, social media and packaging that its single use coffee pods were recyclable as long as consumers followed instructions to remove the metallic lid and empty the pod. But what the Bureau unfortunately found was that Keurig's claims create the general impression that the pods are recyclable throughout Canada. This isn't uncommon. The amount of products you might put into your blue box, you think it's all going to be recycled, but the numbers of what municipalities actually can and can't recycle depends on what equipment is available and what kind of materials are put in there.

So the numbers are actually pretty low and much lower than most people I think expect. As a result, most of these pods weren't actually able to be recycled in the jurisdictions where they're being disposed of. And they also didn't have sufficient instructions regarding what needed to be done to make them recyclable, even in the jurisdictions where they could be recycled. So the Bureau ultimately found these claims were false or misleading because they claim to have more environmental benefits than they truly had.

So ultimately, Keurig entered into a consent order with the Bureau. They paid a pretty significant penalty. They donated also a significant amount to an environmental charity and paid for the Bureau's costs from the inquiry and they changed their recyclable claims and packaging, and published some corrective notices. So that's kind of what happened with the Keurig case, which is just a good example where, you know, their heart was in the right place, they were trying to provide information about some changes they had made to their product, but the language used and the impression by consumers didn't turn out to be accurate.

So you had also asked about, you know, what a company can do to prevent claims of greenwashing. So there's a lot of things you can do, and I think the most important thing to kind of start out with is thinking about what you're actually doing or planning to do. So, what do you do if we're talking about the returned recycled clothes example? You know, what are you collecting? How are you collecting it? What are these materials? How are the materials going to be processed? Are they going to be recycled, are they going to be repurposed or they're going to be disposed of? Is part of them going to be reused in some way and the rest of it is going to be disposed of? And are these end recycled products you're getting, are they actually useful or are they just going to end up in a landfill after one use? Is this really extending the materials' life in any way? Do you need additional materials that create new ways to actually make the recycled product? What kind of emissions are created by the process to actually recycle the product and how do they break down? This is actually when you do the recycling activities that take longer for the product to break down in the environment in a landfill than it would have otherwise. And what kind of environmental impacts arise from that kind of processing or those results with an end product?

So you want to ask yourself to kind of go through every stage of that question, to think about what you're doing. The actual act of collecting clothing no one's going to be using anymore and finding a new home for it or repurposing it, that's great, but you need to think about what you're saying, whether you can actually honestly say it or not.

It might not be possible, whether financially or due to what technologies available or affordable to actually recycle these materials. So you shouldn't imply that you're recycling them if you're not. But it's totally okay to say you're collecting them or you're going to be donating them to a shelter, for example. You just want to make sure that the way you're disposing, if you're going to claim it's recycling, which has an inherently green connotation to it, that you're not doing anything that's actually going to be worse for or have a negative impact on the environment or climate change versus how the product would normally be disposed of in the industry.

So you can speak to all that. The point is really to not provide inaccurate or misleading information. And you also don't want to be too strategic in your language. How would the average person understand what you said, what the claim is, what you’re telling the world this program actually does? Because sometimes you think the language is clear, but the average person would interpret it differently or it is accurate, but it's not how the average person would interpret it based on, you know, the dialect or the way people process information or the version of that word that they use. You want to be really thoughtful about that. And it's of course, because, one, you don't want to be greenwashing, which has regulatory and financial consequences, but it also has reputational consequences as well. So there's a very long answer to some of the ways you can prevent greenwashing in the Keurig case, but I think it's a good starting point for any company in terms of trying to prevent a greenwashing issue.

Ouvedi Rama Naiken: Thanks, Talia. These are some great best practices to keep in mind. You've told us a little bit about how the Competition Bureau is involved in regulating ESG-related messaging. Can you tell us a bit more about how greenwashing and related climate information are regulated in Canada?

Talia Gordner: Yes. So it's regulated on a number of different fronts. There's securities regulators, which as you guys know, have published staff notices regarding environmental and climate change-related disclosure.

We've talked about the Canadian Competition Bureau. They've issued warnings and fines relating to greenwashing activities. Consumer protection legislation, which is partly what the Competition Bureau was relying on in the Keurig case. But they've long had language to protect consumers from false and misleading information.

This often comes up in the context of health claims, for example, but it's not limited or exclusive to that. And there's also civil claims. Those aren't regulated per say or regulatory, but if you want to think about it that way, we have the public taking action based on what their expectations are of what a product would or wouldn't do, or whether or not something is misleading or what standards they want to hold companies to. So those kind of claims, whether it's an individual claim or a class action, is kind of a way the public might be viewed as regulating greenwashing claims as well, though it's not traditionally or technically regulation, but it's definitely something that could impact a company's business or their reputation.

Patricia Chehadé: So what we see here really is that ESG and climate-related disclosure has become a priority not only for regulators, but for the public. And you mentioned briefly, staff notices that have been published in the securities world. What we could add to that is that the Canadian Securities Administrators have introduced a series of national instruments that are expected to come into force early next year.

Now, these instruments will require most public companies to make disclosure on climate-related matters. And under the proposed instruments, the public disclosure that will be required will relate to climate-related governance disclosure, climate-related strategy, risk management and metrics, and target disclosures. So there's definitely a lot coming down the pipeline, and I don't know about you folks, but it's definitely going to be interesting to see how securities regulators will monitor and enforce the disclosure of climate-related information.

And with that in mind, have regulations targeting greenwashing been enforced in Canada?

Talia Gordner: So we talked about the Keurig case, which is a great example of the Competition Bureau doing that enforcement. There's also recently been some other inquiries opened by the Competition Bureau with respect to greenwashing. So I think we can expect to see something on that front. I don't know that there's much more. There is some litigation that started in Canada, but it's significantly more limited than what we're seeing in the U.S. They just will have more litigation or more class actions than we do on these kind of more ground-breaking topics, but I think we can expect to see more regulation from the Competition Bureau, the securities regulators, they're putting out those notices for a reason, and possibly also Health Canada. I think we could expect that from them as well.

Ouvedi Rama Naiken: It's clear that Canadian regulators are paying more and more attention to climate-related information and the impact it has on stakeholders. I'm curious to know what are other jurisdictions doing in the greenwashing space, and is Canada planning to follow suit?

Talia Gordner: We're definitely seeing increased regulations, enforcement and litigation in the U.S. and even more so in Europe. They tend to be ahead of us on these issues, and that's the case here as well. So we're seeing more class actions on ESG misrepresentation issues in the U.S., and there's been some enforcement action for greenwashing by their securities regulators. On the European side, they've increased their standards in some countries of what types of green or ESG claims are permissible.

And the European Commission is also considering requiring mandatory corporate disclosure of ESG information and restrictions on certain types of ESG advertising. So I think we can reasonably expect that Canadian regulators will follow suit, though, as I said, we're definitely behind what Europeans are doing, European countries in the European Commission in terms of ESG regulation. I expect that we'll be following suit, but it will probably be a little bit behind and we'll follow on the coattails and see what they do and what's working for them and move that forward. But I don't think we're going to see anything instantaneous. We seem to be moving pretty slowly on that front.

Patricia Chehadé: Though it might be fair to say that we can expect to see some consistency across all jurisdictions. For our last question, can you talk about how you see the regulatory landscape changing and how companies can prepare for it?

Talia Gordner: So as I said, I think we can expect an increase in regulation to prevent or reduce greenwashing in Canada. We've talked about some of the cases and some of the beginnings of that. I think we can just expect more of it, particularly with regulators coming out with new guidance and notices on what their expectations are in terms of greenwashing.

And I'd suggest getting ahead of these regulations, at least from the financial and reputational perspective. Don't wait for them to come out and see who's at risk of enforcement. It makes more sense from a business perspective to try to make sure you're not doing any greenwashing. You don't want to be the test case and you don't want to be the subject of those enforcement actions. It's very hard to pull things back once they're already out in the public. So in terms of how you can prepare, we actually have this great ESG bulletin series available on the McMillan website, where we're discussing ESG from a number of different angles and regulatory sectors. We're going into these topics in a lot more detail than I can really give justice to today. But high level, I can give you, you know, a pretty decent list of ESG claims or disclosure advice and how they should be made with care.

To start off, one of them is that you don't want to be making ESG-related claims discriminately or selectively across the product line. And you want to make sure you establish an enforcement internal policy on ESG claims. So when I include how such claims are to be made, who will be responsible and accountable for them, there should be some process in place to ensure that if an ESG claim is being made, that is being made accurately and it's not misleading and it's not ultimately determined to be greenwashing.

And you want to make sure you're adopting and applying well-established terms. We don't want to use buzzwords here. Defined key concepts such as sustainability, they have meanings. You have to be really careful about using those kind of terms. You want to ensure that your ESG claims, in whatever form they may come in, including images as well, they're clear, they're true, accurate, balanced, substantiated and verifiable. Verifiable is really, really important.

There are ways to verify these things, whether you're getting an external consultant, somebody who has technical or engineering expertise to actually assess these claims can be verified. And you don't want to make any broad representations that products or services or supply chains or partners are green or sustainable or eco-friendly, socially impactful, without being able to actually back it up with an accurate and a fulsome explanation.

And that's another place where they're being able to actually verify what you're saying comes into effect. That's a good opportunity to consider external accountability or transparency frameworks. There are some certifications for certain types of call it green or ESG-friendly business activities or products. And of course, you want to make sure that they are actually doing the work and that they're actually verifying that these claims or statements or certifications are green.

So it can kind of be like a double level there. But if it's a good, reliable certification, that's a great way to have some accountability for what's recognized in the industry. Of course, and our ESG bulletins should help with this, you want to keep up to date on current guidelines and regulatory guidance with respect to ESG-related claims and be aware of upcoming or implemented regulatory changes. Also, some of the regulators actually provide some specific practice recommendations that they actually publish, will be in addition to the actual regulations and guidance. Those are really great resources as well.

And my final suggestion, I know that was a long list, is to get independent audits done of your ESG performance, compliance and disclosure practices. It's a great way to find out if there are any gaps or potential greenwashing and to close those gaps before it gets to the public, has reputational harm or there's an enforcement action. The list could probably be even longer, but I think that should give you some high-level ideas of how you approach this. It should be just as careful as any other disclosure you're doing or any statements you're making about your products. They should be done with just as much care we're talking about greenwashing. These are some ideas of where those edges are and what kind of work needs to be done to be able to make a claim that is green or ESG-related.

Ouvedi Rama Naiken: Those are great tips, Talia, for businesses to consider. And just to add to what you previously mentioned from a securities law perspective, when making public disclosures, whether it's voluntary or required, public companies can improve the quality of their ESG-related disclosure by focusing on, like you mentioned, informational disclosure and avoiding promotional disclosure.

So according to the Canadian securities regulators, they suggested that public companies should provide consistent disclosure, companies climate-related information should be announced in a factual and balanced manner, and that public companies should refrain from using broad or misleading promotional language.

Patricia Chehadé: Thank you both for sharing some important practice tips. I think we have a lot to think about. Again, thank you, Talia, for joining us today. You provided very valuable insights and I know I'm excited to see how the landscape is going to be changing and evolving in 2023. Please do reach out to McMillan's ESG Industry Focus Group for more information on any ESG-related matter that you may have.

Ouvedi Rama Naiken: So this concludes today's episode. Stay tuned for our next episode coming out in January of next year. This is Ouvedi and Patricia at McMillan, thanks for listening.