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Greenwashing and Drip-Pricing Under Fire: Understanding the Latest Changes to Canada's Competition Act

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Greenwashing and Drip-Pricing Under Fire Understanding the Latest Changes to Canada's Competition Act

Advertising and marketing has been the subject of increased regulatory scrutiny following amendments made to the Competition Act within the last three years. Most notable among these changes are the provisions regarding “greenwashing", which specifically target false, misleading, or unsupported claims about the environmental attributes of a product, service or business. Failure to comply with these standards could result in significant fines and damage to a company's reputation. These changes mark a major shift in how businesses must legally prove and substantiate their environmental claims, emphasizing the need to constantly monitor the evolving regulatory landscape.

In addition to the Competition Bureau's (“Bureau") approach to tackling greenwashing, this publication will also discuss the position adopted by the Canadian Food Inspection Agency in regulating environmental claims in the food industry.

We close this article by briefly examining another aspect of advertising and marketing where the Competition Bureau has been particularly active over the past year and continues to focus: drip-pricing.

By understanding and adhering to these new regulations, businesses can not only avoid legal pitfalls but also build trust with consumers who are increasingly concerned about environmental issues and transparency in marketing practices.

The Competition Act's New Provisions on Environmental Claims

False and misleading representations, including greenwashing claims, have always constituted a deceptive marketing practice under s. 74 of the Competition Act. Greenwashing is where companies make their practices or products appear more “environmentally friendly" than they really are, and it can take on many forms. Examples include using symbols that mimic third party certifications, making vague claims like “green", “safe for the environment" or “eco-friendly", and presenting incomplete or selective data to consumers.

The Bureau is a federal government regulator that enforces the Competition Act, prohibiting companies from making false or misleading claims about products or services. It targets vague, non-specific, incomplete, or irrelevant environmental claims that cannot be supported through verifiable testing methods.

Greenwashing is not a novel issue for the Competition Bureau. On January 6, 2022, the Competition Bureau adopted a strong enforcement position around greenwashing claims and announced a $3M settlement with Keurig Canada Inc. (“Keurig") over its recyclability claims for its single-use coffee pods. The Bureau found that Keurig's claims were not accurate in many areas outside of British Columbia and Quebec, where the pods are not widely accepted in municipal recycling programs. Aside from the $3M penalty, Keurig agreed to donate $800,000 to a Canadian charitable organization focused on environmental causes, pay an additional $85,000 for the Bureau's investigation costs, change its

recyclable claims and the packaging on its pods and publish a corrective notice about the recyclability of its products on its website, in social media, national and local media and in emails to its subscribers.

On June 20, 2024, the Bureau went one step further, and the Competition Act was amended to add provisions that specifically target substantiation of environmental claims. These amendments address environmental claims related to both a business product's environmental benefits as well as a business's overall environmental impact. Further, these provisions require industry to have adequate and proper substantiation based on internationally recognized methodology. This means that any statement, warranty, or guarantee about a product's environmental benefits must be supported by solid evidence. The burden of proof lies with the business making the claim, ensuring that consumers are not misled by false or exaggerated environmental benefits.

The concept of “internationally recognized methodology" is not defined under the Act and remains ambiguous. However, the Bureau has launched a public consultation on the development of new guidance to inform the enforcement of environmental claims. This initiative, which invites stakeholders to provide comments until September 27, 2024, will hopefully shed some light on this matter. In the meantime, the following standards for adequate and proper testing published by the Bureau continue to apply to environmental claims. For the testing to be considered adequate and proper, it must:

- Be conducted before the claim is made;
- Be done under controlled circumstances to eliminate external variables;
- Eliminate bias as much as possible;
- Reflect the real-word use of a product; and
- Support the general impression made by the claim.

Enforcement Measures under the Competition Act: New and Old

Such heightened substantiation standards have come into force in the wake of skyrocketing penalties for businesses found to be engaging in deceptive marketing. The last wave of amendments to the Competition Act in June 2022 introduced significantly larger administrative monetary penalties (AMPs). Previously capped at CAD $10 million for a first infringement, AMPs can now be up to three times the value of the benefit derived from the deception or, if this cannot be reasonably determined, up to 3 percent of a company's annual worldwide gross revenues.

The penalty increase in Canada was introduced to address concerns that the prior AMPs were so insignificant from a monetary perspective that they did not operate to deter the bad practices from the world's largest firms. Accordingly, to provide a strong financial incentive for businesses to comply with the Competition Act, the Bureau's view was that AMPs must be “greater than the profit that the [firm] might realize as a result of its anti-competitive conduct."

Additionally, liability is not limited to AMPs. Businesses face another significant risk: private actions. Pursuant to the Act's amendments, private parties can request permission from the Competition Tribunal to file applications for alleged deceptive marketing or misleading advertising, including claims about environmental benefits, if the Tribunal is satisfied “that it is in the public interest to do so". Thus, rather than depending exclusively on the Bureau to challenge misleading practices, private individuals can now bring such cases before the Tribunal. The term “public interest" remains undefined in the Act, which is

anticipated to cause some ambiguity until further case law clarifies the matter. It is worth pointing out that non-governmental organizations (NGOs) and advocacy groups will probably leverage this new enforcement mechanism for strategic litigation, especially concerning greenwashing allegations.

We also note that these private rights will only take effect as of June 20, 2025. Penalties for successful private applications may include temporary orders, interim injunctions, prohibition orders, restitution orders, and administrative monetary penalties up to 3% of a corporation's worldwide gross revenues.

In addition to the new enforcement measures mentioned above, businesses should still be mindful of the existing enforcement methods, which are less burdensome. For instance, a group of six Canadian residents can file a formal complaint with the Competition Bureau, prompting an investigation into alleged greenwashing.

Limited Availability of Enforcement Guidance (So Far)

Previously, the Competition Bureau provided guidelines to help businesses navigate these requirements, but these guidelines have been archived since November 24, 2021 as they no longer reflected the latest standards. There is ongoing discussion about the Bureau issuing new guidance reflecting the updated provisions, offering more refined environmental claims criteria.

With this goal in mind, in July 2024, the Competition Bureau launched a public consultation to gather feedback on these new provisions (ending on September 27, 2024), with these exchanges informing its future enforcement guidance. This consultation is an important step in ensuring transparency and predictability with respect to these provisions, helping businesses navigate the complexities of compliance.

In the meantime, the Competition Bureau has issued a one-page bulletin summarizing the key aspects of the new provisions. This bulletin highlights the importance of transparency and accuracy in environmental claims and underscores the Bureau's commitment to cracking down on greenwashing.

Practical Advice for Businesses Concerning Environmental Claims

Despite the increased emphasis on enforcement, the Bureau has issued minimal guidance thus far on making environmental claims, and has yet to provide substantive direction similar to what is available in other jurisdictions — notably, the U.S. Green Guide, UK Green Claims Code and New Zealand Environmental Claims Guidelines. Nonetheless, as businesses await more detailed guidance from the Bureau, it is evident that minimizing greenwashing risks can be achieved by making sure that:

Claims are accurate and specific: Claims that make general statements about their environmental impact, and which are not reinforced by a robust methodology supporting the claim, are more likely to be misleading. Businesses are encouraged to use clear and prominent explanatory/qualifying statements to accompany environmental claims, as applicable and appropriate;

Claims are substantiated and verifiable: Claims must be tested, and all tests must be conducted in good faith and documented before the claim is made. Businesses should review published guidance from regulatory agencies and CSA/ISO standards, study their product's waste and emissions to understand

environmental impact, and consider third-party certifications for validation.

Claims are relevant: Claims must be specific to a particular product and used only in the appropriate context. For example, it would be improper to imply that a claim covers the entire lifecycle of a product when it only covers a portion.

Claims do not mislead consumers into believing they are endorsed by a third-party organization: A company cannot trick consumers into thinking their business practices have been affirmed by an environmental organization. Be careful when using colors, logos, or adjectives that are usually linked to third-party organizations.

Implications for Advertisers and Marketers

For advertisers and marketers, these changes mean a more rigorous approach to crafting environmental claims that are made to the public, whether they are made on websites, in advertising, on packaging or labels (including logos), and on any other marketing materials. It's not sufficient to simply state that a product is “eco-friendly" or “sustainable." More specificity in claims is required, for example, performance standards or product characteristics, that are substantiated with credible evidence, which could involve scientific testing, third-party certifications, or other forms of validation.

This shift towards greater accountability is likely to impact marketing strategies significantly. Businesses will need to invest more in research and development to ensure their products meet the new standards. Additionally, marketing teams will need to work closely with legal and compliance departments to ensure that all claims are thoroughly vetted before they are made public.

Other Federal Regulators Monitoring: CFIA Targets Environmental Claims in the Food Industry

The Competition Bureau is not alone in fixing its sights on greenwashing; recently, the Canadian Food Inspection Agency (“CFIA”) has also begun to scrutinize environmental claims in the food industry. These agencies are particularly focused on ensuring that any claims concerning the environmental benefits of food products appearing on labels and packaging are substantiated. This includes claims related to organic farming, sustainable sourcing, and other environmentally friendly practices. As Canada is a world leader in agriculture, the CFIA's on-going monitoring and policy developments in this area will have applications in many sub-industries.

The CFIA has outlined that all method of production claims on food labels must be accurate, truthful, and not misleading. The CFIA also provides several best practices, emphasizing that businesses should ensure that claims are truthful, specific, substantiated and verifiable. Claims should also not exaggerate the environmental benefits of any products, should not result in misinterpretation, and should not imply endorsement by any third-party organization if this is not the case.

While not mainly centered on environmental issues, the CFIA has set strict guidelines on related concepts that businesses must adhere to. For instance, if a product is labeled as “organic," it must meet the standards set by the Organic Products Regulations. Similarly, claims about sustainable sourcing must be backed by credible certifications or evidence. This ensures that consumers are not misled by false or exaggerated claims about the environmental benefits of food products.

Moreover, the CFIA has been proactive in educating businesses about the importance of accurate environmental claims, even making available an Industry Labelling Tool on their website to help businesses understand the regulatory requirements and best practices for making claims on product labels.

We anticipate that other federal regulators, such as Health Canada, will also pursue opportunities to ensure that related claims made on products and services regulated by laws it administers are also appropriately represented and substantiated.

Drip Pricing: An Ongoing Concern

Drip pricing is another area of focus for the Competition Bureau. Drip pricing is the term used to describe the practice of advertising a product or service at a base price, only to reveal additional mandatory fees later in the purchasing process. These hidden fees can mislead consumers and operate to prevent them from making informed purchasing decisions.

The Competition Bureau has been actively pursuing cases related to drip pricing. In June 2024, the Bureau entered into a consent agreement with Sirius XM Canada Inc. ("Sirius") over drip pricing where Sirius was fined with a $3.3 M administrative monetary penalty for discrepancies between the price as advertised and as ultimately paid by consumers, which resulted from the addition of music royalties and administrative fees.

Further, in May 2023, the Competition Bureau took legal action against Cineplex, Canada's largest theater operator, for allegedly advertising misleading ticket prices. The Bureau claimed that Cineplex was adding a mandatory CAD $1.50 online booking fee to the advertised ticket prices, making the initial price unattainable. The Commissioner of Competition claims that Cineplex made $40 million from this practice since 2022. The Competition Bureau's case against Cineplex is still in process as of the time of this publication. However, following earlier investigations by the Competition Bureau, Ticketmaster was fined CAD $4 million in 2019 and StubHub was fined CAD $1.3 million in 2020, both for engaging in drip pricing.

The Evolution of Drip Pricing Regulations

The issue of drip pricing has been on the Competition Bureau's radar for a few years. Amendments brought to the Competition Act in June 2022 explicitly recognized drip pricing as a harmful business practice. These amendments were a significant step forward in protecting consumers from hidden fees and ensuring transparency in pricing.

Over the years, the Competition Bureau has taken action against various industries, including car rental companies and online ticket sales platforms as a result of hidden fees that qualified as drip pricing. In order to identify and address deceptive practices more effectively, the Competition Bureau encourages consumers to report any instances of hidden fees or misleading pricing practices through their online complaint form.

Businesses must clearly disclose all mandatory fees and ensure the advertised price is the true amount consumers will pay. Prices shown in any media (e.g. email, billboards, social media, television, etc.) should reflect the final cost, excluding government-imposed sales taxes. Businesses will need to pay close

attention to the prices they advertise to their customers across all media to ensure consistent and compliant pricing practices.

Impact of Misleading Advertising on Brand Integrity and Consumer Trust

What these recent trends of increased regulatory scrutiny tell us is that building and maintaining consumer trust is more critical than ever. Consumers vote with their pocketbooks; companies that can demonstrate genuine commitment to transparency and sustainability are likely to stand out in the competitive market. As this area of regulatory law seems to be ever-evolving in Canada and stakeholder scrutiny in this domain is ever-increasing, businesses may consider adopting a proactive approach that involves not only complying with existing regulations but also going above and beyond to ensure that their business practices are clear, honest, and presented in a manner that fosters consumer trust and goodwill.

Given the heightened regulatory environment, businesses should adopt proactive strategies to ensure compliance with the Competition Act's provisions on environmental claims and drip pricing. Best practices may include:

1. **Conducting thorough testing and validation**: Businesses should ensure that all environmental claims are supported by credible evidence. This may involve scientific testing, third-party certifications, or other forms of validation. Businesses should also maintain detailed records of all supporting evidence.
2. **Implementing transparent pricing practices and regular updates**: Businesses should clearly disclose all mandatory fees upfront, ensuring that the advertised price is the actual price consumers will pay. Moreover, staying up to date on local pricing laws (particularly for national campaigns) is equally as important. For instance, all-in pricing in advertising has been a required market practice under Quebec's consumer protection legislation and is often the source of class actions in that province.
3. **Clear communications**: Use clear and straightforward language when communicating claims or prices to consumers. In Canada, any ambiguity will be interpreted in favor of the consumer. Further, it is required under consumer protection legislation in most provinces to expressly bring certain prescribed disclosures in internet agreements to the consumer's attention. Moreover, businesses should not rely on disclaimers or fine print to correct the general impression conveyed by the main claim or main advertised price.
4. **Engaging in continuous monitoring and auditing**: Businesses should establish a compliance program that includes regular monitoring and auditing of marketing and pricing practices. This can help identify potential issues early and ensure ongoing compliance with regulations.
5. **Educating and training staff**: Train their marketing, sales, and customer service teams to iterate the importance of making transparent and truthful claims. Businesses should ensure that all teams are aware of the general regulatory requirements as well as the business' own specific commitments in terms of advertising their products and services.
6. **Engaging with regulatory bodies**: Businesses should participate in public consultations and engage with regulatory bodies to stay informed about upcoming changes and provide feedback on proposed regulations. This can help businesses stay ahead of the curve and adapt to new requirements more effectively.

Conclusion

The new provisions in the Competition Act, along with increased inquiry from the CFIA, mark a significant shift in the advertising and marketing landscape. The focus on greenwashing and drip pricing is part of a broader effort to enhance consumer trust in the marketplace. By ensuring that all environmental claims are substantiated and verifiable, the relevant regulatory authorities can ensure that businesses are not misleading consumers with surface-level or abstract claims in order to increase their profits or market share. By cracking down on misleading claims and hidden fees, the Competition Bureau aims to create a more transparent and fair environment for consumers.

This level of regulatory oversight is particularly important in an era where consumers are increasingly concerned about supporting value-driven businesses whose practices are sustainable and ethical.

To this end, governments have raised the bar for businesses, who must now navigate a more complex regulatory environment, ensuring that all environmental claims are backed by solid evidence and that pricing practices are transparent and fair. Businesses that can adapt to these changes and demonstrate a genuine commitment to transparency and sustainability will be well-positioned to succeed in a competitive market in which stakeholder demand for corporate accountability is growing.

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