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More Greenwashing Cases Lead to Litigation in Canada

Regulators and environmental organizations are increasingly focusing on seeking to hold companies liable for "greenwashing". "Greenwashing" refers to the practice of making misleading or unsupported claims about the sustainability or environmental qualities of a product, service, or business.

While litigation and regulatory actions targeting alleged greenwashing have historically been relatively rare in Canada, the landscape is gradually evolving; regulatory penalties penalizing greenwashing practices are increasing, and litigation is becoming more common. Consequently, companies that make public statements about the environmental performance of their products or businesses may face increased risk of potential liability.

Competition Law Updates

The Competition Bureau (the "**Bureau**") is responsible for enforcing multiple statutes that prohibit false or misleading representations concerning products or business interests. Among these statutes, the *Competition Act* (the "**Act**") holds the broadest scope and imposes the most substantial penalties for non-compliance. The Bureau prohibits misleading representations through two key provisions:

- Subsection 52(1) of the Act makes it a criminal offence for a person to promote a product, service or business interest by knowingly or recklessly making claims that are false or misleading in a "material" respect.
- Section 74.01(1)(a) of the Act, in contrast, is a civil prohibition against deceptive marketing that allows the Bureau or private litigants to seek redress for alleged greenwashing. This section,

similar to the criminal prohibition in section 52, forbids a person from making a representation to the public that is false or misleading in a "material" respect.

In both instances, a claim is deemed false or misleading not solely by the literal interpretation of the words, but also by the overall impression it creates. The significance of the alleged misrepresentation is determined by whether the information, if accurately presented, could affect consumer behavior, such as prompting a purchase or use of a product or service.

The Act recently underwent significant changes in 2022, introducing notably higher administrative monetary penalties ("**AMP**") for violations of its civil sections. Previously, the maximum AMP was set at \$10 million (Canadian Dollars) for a first offense. However, the recent amendments allow for AMPs of up to three times the ill-gotten gains from the deceptive practices. If determining this amount proves unfeasible, penalties can reach up to 3 percent of a company's global annual revenue. These penalties now have grown to surpass those currently imposed by the U.S. Federal Trade Commission for similar offenses.

Furthermore, if the Bureau suspects a violation of the criminal section of the Act, it can refer the case to the Public Prosecution Service of Canada for criminal prosecution. In the event of a conviction, the court has the authority to impose an unrestricted fine and a maximum prison sentence of 14 years.

Recent Competition Bureau Enforcement

The Competition Bureau has been actively addressing greenwashing in recent years, investigating companies making false or misleading environmental claims. One such

investigation targeted Keurig Canada Inc.'s claims regarding the recyclability of its single-use coffee pods. The Bureau's inquiry found that these claims were deceptive, as most municipalities outside of British Columbia and Quebec did not accept the coffee pods or required complex recycling preparation. In January 2022, Keurig reached a settlement with the Bureau, agreeing to pay a C\$3-million penalty, donate C\$800,000 to environmental charities, and cover the C\$85,000 investigation cost.

More recently, Greenpeace Canada filed a complaint with the Competition Bureau against the Pathways Alliance, a coalition of six major oil sands producers. Greenpeace alleged that the "Let's clear the air" advertising campaign contained false and misleading representations. The complaint focused on Pathways' claims of emissions reduction while expanding fossil fuel production, lobbying against climate action, and failing to meet its emission targets by not accounting for lifecycle emissions. The Competition Bureau confirmed it was investigating Greenpeace's complaints, and the results are expected in the coming months.

Although enforcement has increased, the Bureau has decreased its regulatory guidance on environmental claims. For example, the Bureau recently archived its previous guiding document titled 'Environmental Claims: A Guide for Industry and Advertisers' (the "**Guide**"), noting that it may no longer align with the Bureau's current policies and practices. In place of the detailed Guide, the Bureau has introduced more general guidance on its website. This change has left businesses with increased ambiguity regarding the requirements for substantiating environmental claims.

Potential for Climate-Change Litigation

The increase in Bureau investigations into businesses' environmental marketing claims is, in

part, a response to a new strategy employed by environmental activists. These activist groups have begun initiating applications under section 9 of the Act. This section allows six individuals to request the Commissioner of Competition to initiate an inquiry into conduct that violates the misleading advertising provisions of the Act. Notably, the recent greenwashing investigations conducted by the Bureau seem to have emerged from the use of section 9 applications.

Companies accused of "greenwashing" are also vulnerable to individual litigation pursuant to Part IV of the Act. Under subsection 36(1) of the Act in Part IV, individuals who have suffered losses or damages due to conduct contrary to Part VI of the Act, which includes section 52, have a statutory right of action. As climate change class actions continue to proliferate, particularly in non-Canadian jurisdictions such as the United States, prospective plaintiffs are increasingly likely to utilize this statutory right of action, along with provincial consumer protection statutes, to launch class proceedings related to alleged greenwashing.

Looking Forward

As companies persist in highlighting their ESG attributes across their products and business operations, cases of greenwashing and ESG-related lawsuits, including class actions and shareholder activism litigation, will continue to evolve within the Canadian landscape. Moreover, an increase in corporate governance and directors and officers proceedings linked to ESG issues can be expected, encompassing derivative actions and oppression remedy claims.

ESG litigation and regulatory proceedings are progressively becoming a substantial risk factor for corporations, their management, and directors.

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