

SQUEAKY “CLEAN”: COMPETITION BUREAU COMBATS GREENWASHING

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McMillan is authoring a number of bulletins to assist clients in navigating the quickly developing regulatory regime surrounding ESG issues. An introductory bulletin can be found [here](#). This bulletin focuses on competition law developments. McMillan’s [Competition Group](#) regularly interacts with the Canadian Competition Bureau on related issues.

Consumers are increasingly demanding that the products and services they purchase are not harmful to the environment and that the businesses they deal with are “eco-friendly”. Similarly, businesses are adopting policies and practices that support the environment, and are marketing their environmental/sustainability credentials as a means of attracting consumers. While environmentally themed advertising claims have been around since the 1970s, the current political climate with respect to environmental issues^[1] gives such claims greater value in the market.

This market reality has led to a dramatic rise in “greenwashing”, a phenomenon that arises when a business, intentionally or inadvertently, makes a false or misleading claim about the environmental or sustainability attributes of its business or its products. As with other types of false or misleading claims, greenwashing has the effect of misleading consumers into acting contrary to their intent to purchase from “green” businesses or to purchase “green” products.

Given the rise in the importance of the environmental attributes of businesses and products to consumers, the issue of greenwashing is increasingly becoming a priority of enforcement agencies, including Canada’s Competition Bureau.

Misleading Advertising

An objective of competition law is to deter deceptive marketing practices to ensure consumers receive accurate information to allow them to make informed buying decisions.

The *Competition Act* prohibits businesses from making a materially false or misleading representation to the public to promote the supply or use of a product/service or a business interest. A representation is deemed to

be “material” if it could influence a consumer to buy or use the product/service.

When assessing whether the representation is false or misleading, the courts will consider the “general impression” conveyed, in addition to the literal meaning of the representation. An advertisement is not to be interpreted as a contract, with attention to detail. Instead, taken as a whole, what meaning does a consumer get by reading/viewing/listening to the advertisement? A key issue with ‘green’ claims is that there is much ambiguity in the subject matter. This, combined with marketers’ natural desire to keep the message simple, make claims of this sort especially prone to being assessed as misleading.

Penalties

The potential penalties upon a finding of a false or misleading representation are very significant. An advertisement may be assessed under a criminal provision if such false or misleading representations has been made knowingly or recklessly, otherwise the representation will be assessed under a parallel civil provision.

- Criminal track. The court may order a fine up to \$200,000 on summary conviction or a fine in the court’s discretion on conviction on indictment, and imprisonment up to one year on summary conviction and up to 14 years on conviction on indictment.
- Civil track. The court may order: that the impugned conduct cease; that corrective notices be published; administrative monetary penalties (“**AMPs**”) against corporations up to the greater of (i) \$10 million for a first occurrence (\$15 million for subsequent occurrences) and (ii) three times the value of the benefit derived from the deceptive conduct (or, where that is too difficult to calculate, 3% of the corporation’s worldwide annual gross revenues), and AMPs against individuals up to the greater of (i) \$750,000 for a first occurrence (\$1,000,000 for subsequent occurrences) and (ii) three times the value of the benefit derived from the deceptive conduct.

The ability to order AMPs up to 3% of the advertiser’s worldwide gross revenues is a new and potentially powerful remedy. We predict that the benefit derived from the deceptive conduct will be difficult to assess in almost all cases, and penalties in those cases will be based on percent of gross revenues.

Bureau Action – Greenwashing is a Priority

The Bureau has sent a clear message that it has a significant role to play in the transition to a greener economy and in achieving greener growth goals, while enhancing Canada’s global competitiveness. The Bureau has indicated that greenwashing is a high enforcement priority. The Bureau has a history of announcing enforcement priorities. While the Bureau does not have the resources to deal with every potentially offside ad, when they announce a priority area for enforcement, businesses can expect increased scrutiny and risk.

The Bureau has announced that it will take action in relation to greenwashing that raises issues under the

Competition Act, the *Consumer Packaging and Labelling Act* as well as the *Textile Labelling Act*. The Bureau noted that it may take into account national and international standards, technological and scientific advances, consumer behaviour and other legal requirements.

On September 20, 2022 the Bureau hosted a *Competition and Green Growth Summit* to examine the interaction between competition law/policy and sustainability. The widespread consensus at the Summit was that greenwashing is a serious concern.

The misleading advertising provisions appear to be clear: if a business makes a representation to promote a product/service or a business interest that is materially false or misleading, they may face sanction. However, there is little guidance to businesses in Canada, both in respect of the legal standards and the Bureau's approach.

The Bureau recently archived its enforcement guidelines on environmental claims, meaning they no longer view them as their policy. The Bureau has not provided advice as to when, or if, any replacement guidelines might be issued. This lack of guidance presents a significant challenge, as an assessment of environmental/sustainability claims and credentials is inherently complicated, especially when businesses are increasingly being pressured to make bold, broad claims regarding sustainability. The Bureau's website contains general advice regarding environmental claims, which does little to clarify the uncertainty.^[2]

Bureau Investigations into Greenwashing

It is likely there will be increased Bureau investigations into businesses' green marketing claims, in part fueled by the Bureau's increased interest but also by the recent strategy adopted by environmental activists. Activists are commencing applications under section 9 of the *Competition Act*, which provides that six persons may apply to the Commissioner to commence a formal investigation (an inquiry) into conduct that contravenes the advertising provisions of the Act.

This strategy was successful in the 2019 application by Ecojustice that triggered a Bureau inquiry regarding claims by Keurig Canada Inc. ("**Keurig**") that its coffee pods are recyclable. Keurig modified its single use coffee pods to be made from a recyclable plastic, which modification presumably involved significant costs regarding technology and manufacturing processes. To market this positive environmental change, Keurig announced via its website, social media and packaging that its single-use coffee pods were recyclable, subject to consumers following instructions to remove the metallic lid and empty the pod.

The Bureau investigated these claims and determined that: (i) Keurig's claims created the general impression that its pods were recyclable throughout Canada, and that consumers could prepare the pods for recycling by following limited instructions, and (ii) the pods were not acceptable in many municipal recycling programs

throughout the country and the instructions provided by Keurig to prepare the pods for recycling were incomplete (i.e., additional steps were required to prepare the pods for recycling). In other words, the Bureau found that these claims were false or misleading because they claimed to have more environmental benefits than they truly had.

Keurig agreed to a consent order with the Bureau, pursuant to which Keurig agreed to pay a penalty of \$3 million, donate \$800,000 to an environmental charity and pay \$85,000 for costs of the Bureau. Keurig also agreed to change its recyclable claims and packaging, publish corrective notices, and enhance its corporate compliance program.

Presumably buoyed by this success, there will likely be many more activist 'six person' applications in the future.^[3] In the fall of 2022, there have been at least two applications filed.

On October 12, 2022, the Bureau confirmed that it is investigating a financial institution in relation to a complaint filed by Ecojustice on behalf of a group of individuals in April 2022. The complaint alleges that marketing material contains misrepresentations regarding a commitment to reduce emissions and address climate change, while the institution continues to promote fossil fuel development and expansion.

On November 10, 2022, the Canadian Association of Physicians for the Environment announced that the Bureau has opened an inquiry in response to their filing of a complaint against the Canadian Gas Association. The complaint relates to the Fuelling Canada advertising campaign, including with respect to claims that gas is environmentally friendly, "clean", affordable and part of a sustainable energy future.

In addition to the Bureau's ability to investigate reviewable practices and criminal matters, the *Competition Act* includes various civil provisions that govern false or misleading representations. We expect there will be an increase in both regulatory complaints to the Bureau and private lawsuits based on Competition Act provisions.

Conclusion

Given the increasing regulatory scrutiny for greenwashing, and the lack of jurisprudence and specific guidance from the Bureau, there is increased risk associated with making environmental claims. There is uncertainty regarding the ability to market environmental attributes for various reasons, including: the science measuring environmental harm is rapidly evolving, the costs to measure the life cycle of a product/service/business will often exceed the resources of businesses, and the activists' understanding of "eco-friendly" is likely much narrower than that of a typical consumer. For example, a standard that would prohibit a business from making any claim that it supports the environment if not all of its activities are fully directed to achieving such environmental goals is not reasonable or, more importantly, is not consistent with the general impression of

notional typical consumer. Too harsh a standard of review of environmental claims will have a chilling effect on businesses deciding whether to make such claims. As a consequence, businesses may be discouraged from developing products with reduced impact on the environment given that their ability to market them may be too risky.

Companies can continue to market positive environmental attributes, with caution. Businesses making environmental claims should avoid bold, broad statements, but rather ensure the claims are specific and accurate (both literally and from a general impression perspective).

If you would like more information about these developments, or would like a more detailed presentation on how ESG regulation affects your business, please reach out to a member of the [Competition Group](#), or your usual McMillan contact.

[1] The highest court in Canada takes judicial notice of the “grave threat” that climate change represents: “The essential factual backdrop to these appeals is uncontested. Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity’s future. The only way to address the threat of climate change is to reduce greenhouse gas emissions.” *References re Greenhouse Gas Pollution Pricing Act*, (2021) 455 DLR (4th) 1 (SCC).

[2] Follow best practices by making sure that your claims:

- are truthful and **aren’t misleading**;
- are **specific**: be precise about the environmental benefits of your product;
- are **substantiated and verifiable**: claims must be tested and all tests must be adequate and proper;
- do not result in misinterpretations;
- **do not exaggerate** the environmental benefits of your product; and
- do not imply that your product is **endorsed by a third-party organization** if it isn’t; and,

If you’re unsure whether a claim will mislead or misrepresent, then don’t make the claim! See [Environmental claims and greenwashing](#)

[3] See EcoJustice’s website at [Calling wipes “flushable” is false and misleading, say environmental groups](#) and [Good news! We’re closer to stopping the scourge of ‘flushable’ wipes](#). No enforcement action was taken by the Bureau (See Global News reporting of the decision by the Competition Bureau of their decision to not take enforcement action three years after the initial complaint filed in May 1, 2019: [A look at the Competition Bureau’s investigation on ‘flushable’ wipes](#))

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A Cautionary Note

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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