

## GREENWASHING: WHAT IT IS AND WHY IT MATTERS

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*In marketing, companies often tout the environmental benefits, or environmental superiority, of their products. As environmental issues are becoming top of mind for consumers, many companies want to emphasize that their products have certain desirable qualities, such as being biodegradable, recyclable, or sourced from sustainable materials. But when exactly are these claims appropriate, and when does emphasizing these “green” qualities cross the line into misleading consumers about the environmental benefits of a product?*

*Pour commercialiser leurs produits, il n'est pas rare que les entreprises en vantent les bienfaits ou la supériorité sur le plan environnemental. L'environnement étant de plus en plus une préoccupation pour les consommateurs, bon nombre d'entreprises insistent sur les vertus de leurs produits : ils sont biodégradables, recyclables ou faits de matériaux durables. Mais comment savoir si ces prétentions écologiques sont justes et ne relèvent pas davantage de la publicité trompeuse?*

### 1. What is Greenwashing?

**G**reenwashing involves making environmental (i.e., “green”) claims which may leave consumers with the impression that a company or a product or service is “environmentally friendly” when in fact it is not. Greenwashing may, for example, involve claims that a product is “biodegradable”, “non-toxic”, or “made from natural ingredients”, or may include more specific claims related to the materials or the amount of energy used to produce a product. The use of a third-party logo or seal, for example, a logo showing that a product is “Certified Organic”, is another type of green claim. Greenwashing can involve either comparative (as against a competitor’s product or service) or absolute environmental claims.

The Canadian Standards Association Group (the “CSA”) (as described in more detail below) sets out a useful categorization of different types of green claims. The CSA considers three types of claims:

- **Type I Claims:** These are environmental labels, logos, certificates, etc. which generally give consumers an indication of the environmental preferability of a product. These labels are administered by an independent third party which will have a certification process or some

series of requirements or criteria that must be met before a company can display their label or logo. For example, use of the “FairTrade” logo that is seen on many coffee products by a company would be considered a Type I environmental claim by the company using the logo.<sup>2</sup>

- **Type II Claims:** These are self-declared environmental claims and are likely the most common type of environmental claims. Self-declarations can appear, for example, in advertisements, on packaging or labels, on a company’s website, or in any other type of communication from a company. These types of claims can include self-declarations that a product is, for example, “organic”, “sulfate free”, “ethically sourced”, “biodegradable”, or “green”. Type II claims have generally been the focus of most jurisdictions’ enforcement and guidance with respect to greenwashing, as compared to the other types of claims.
- **Type III Claims:** These claims include the declaration of quantified environmental information on the life cycle of a product, similar to a nutrition label on food products. These types of claims include detailed, comprehensive data lists that completely profile a product (or service) and are generally used in business-to-business interactions, although they are sometimes used in business-to-consumer interactions as well.

Greenwashing—as a form of misrepresentation—can potentially be considered false or misleading advertising. As such, green claims by companies could potentially be in contravention of Canada’s *Competition Act* (the “Act”), as well as in contravention of various other laws which regulate misleading advertising and misrepresentations, including securities laws, provincial consumer protection laws and personal injury (tort) law.

Greenwashing is becoming increasingly prevalent in recent years. A global sweep of over 500 websites by the International Consumer Protection Enforcement Network (“ICPEN”)<sup>3</sup> and the UK Competition and Markets Authority (the “CMA”)<sup>3</sup> found that over 40% of these websites appeared to be using green advertising tactics that could be considered misleading and therefore may be in contravention of applicable consumer protection laws.<sup>4</sup> A similar website sweep undertaken by the European Commission found that 42% of green claims reviewed were either exaggerated, false or deceptive and could potentially qualify as unfair commercial practices.<sup>5</sup> Another sweep of sustainability advertisements undertaken by the European Commission found that in almost half of the claims reviewed, there was a reason

to believe that the claim may be false or deceptive and potentially an unfair commercial practice under the applicable consumer protection laws.<sup>6</sup>

This increase in green claims (and potential greenwashing) by companies is likely in response to the increasing concern which consumers are exhibiting with respect to the environmental impact of the goods and services which they purchase. In fact, some studies have found that the vast majority (approximately 73%) of consumers globally would change their consumption habits to reduce their environmental impact.<sup>7</sup>

In response to the increasing prevalence of environmental advertising, many international jurisdictions are renewing their focus on the regulation of green claims. Various jurisdictions (including the European Union, the United Kingdom, and the United States,) are revisiting their legislation, policies and guidance relating to the regulation of environmental claims. Various countries are also putting together task forces and undertaking market studies to assess just how big the issue of greenwashing is, and how it can be addressed.

As such, it would not be unexpected if Canada also saw increased interest with respect to the regulation of environmental claims, which may in turn mean increased enforcement through public and private channels alike. In fact, the Competition Bureau (the “**Bureau**”) has announced that it will be hosting its first “Competition and Green Growth Summit”, which is focused on the interaction of competition law and sustainability.<sup>8</sup> In the Bureau’s press release announcing this summit, it highlights that “Canada and other countries across the world are taking significant actions to move towards a greener economy. Environmental and sustainability measures such as carbon taxes, net-zero targets and [e]nvironmental, [s]ocial, and [g]overnance factors are impacting business competitiveness more and more. Consumers are also changing their buying habits because of their growing environmental consciousness.” The summit will occur on September 20, 2022. Accordingly, it is increasingly important for Canadian companies to carefully consider the environmental claims they are making in the context of applicable laws, both domestically and internationally.

This article examines the legal regimes applicable to environmental claims in Canada, including competition, securities and consumer protection laws. It also provides a brief summary of the treatment of such claims in other jurisdictions where there has been a recent increase in interest in greenwashing issues, including the United States, European Union and United Kingdom, among others.

Given the increased enforcement in this area, and given the lack of guidance from the Bureau (along with the lack of judicial guidance in case law in Canada), it is increasingly necessary for the Bureau to provide updated guidance with respect to environmental claims and related evolving issues in Canada. Moreover, due to the international nature of many businesses operations, it would be practical and beneficial if such new guidance from the Bureau was sufficiently detailed, practical and, where possible, consistent with the guidance being provided internationally.

## 2. Canada

### a) Competition Law Enforcement

In Canada, greenwashing—as a form of misleading advertising—is largely governed by the Act. Specifically, section 74.01(1) of the Act sets out the general prohibition against making representations to the public for the purposes of promoting a product, service or business interest that are false or misleading in a material respect.<sup>9</sup>

A representation is “false” if the representation is, when properly construed, incorrect or inaccurate. A representation is “misleading” if it conveys an inaccurate or incorrect general impression, after giving consideration to all the surrounding circumstances.<sup>10</sup> A representation can be literally true, and still be considered misleading. A representation is considered “material” if it would likely influence an “ordinary citizen” in “deciding whether or not [they] would purchase the product.”<sup>11</sup>

Section 52(1) of the Act contains the criminal prohibition against misleading advertising. This section prohibits a person from *knowingly or recklessly* engaging in the activities prohibited by section 74.01(1). It is this mental element that differentiates these two provisions.

Where a court finds, on an application brought by the Commissioner of Competition (the “**Commissioner**”), that a person has violated section 74.01(1) of the Act, the court may order the person not to engage in the impugned conduct, to publish a corrective notice and/or to pay an administrative monetary penalty of up to the greater of (i) \$750,000 (for a first offence) and (ii) three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined. The administrative monetary penalties that could be awarded against a corporation are the greater of (i) \$10 million (for a first offence) and (ii) three times the value of the benefit derived from the conduct in question or, if that amount cannot be reasonably determined, 3% of the corporation’s annual

worldwide gross revenues. Where a person is found on indictment to have committed an offence under section 52(1) of the Act, they are liable for a fine (at the discretion of the court), imprisonment not to exceed one year, or both.<sup>12</sup> On a summary conviction under section 52(1) of the Act, a person is liable for a fine not to exceed \$200,000, imprisonment not to exceed one year, or both.<sup>13</sup>

The Bureau is also responsible for enforcement under two additional acts: the *Consumer Packaging and Labelling Act*, and the *Textile Labelling Act*. Each of these acts also contains provisions against misleading advertising that may be contravened by certain greenwashing practices.<sup>14</sup>

### i) Public Enforcement

Pursuant to the Act, the Commissioner, through the Bureau, can investigate conduct that the Commissioner has reason to believe may, or is about to, contravene different provisions of the Act. The Act grants the Commissioner numerous investigative powers to pursue their inquiries. As deceptive marketing is a “dual track” (i.e., criminal *or* civil) offence under the Act, the Bureau will have to choose whether to pursue potentially false or misleading representations under either the civil or criminal enforcement track. Generally, the Bureau will pursue only the most egregious conduct under the criminal track, which requires proof of recklessness or knowing intent.

As part of Canada’s presidency of ICPEN for 2020-2021, the Bureau announced that environmental misleading advertising claims would be one of its areas of focus.<sup>15</sup> ICPEN has since worked with other competition authorities, such as the United Kingdom’s Competition Markets Authority, to investigate the prevalence of greenwashing.<sup>16</sup> It is foreseeable that the increased focus on greenwashing by the Bureau in connection with its ICPEN presidency will carry over into its enforcement priorities in Canada moving forward.

That being said, this is not a new issue for the Bureau, which has investigated many instances of potential greenwashing in the past. For example:

- In 2010 the Bureau came to an agreement with a United States paint products company which was claiming that its products were made of biodegradable material, noting that its biodegradability could be dependent on conditions of use or disposal. The Bureau noted that, as per its environmental claims guidelines (discussed below), claims of biodegradability should not be made if a product releases any substances in concentrations harmful to the environment during

disposal or the degradation process. The company agreed to remove these claims from its products sold in Canada.<sup>17</sup>

- In 2013, the Bureau reached consent agreements with each of Hyundai Auto Canada Corp. (“**Hyundai**”) and Kia Canada Inc. (“**Kia**”).<sup>18</sup> These agreements each related to fuel consumption ratings that had been allegedly incorrectly represented in marketing and advertising materials for certain Hyundai and Kia vehicles sold in Canada. More specifically, Hyundai and Kia had allegedly each made representations regarding the fuel consumption of certain vehicles, based on testing that had been conducted at joint testing facilities in Korea. However, due to errors at this testing facility, the fuel consumption representations were incorrect. Accordingly, in each case, the Commissioner concluded that the representations contravened the civil deceptive marketing provisions of the Act.
- In 2016, Volkswagen Group Canada Inc. (“**Volkswagen**”) and Audi Canada Inc. (“**Audi**”) entered into a consent agreement with the Commissioner with respect to a contravention of the misleading advertising provisions of the Act (the “**2016 Volkswagen/Audi Consent Agreement**”).<sup>19</sup> Representations had been made to the Canadian public promoting certain Volkswagen and Audi vehicles as being environmentally friendly and equipped with 2.0 litre clean diesel engines, which had reduced emissions and were cleaner than equivalent gasoline engines in Canada. In fact, the engines emitted nitrogen oxide emissions up to levels that well exceeded the standards to which they were certified. Accordingly, the Commissioner concluded that the representations contravened s. 74.01(1)(a) of the Act. To remedy the issue, an “Owner Credit Package” was voluntarily established by Volkswagen and Audi to owners and lessees of the affected vehicles, including pre-paid credit cards for use generally and in their dealerships, as well as free service visits and three years of roadside assistance. Volkswagen and Audi also agreed to pay an administrative monetary penalty of \$7.5 million each.
- In 2018, Volkswagen, Audi and Porsche Cars Canada, Ltd. (“**Porsche**”) were subject to a subsequent investigation by the Bureau regarding similar representations to those discussed above made in respect of 3.0 litre engines. A further consent agreement was reached with these parties, whereby they agreed to, among other things, that Volkswagen and Audi pay an administrative monetary penalty of \$1.25 million each (the “**2018 Volkswagen/Audi/Porsche Consent Agreement**”).<sup>20</sup>

- Most recently, at the outset of 2022, the Bureau concluded its investigation into Keurig Canada Inc. (“**Keurig Canada**”)’s environmental claims made to consumers regarding the recyclability of Keurig Canada’s single-use coffee pods.<sup>21</sup> The Bureau concluded that these claims were false or misleading in geographic areas where the pods were not widely accepted for recycling programs, specifically in all provinces except Quebec and British Columbia. The Bureau concluded that Keurig Canada’s claims describing the steps required to prepare its pods for recycling were false or misleading in certain municipalities. Specifically, the Bureau concluded that while Keurig Canada’s recyclable claims suggest to consumers that by peeling the lid off and emptying out the coffee grounds, the pods could be recycled, some local recycling programs require additional steps to recycle the pods.<sup>22</sup> As a result of the consent agreement between the Bureau and Keurig Canada following this investigation, Keurig Canada was required to pay a \$3 million penalty, donate \$800,000 to a Canadian charitable organisation focused on environmental causes, and pay an additional \$85,000 for the costs of the Bureau’s investigation. Pursuant to the consent agreement, Keurig Canada agreed to change its recyclable claims and the packaging of certain pods, and publish corrective notices about the recyclability of its product on its websites, on social media, in national and local news media, in the packaging of all new brewing machines and via email to its subscribers.<sup>23</sup>

Notably, in commenting on the conclusion of the Keurig investigation, the Commissioner reiterated the Bureau’s concern over the increase of greenwashing marketing practices and its commitment to consumer protection. The Commissioner stated: “portraying products or services as having more environmental benefits than they truly have is an illegal practice in Canada. False or misleading claims by businesses to promote “greener” products harm consumers who are unable to make informed purchasing decisions, as well as competition and businesses who actually offer products with a lower environmental impact”.<sup>24</sup>

## ii) Private Enforcement

Under section 36 of the Act, an individual can bring a suit before either a Provincial Superior Court or the Federal Court with respect to conduct contrary to the criminal offences of the Act—including the criminal misleading advertising provisions—if that individual suffered loss or damage as a result of the conduct. Where successful, a plaintiff can recover single and actual damages suffered (i.e., full and fair compensation which places the

plaintiff in the same position it would have been in but for the conduct).<sup>25</sup> The Act also allows private actions to proceed by way of class action, which is the most common form of private competition proceeding in Canada.

A number of class actions have been pursued which allege greenwashing contrary to the Act, among other laws. For example:

- Class action lawsuits were pursued in relation to the Volkswagen, Audi, and Porsche emissions representations, discussed above. In relation to the conduct underlying the 2016 Volkswagen/Audi Consent Agreement, a class action resulted in a settlement requiring Volkswagen and Audi to pay \$2.1 billion to consumers.<sup>26</sup> In relation to the conduct underlying the 2018 Volkswagen/Audi/Porsche Consent Agreement, a class action resulted in a settlement of \$290.5 million, representing buyback, repair, and restitution payments for affected customers.<sup>27</sup>
- In *Kalra v Mercedes Benz*,<sup>28</sup> a class action was brought on behalf of all persons and corporations in Canada who own, owned, lease or leased a BlueTEC Mercedes-Benz vehicle between 2006 to 2016. The plaintiff alleged the vehicles contained a defect or “defeat device” that turned off the emission control system when the ambient air temperature dropped below 10 degrees Celsius, resulting in the emission of high and illegal levels of nitrogen oxide pollution. The class action alleges a wide range of statutory and common law claims, including that false or misleading statements were made contrary to the Act.

In addition to private enforcement under the Act, Ad Standards, a private self-regulatory body, also monitors misleading advertising in Canada. Ad Standards’ mandate is to build “public confidence in advertising by helping ensure ads in all media, are truthful, fair and accurate.” Essentially, Ad Standards will investigate complaints from private parties regarding alleged misleading advertising. Where an advertisement is found to contravene Ad Standards’ code, Ad Standards will “name and shame” the company, posting a summary of its decision on the Ad Standards website.

Ad Standards has published the *Canadian Code of Advertising Standards* (the “Code”) which sets criteria for acceptable advertising and provides a mechanism for adjudicating and resolving consumer complaints and competitive disputes.<sup>29</sup> With respect to environmental claims, Ad Standards has noted that in most cases it would review these under Clause 1 of the Code: Accuracy and Clarity.



Ad Standards has investigated various environmental claims, including the following:

- In 2020, an advertisement which claimed the product used less water than its competitors and “joked” about the benefits of using less water was found to be in contravention of Clause 1(a) of the Code. Although it had evidence to support the comparative claim, it was found to contravene the Code on the basis that the “joked” about benefits of using less water were exaggerated and may be taken seriously as “water scarcity is a very serious issue”.<sup>30</sup> The company in this case was not identified.
- In 2019, an unidentified transit advertisement claimed that natural gas was a more environmentally friendly choice. Ad Standards found that the correct frame of reference for the advertisement was in relation to residents of British Columbia where the advertisement was seen. In that context, the general impression created would be a likely comparison of hydro against natural gas. The advertisement did not clearly indicate that the claim was based, instead, on a comparison with coal and accordingly was found to contravene Clause 1 (b) of the Code.<sup>31</sup>
- In a 2018 television commercial, an advertiser specifically claimed that the advertised product could improve the environment in certain specified ways. Ad Standards found that the evidence provided did not support the claim and as such the claim was in contravention of Clause 1(a) and (e) of the Code. The company in this case was not identified.
- In 2017, Ad Standards found that an advertisement by real estate group, claiming that its new condominium development would not impact a nearby fish hatchery and aquifer was contrary to Clause 1(a) and (e) of the Code as, among other things, the claim was unsupported by the evidence provided to Ad Standards.<sup>32</sup>
- In 2017, in a newspaper advertisement about making sustainable energy choices, an advertiser used the words “renewable natural gas”. The advertiser explained that “renewable natural gas” (as opposed to conventional natural gas) is produced from decomposing organic waste from landfills, agricultural waste, and wastewater from treatment facilities. However, as the advertisement contained no explanatory statement clarifying that it was referring to “renewable natural gas” as opposed to conventional natural gas, Ad Standards

found that the impression the advertisement conveyed was misleading and, as such, the advertisement was in contravention of 1(a) and (d) of the Code.<sup>33</sup> The company in this case was not identified.

## **b) What Guidance is currently available to Canadian Businesses?**

### **i) Guidance from the Competition Bureau**

In 2008, the Bureau published *Environmental Claims: A guide for industry and advertisers* (the “**Environmental Claims Guide**”), which was intended to act as guidance with respect to the Bureau’s enforcement of the misleading advertising provisions of the Act, the *Consumer Packaging and Labelling Act*, and the *Textile Labelling Act* in the context of environmental claims. The Environmental Claims Guide was released in conjunction with the CSA.

The CSA is a standard setting body affiliated with the Standards Council of Canada (the “**SCC**”). The SCC represents Canada at the International Organization for Standardization (the “**ISO**”) - a worldwide federation of national standards bodies. The ISO publishes various standards which, while not mandatory, are adopted by many organizations internationally and generally serve as a best practices guide. The CSA/ISO have adopted several standards related to environmental claims. These include *CAN/CSA ISO 14021: Environmental labels and declarations—Self declared environmental claims (Type II environmental labelling)* (“**ISO 14021**”). The Environmental Claims Guide was based on a large part on the version of ISO 14021 published in 1999 and was intended to act as a best practice guide with respect to the application of ISO 14021 in addition to acting as guidance with respect to the application of the Act to Type II Claims. Further environmental claims standards published by the CSA are discussed below in more detail.

As of November 4, 2021, the Environmental Claims Guide was archived by the Bureau.<sup>34</sup> The Bureau noted that the Environmental Claims Guide may not reflect its current policies or practices and acknowledged that the Environmental Claims Guide does not reflect the latest standards and evolving environmental concerns. The guide will remain available for reference, research, and recordkeeping purposes, but it will not be altered or updated as of the date of archiving. Unfortunately, no new substantive guidance has yet been published by the Bureau in place of the Environmental Claims Guide, and there has been no suggestion of when such guidance should be expected. In the meantime, the Bureau offered limited guidance

in a bulletin dated November 3, 2021 (the “**2021 Greenwashing Bulletin**”), stating simply that advertisers should be sure that all environmental claims:

- are truthful and aren’t misleading;
- are specific (*be precise about the environmental benefits of the 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 the product; and
- do not imply that the product is endorsed by a third-party organization if it is not.<sup>35</sup>

The 2021 Greenwashing Bulletin also notes that businesses should avoid vague claims such as “eco-friendly” or “safe for the environment”, and that all claims should be, as applicable, based on adequate and proper testing.<sup>36</sup> Additionally, the Bureau stated that when assessing environmental claims, it may consider national and international standards, technological and scientific advances, consumer behaviour and other legal requirements. Accordingly, companies should similarly take each of these into consideration.

While the Environmental Claims Guide has been archived, it does remain available for reference. Moreover, while any new guidance will likely be substantially updated with respect to new and cutting-edge issues (such as sustainability and carbon neutral claims), one would expect that any new guidance from the Bureau will incorporate prior positions taken in relation to some of the more well established issues (such as issues with respect to recycling claims). Additionally, the Environmental Claims Guide remains the only detailed, substantive guidance provided by the Competition Bureau. As such, this guide may assist companies in the interim period until new guidance is provided by the Bureau, and it may also assist in predicting what updated guidance from the Bureau can be expected to look like. Accordingly, an overview of the Environmental Claims Guide is discussed below. However, companies should be cautious with respect to reliance on these guidelines.

The Environmental Claims Guide, as noted above, related to self-declared green claims (Type II claims, as defined by the CSA). As such, this guide did not assist businesses and industries in complying with the *Competition Act*

with respect to other types of green claims, such as the use of third-party certified eco-labels and logos.

The Environmental Claims Guide defined an environmental claim as “[a]ny statement or symbol that refers to, or creates the general impression that it reflects, the environmental aspects of any product or service ...”.<sup>37</sup> It also set out general requirements for all claims, as well as specific requirements with respect to the use of certain symbols and certain types of comparative claims.

The general requirements included the following:

- **Accurate and Verifiable:** While self-declared environmental claims specifically do not require third-party verification of supporting data prior to making the claim, the data relied on to make the claim must be available and accurate. As such, if claims are based on confidential business information which is not generally available for verification, a third party should have audited this claim. With respect to verification methodologies, ISO 14021 includes specified verification methodologies for certain types of claims defined in the standard, and includes a hierarchy of test methods that should be used for all other types of claims. Additionally, to be considered accurate, claims should be continually reassessed and updated to reflect changes in technology, competitive products or other circumstances that could affect the accuracy of the claim.
- **Life Cycle Considerations:** The Environmental Claims Guide emphasizes that the entire life cycle of a product should be considered before making claims. This includes everything from raw material acquisition or generation of natural resources to final disposal of the product, and every step in between. While a complete life cycle analysis is not mandated by the Environmental Claims Guide, it is emphasized that the entire life cycle should be considered.
- **Meaningful/ Relevant:** Claims should be made in an appropriate context and setting. For example, claims should only relate to an environmental aspect that either exists or is likely to be realized, during the life of the product. If a material is technically capable of being recycled, but recycling facilities for that material do not exist in the relevant geographic area (and are not likely to be built during the life of that product), it should not be claimed that it is recyclable. By way of further example, if a claim is based on a pre-existing but previously undisclosed aspect of a product, it should be presented in a manner

that does not lead consumers to believe that the claim is based on a recent product or process modification. If soaps used for dishes have never contained phosphate, a simple “phosphate-free” claim attached to the dish soap is inappropriate.

- **Specific:** An environmental claim that is vague or non-specific or which broadly implies that a product is environmentally beneficial or environmentally benign should not be used. Moreover, the claim should clearly specify to what aspect of the product it applies and should be specific as to the environmental aspect or environmental improvement which is claimed. Claims such as “environmentally friendly”, “ecological (eco)”, and “green” are examples of vague claims and should be reserved for products/services whose life cycles have been thoroughly examined and verified (this will require more comprehensive test results than fact specific claims, such as “contains no chlorine”). In most cases, it is best to avoid these types of vague claims. Additionally, if a comparative assertion of environmental superiority or improvement is made, a company must be specific and clear with respect to the basis for the comparison.
- **Reasonable Terminology:** In general, claims should use terminology that is unlikely to result in misinterpretation, and any likely or obvious ambiguities should be avoided. Consideration should also be given to literacy levels in the countries where the product is being sold when selecting terminology. Any claim that, despite being literally true, is likely to be misinterpreted by purchasers or is misleading through the omission of relevant facts should be avoided. Environmental claims should not be restated using different terminology to imply multiple benefits for a single environmental change. Moreover, no claim should, either directly or by implication, suggest an environmental improvement exists which does not exist, or exaggerate the environmental claim or its impact.
- **Explanatory Statements:** Self-declared environmental claims should be accompanied by an explanatory statement if the claim alone is likely to result in misunderstanding. This explanatory statement must itself not be misleading and must be presented in a manner that clearly indicates that the environmental claim and explanatory statement should be read together. For example, the explanatory statement should be of reasonable size and in reasonable proximity to the environmental claim it accompanies.

Some of the specific guidance provided in the Environmental Claims Guide included guidance on the following issues:

- claims of “... free” i.e., “pesticide free”;
- claims using specific terms, including: sustainable, compostable, degradable, designed for disassembly, extended life product, recovered, recyclable, recycled content, reduced energy consumption, reduced resource use, reduced water consumption, reusable and refillable, and waste reduction;
- comparative claims; and
- the use of symbols (including both original symbols and wellknown symbols such as the recycling Mobius loop).

There were two major limitations to the Environmental Claims Guide, which will hopefully be remedied by the Bureau if it provides new guidance. First, as noted above, it only applied to Type II claims (self declarations) and therefore did not provide companies with guidance with respect to the Bureau’s approach to other types of claims, including the use of third party-verified environmental labels.

Second, the Environmental Claims Guide was more than 12 years old when it was archived. The ISO standard that it was based upon (published in 1999) was replaced in 2016 with a new version of ISO 14021 and was further amended in 2021. As acknowledged by the Bureau, due to its age, the Environmental Claims Guide failed to provide relevant guidance on current key issues. For example, with respect to sustainability claims, the Environmental Claims Guide noted:

... The concepts involved in sustainability are highly complex and still under study. At this time there are no definitive methods for measuring sustainability or confirming its accomplishment. Therefore, no claim of achieving sustainability shall be made ...

Sustainability has become an increasingly important topic in recent years and there are many tools and methodologies that have been created to measure it.<sup>38</sup>

While the Environmental Claims Guide is incomplete and out of date, it at least provided some substantive guidance to companies. Archiving these guides without providing improved and updated guidance leaves companies in a decidedly worse and more uncertain place than before. While some

of the guidance contained in the Environmental Green Guides was obviously out of date and should not have been followed (for example, with respect to sustainability claims), it is likely that some of the guidance was useful and may still be reflective of the Bureau's current approach.

Since publishing the Environmental Claims Guide in 2008, the Bureau published additional limited guidance with respect to environmental claims:

- In 2017, the Bureau published a bulletin focusing on overly vague claims which use terms such as “organic”, “green”, “eco-friendly”, “biodegradable” or “safe for the environment”.<sup>39</sup> The bulletin emphasized that claims should be, among other things, accurate, specific, substantiated, and verifiable. While this publication from the Bureau signalled that it may be taking a closer look at overly “vague” green claims, it did not provide any additional meaningful guidance.
- On January 26, 2022, the Bureau published a short notice advising consumers to “[b]e on the lookout for greenwashing.”<sup>40</sup> This notice highlighted that there has been an increase in false and misleading environmental claims in Canada and encouraged consumers to be vigilant with respect to potential greenwashing. Among other things, this notice also highlights the need for adequate evidence and the fact that vague or broad statement such as “eco-friendly” and “safe for the environment” should not be used without further explanation.
- On April 4, 2022, the Bureau published its 2022/2023 Annual Plan (the “**Annual Plan**”), in which it noted that it will be holding a summit focused on the role of competition policy and enforcement in the green economy.<sup>41</sup>

While each of the above publications by the Bureau shows its increased interest in greenwashing, they provide little guidance to businesses wanting to comply with misleading advertising laws.

## ii) Guidance from the Canadian Standards Association

As noted above, the CSA has released several environmental claims standards. While these standards are not binding, and while the CSA, ISO and SCC have no power to enforce these standards, they are accepted in many industries as best practices guides and are adopted by many international organizations. ISO standards are also endorsed by various other internationally recognized eco-labelling bodies, such as the Global Ecolabelling Network.

These CSA standards can be viewed as best practices. The fact that the Bureau largely adopted the 1999 version of ISO 14021 with respect to Type II claims in its Environmental Claims Guide suggests that it is likely to look to the updated ISO 14021 guidance on Type II claims. Further, it may look to ISO guidance on other types of environmental claims as well in applying the false or misleading representation provision of the Act. Considering the Bureau's recent archiving of the Environmental Claims Guide, the updated ISO 14021 standard may now provide the best guidance available with respect to how the Bureau may approach environmental claims.

The following additional ISO guidelines also consider environmental claims and were cited briefly by the Bureau in the Environmental Claims Guide:

- CAN/ISO 14020: Environmental labels and declarations—General Principles
- CAN/ISO 14024: Environmental labels and declarations—Type I environmental labelling—Principles and procedure
- CAN/ISO 14025: Environmental labels and declarations—Type III environmental declarations

### iii) Guidance from Ad Standards

Ad Standards has provided general advice on green claims and has also noted that it will take the guidance published by the Bureau (discussed above in more detail) into consideration.<sup>42</sup> Ad Standards will generally consider the following factors:

- Does the environmental benefit claimed for the product appear to be supported by science-based evidence?
- Is the scientific evidence that is being used to substantiate the claim generally well-recognized and accepted by authorities on the subject?
- Is the advertisement unbalanced by singling out one environmentally positive attribute of the product while ignoring other characteristics or issues that may be harmful to the environment?
- Does the advertisement make absolute and unqualified claims, such as “environmentally friendly” or “not harmful to the environment”? Or does the advertiser qualify its claims by appropriately communicating a product's limitations?



### c) Enforcement under Other Legal Regimes

In addition to competition laws, green claims by companies could potentially be in contravention of various other laws which similarly regulate misleading advertising and misrepresentations, including securities laws, provincial consumer protection laws and industry specific regulation.

#### i) Securities Law

Misrepresentations made by public companies, including misrepresentations with respect to the environmental benefits of products, may create liability for a company under securities laws.

Under provincial securities laws, publicly traded companies have certain mandatory disclosure requirements. These include periodic disclosure requirements (including publication of annual financial statements, a management's discussion and analysis, and an annual information form) as well as timely disclosure requirements (including publication of material changes and material contracts, and disclosure required in a prospectus or meeting circular.).

Any misrepresentations made by companies, either in this mandated disclosure or otherwise may be found to be in contravention of, among other things, provincial securities laws, such as the *Ontario Securities Act* (the "OSA"), and can give rise to a private right of action by an individual that has relied on that representation to their detriment.<sup>43</sup> Moreover, a misrepresentation in any material, evidence or information submitted to the Ontario Securities Commission ("OSC") may give rise to an offence under the OSA. Upon conviction of such an offence, a person or company can be liable to a fine of not more than \$5 million or (in the case of an individual) of imprisonment for a term of not more than five years less a day, or both. Accordingly, greenwashing—as a form of misleading representation—is also potentially punishable under securities laws.

For example, Greenpeace has brought several complaints against Kinder Morgan Canada ("**Kinder**") with the Alberta Securities Commission ("**ASC**"), OSC and Canadian Securities Administrators (for the purposes of this section, the "**CSA**"). Greenpeace initially alleged that Kinder failed to provide "full, true and plain" disclosure of material facts relating to the securities issued or proposed to be distributed in connection with its initial public offering. The allegations related to Kinder's reliance on so called "outdated" oil demand projections and "inadequate" disclosures on the impact that climate-related risks might have on its business.<sup>44</sup> After Kinder's

completion of its initial public offering, Greenpeace brought a subsequent complaint to the OSC (which was passed on to the ASC), alleging incomplete disclosure of climate-related risks in Kinder's first annual report.<sup>45</sup> The ASC agreed to review the complaint, but the results were not disclosed.

Recently, there has been increased pressure for companies to make more environmental, social and governance ("ESG") related disclosure: with more ESG statements meaning more chances for public companies to make (inadvertent) greenwashing claims.<sup>46</sup> In this regard, the OSC published a staff notice in 2019 (the "**Staff Notice**") emphasizing the requirements for companies to disclose environmental (and particularly, climate-change) related risks.<sup>47</sup> The notice revealed that 22% of issuers provided boilerplate climate change-related disclosure and another 22% provided no disclosure at all.<sup>48</sup> Additionally, on May 17, 2021, Bill 294, *Securities Amendment Act (Climate Risk Financial Disclosure)*, 2021 passed the first reading.<sup>49</sup> If it receives royal assent, issuers and reporting issuers will be required to conduct climate-related risk assessments to identify material facts and material changes for the purposes of the *Securities Act*.<sup>50</sup> Further, the OSC's priorities for the 2021–2022 year included a discussion of increased ESG disclosure,<sup>51</sup> and this issue was also considered by Ontario's Capital Markets Modernization Taskforce in their final report.<sup>52</sup>

The CSA is also recognizing the need for ESG-related disclosure in the investment fund industry specifically, as recently emphasized in Staff Notice 81-334.<sup>53</sup> While this notice does not create new legal requirements or modify existing ones, it does clarify and explain how the current securities regulatory requirements apply to ESG-related investment fund disclosure and sets out best practices to enhance ESG disclosure and communications. The Staff Notice specifically refers to the potential for ESG disclosure to mislead investors.<sup>54</sup>

In response to the Staff Notice and movement toward mandatory climate-related disclosure standards, the CSA recently proposed National Instrument 51-107 *Disclosure of Climate-related Matters* and a companion policy.<sup>55</sup> The proposed instrument would introduce substantive disclosure requirements regarding climate-related matters and also require that such disclosure be made in a consistent format (to improve the comparability of the information issuers disclose).<sup>56</sup> The proposed instrument would apply to all reporting issuers (excluding investment funds), issuers of asset-backed securities, designated foreign issuers, SEC foreign issuers, certain exchangeable securities issuers and certain credit support issuers.<sup>57</sup> Disclosure

requirements are related to four core elements set out by the Task Force on Climate-related Financial Disclosures (“TCFD”):<sup>58</sup>

- **Governance:** Reporting issuers would be required to disclose the organization’s governance around climate-related risks and opportunities.
- **Strategy:** Reporting issuers would be required to disclose the actual and potential impacts of climate-related risks and opportunities on the organization’s business, strategy, and financial planning where such information is material.
- **Risk Management:** Reporting issuers would be required to disclose how the organization identifies, assesses, and manages climate-related risks.
- **Metrics and Targets:** Reporting issuers would be required to disclose the metrics and targets used to assess and manage relevant climate-related risks and opportunities where such information is material.

Reporting issuers would be required to disclose the information regarding “governance” and “risk management”, while the required information regarding “strategy” and “metrics and targets” would only be required where such information is material.<sup>59</sup>

Accordingly, as companies increase the amount of environmental disclosure they are required (or encouraged) to make, there is a corresponding heightened risk of misrepresentations arising from such disclosure. In fact, the CSA, along with the OSC and the British Columbia Securities Commission, have recently undertaken a sweep of public companies disclosure to ensure compliance with securities laws focusing on the ESG claims made by investment fund managers.<sup>60</sup>

Similar sweeps have been done in the United States by the Securities Exchange Commission (the “SEC”) and a related Climate and ESG Task Force has been established by the SEC.<sup>61</sup> The International Organization of Securities Commissions has also established a task force focused on sustainability related disclosure made by public companies and asset managers.<sup>62</sup> Moreover, on March 30, 2022, the SEC, Division of Examinations issued its 2022 Examination Priorities Report, which specifically includes reference to “greenwashing”.<sup>63</sup> The Division of Examinations plans to focus on ESG-related advisory services, investment products, and private fund offerings. The Division of Examinations will also continue to focus on ESG-related advisory services and investment products. More specifically,

it will focus on whether ESG investing approaches are accurately being disclosed and whether registered investment advisors and registered funds have implemented policies, procedures, and practices in connection with their ESG-related disclosures. The Division of Examinations will also review whether proxy votes align with ESG-related disclosures and mandates, as well as whether there are misrepresentations of ESG factors with respect to portfolio selection.<sup>64</sup>

Other jurisdictions are also increasing focus on environmental claims in financial and public company disclosure including, for example, Switzerland,<sup>65</sup> France,<sup>66</sup> the European Union,<sup>67</sup> Australia,<sup>68</sup> Germany,<sup>69</sup> and Singapore.<sup>70</sup>

## ii) Consumer Protection Laws

Most provinces have consumer protection legislation in place to protect consumers from unfair or deceptive practices including false, misleading, or deceptive representation.<sup>71</sup> Accordingly, these laws will also capture misleading advertising with respect to environmental claims.

For example, in Ontario, section 14 of the *Consumer Protection Act* (the “CPA”) states that it is an unfair practice for a person to make a false, misleading, or deceptive representation. Subsection 14(2) of the CPA sets out a list of examples, including “a representation that the goods or services are of a particular standard, quality, grade, style or model, if they are not.”<sup>72</sup> The remaining provinces and territories have substantially similar provisions in their consumer protection legislation.<sup>73</sup>

Individuals may bring private actions under these laws, including with respect to false or misleading environmental claims. For example, in a proposed class action, the case of *Maginnis v FCA Canada Inc.*, the plaintiffs sought to certify certain common issues under the CPA. Certification was ultimately denied in part because the plaintiffs failed to adduce any evidence of harm or loss, and that without any such evidence, the action was not suitable for certification as a class action.

## iii) Industry Specific Regulation

Certain specialized industries also have their own regulations which, in some cases, will contain general misleading advertising provisions that could capture misleading environmental claims.

For example, the food and beverage industry has several statutes in place to protect consumers from misrepresentation regarding the origin and

content of food, or the manner in which food was prepared. Section 5(1) of the *Food and Drugs Act* prohibits the labelling, packaging, treatment, processing, sale or advertising of food “in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.”<sup>74</sup> In 2018, Cericola Farms Inc. (“**Cericola**”) pled guilty to two counts of violating subsection 5(1) of the *Food and Drugs Act* for mislabelling conventional poultry as organic. The Canadian Food Inspection Agency investigated Cericola and determined that approximately 286,000 kilograms of poultry was sold “in a manner likely to create an erroneous impression of its character and nature.” Cericola was ordered to pay total fines of \$400,000.<sup>75</sup>

Similarly, the regulations under the *Drug and Pharmacy Regulation Act* (“**DPRA**”)<sup>76</sup> and the *Pharmacy Act*<sup>77</sup> address false and misleading statements/advertisements by the general public and by pharmacists, respectively. Specifically, the General Regulation made under the DPRA prohibits anyone from falsely advertising a pharmacy or its services.<sup>78</sup> The General Regulation under the *Pharmacy Act* states that a pharmacist shall not publish, display, distribute or use an advertisement relating to drug services that is false, misleading, or deceptive, whether because of the inclusion of information or the omission of information.<sup>79</sup>

Additionally, the Pharmaceutical Advertising Advisory Board, an independent advisory board which grants preclearance of pharmaceutical advertising and certifies such advertising as compliant with its code, includes provisions against misleading advertising in its code. For instance, its code requires that all advertising be accurate, complete, and clear and be presented in a manner that accurately interprets valid and representative research findings.<sup>80</sup>

Accordingly, companies which operate in a regulated industry, such as food or pharma, should be cognizant of the additional misleading advertising regimes governing such industry, and should consider how these regimes may apply to environmental claims specifically.

### **3. Greenwashing in Other Jurisdictions**

As noted above, scrutiny over green claims is not unique or isolated to Canada. Regulatory bodies around the world are focusing on these claims and the challenges that they represent when it comes to enforcement. Below are brief discussions of how this issue is being tackled in some jurisdictions where there has recently been an increased focus on regulating green claims.

### a) United States

In the United States, green marketing is subject to scrutiny from the Federal Trade Commission (the “FTC”). Section 5 of the *Federal Trade Commission Act*, 15 U.S.C. § 45 (the “FTC Act”) prohibits deceptive acts and practices in or affecting commerce. This would include certain marketing claims, including environmental claims that are unfair or deceptive. The FTC can prosecute such claims under the FTC Act.

The FTC published *Part 260—Guides for the Use of Environmental Marketing Claims* (the “FTC Green Guides”)<sup>81</sup> to help businesses navigate environmental claims. First published in 1992, and revised most recently in 2012, the FTC Green Guides set out the following general principles that apply to all environmental marketing claims:

- qualifications and disclosures should be clear, prominent and understandable in order to prevent deceptive claims;
- unless it is clear from the context, an environmental claim should specify whether it refers to the product, packaging, service or just to a portion of the product, packaging or service;
- an environmental claim should not overstate, directly or by implication, any environmental attribute or benefit; and
- comparative environmental marketing claims should be substantiated and clear to avoid consumer confusion about the comparison.

Additionally, the FTC Green Guides caution against “general environmental benefit” claims (i.e., “eco-friendly” or “green”) as they can be vague and misleading and also provide specific guidance on several targeted issues, including with respect to carbon offsets, certifications and seals of approval, “free of” claims, and claims using specific terminology (such as “compostable”, “degradable”, “non-toxic”, “ozone-safe”, “recyclables”, or “renewable”). Notably, the FTC Green Guides do not specifically address claims pertaining to sustainability, or the use of the terms “natural” or “organic.” In this regard, the FTC has stated that it “lacks a sufficient basis to provide meaningful guidance”.<sup>82</sup> This mirrors the Bureau’s hesitancy to provide guidance on sustainability and highlights that the FTC may also need to take another look at the progress made in tracking and measuring sustainability.

The FTC also published a Statement of Basis and Purpose (“**Statement of Basis**”) which provides additional context for the FTC Green Guides.<sup>83</sup> The Statement of Basis provides an overview of the Green Guides and further discusses:

- general issues, including industry compliance;
- harmonization of the FTC Green Guides with international law or standards;
- life cycle-related issues;
- issues relating to specific environmental marketing claims addressed in the FTC Green Guides; and
- why certain claims are not addressed in the FTC Green Guides (including sustainable, organic and natural claims).

The Statement of Basis also notes that, while the FTC Green Guides are harmonized with ISO 14021 where possible, they are not entirely aligned due to the differential nature and purpose of the FTC Green Guides and ISO 14021. This is quite different from the Bureau’s approach which was to adopt as part of its Environmental Claims Guides a substantial amount of the guidance set out in ISO 14021. The FTC noted that the CSA and ISO 14021 are concerned not only with preventing false and misleading claims, but also with encouraging the supply of more environmentally friendly products. Alternatively, as a regulatory enforcement agency, the FTC is focused only on preventing the dissemination of misleading claims, and it is not within its mandate to otherwise encourage or discourage environmental claims. Accordingly, the FTC’s approach will not always align with ISO standards.

Notably, the FTC Green Guides are included in the FTC’s regulatory review schedule which was published in July 2021 and are set to be updated for 2022.<sup>84</sup> The FTC has also announced that it is seeking public comment on revisions to its “energy labeling rule” which will allow consumers to more accurately compare the estimated annual energy consumption appliances before they buy them.<sup>85</sup> Changes made to these guidelines in the United States, and whether this leads to increased enforcement with respect to environmental claims in the United States, should be watched closely by Canadian companies. It is not uncommon for the Canadian competition authority to mirror the United States with respect to substantive changes to antitrust/consumer protection law, or enforcement priorities.

With respect to public enforcement of environmental claims in the United States, there have been numerous complaints filed with the FTC and investigations undertaken by the FTC. For example:

- In February 2021, a coalition of national and regional research, policy, and advocacy organizations filed a complaint with the FTC against Smithfield Foods Inc. (“**Smithfield**”), a large pork producer. The complaint was related to Smithfield’s advertising relating to the company’s sustainability efforts and environmental records. The coalition collectively called on the FTC to investigate and subsequently remove what they alleged were misleading claims.<sup>86</sup>
- In March 2021, several environmental groups, including Global Witness, Greenpeace, and Earthworks, filed a false advertising complaint with the FTC against Chevron Corporation. The groups (citing the FTC Green Guides) alleged that the oil company had misled consumers regarding its actions to combat climate change by exaggerating its investment in renewables when in fact Chevron Corporation had only spent 0.2% of its capital expenditures on lower-carbon energy sources.<sup>87</sup>
- In April 2022, the Department of Justice (the “**DOJ**”) (on behalf of the FTC) initiated an action against Kohl’s, Inc. and Walmart, Inc. for allegedly falsely marketing rayon textile products as bamboo. The action also alleges that these companies are making deceptive environmental claims by representing that the so-called bamboo textiles were made using ecofriendly processes. The DOJ alleges that the process used to turn bamboo into rayon includes the use of toxic chemicals and produces hazardous by-products, and, as such, is not “ecofriendly”. The DOJ is asking the court to impose penalties of USD\$2.5 million and USD\$3 million against Kohl’s, Inc. and Walmart, Inc., respectively.<sup>88</sup>

As in Canada, there are also numerous additional consumer protection statutes in the United States aside from the FTC Act which provides public bodies and/or private individuals rights of action with respect to misleading representations or deceptive marketing. For example:

- Several greenwashing cases were brought in 2020 under the *California Business and Professions Code*, including *Bush v Rust-Oleum Corporation*,<sup>89</sup> *Toth v SC Johnson & Son, Inc.*,<sup>90</sup> and *Moran v SC Johnson and Son, Inc.*,<sup>91</sup> each involving claims that the products were “non-toxic” when the products were allegedly harmful to the environment. While *Bush v Rust-Oleum Corporation* was dismissed pursuant to a



settlement agreement, the case of *Toth v SC Johnson & Son, Inc.* was voluntarily dismissed<sup>92</sup> and the outcome of *Moran v SC Johnson and Son, Inc.* is still pending.<sup>93</sup>

- In 2021, the City of New York brought a securities fraud case against Exxon Mobil Corp., ExxonMobil Oil Corporation, Royal Dutch Shell plc, Shell Oil Company, BP p.l.c., BP America Inc., and American Petroleum Institute for engaging in deceptive trade practices in violation of NYC Code § 20-700.<sup>94</sup> The action alleged that the defendants deceived investors with respect to how it accounted for the cost of future climate-change regulation. More specifically, the claims included: (i) misrepresenting the purported environmental benefit of using the defendants' fossil fuel products and failing to disclose the risks of climate change caused by those products, including by; and (ii) deceiving New York City consumers by engaging in false and misleading greenwashing campaigns.<sup>95</sup>

Notably, the court ruled in favour of the defendants, noting that allegations of deception and misrepresentation must be substantiated and suggesting that the burden of proof falls on the accuser and not the accused. More specifically, the court found that the State did not present testimony that "any shareholder had been misled" nor that the defendants had made "any material misrepresentations" that would have misled a reasonable investor".<sup>96</sup>

- Between 2019 and 2020, there were also several civil actions filed involving misleading environmental advertising, including *Food & Water Watch Inc. v Tyson Foods Inc.*<sup>97</sup> (which alleged that Tyson Foods Inc. misled customers to believe that its poultry products were produced in an environmentally responsible way), and *Briseno v ConAgra Foods, Inc.*<sup>98</sup> (which disputes the use of "100% natural" on a product).
- In October of 2021, in a matter related to the investigation by the Bureau into Keurig Canada's recyclability claims (discussed above), Keurig Green Mountain ("**Keurig**") reportedly came to an agreement to settle a class-action suit filed by a consumer in the United States District Court for the Northern District of California over similar alleged misleading recyclability claims. Keurig allegedly advertised that their single-use coffee pods were recyclable in various claims on their website and other promotional materials for the products despite the pods themselves not being recyclable or reusable, thus making

these claims “false and misleading” to the extent that “ordinary consumers, are likely to be deceived by such representations”.<sup>99</sup> Keurig entered into a settlement, where it agreed to pay USD\$10 million. Pursuant to the settlement, Keurig will not label, market, advertise, or otherwise represent that its products are recyclable (through use of the word “Recycling” or through the conspicuous use of the ‘Chasing Arrow’ symbol) without clearly and prominently including a revised qualifying statement, “Check Locally—Not Recycled in Many Communities”.<sup>100</sup>

- Oatly Group AB (“**Oatly**”) is facing a class action lawsuit brought in the Southern District of New York in July 2021.<sup>101</sup> The lawsuit alleges that Oatly made false and misleading statements about its sustainability practices and impact, among other things, by making Oatly’s product (oatmilk) appear more sustainable than it actually is. The complaint was dismissed by the court in October 2021, but the court permitted the plaintiffs to re-submit amended pleadings.<sup>102</sup>

## b) European Union

The *Unfair Commercial Practices Directive*<sup>103</sup> in the European Union (the “EU”) captures misleading advertising in general, including green claims. However, the EU is also working towards improving its consumer protection legislation with respect to green claims more specifically.

As part of the EU’s initiative to tackle greenwashing, the European Green Deal<sup>104</sup> includes considerations relating to environmental advertising and notes that “[c]ompanies making ‘green claims’ should substantiate these against a standard methodology to assess their impact on the environment”. Environmental claims are also noted in the comprehensive report and action plan on the “circular” economy,<sup>105</sup> which was adopted by the EU in 2020 in connection with the European Green Deal.<sup>106</sup>

In connection with these initiatives, the European Commission has undertaken various public consultations. One public consultation (which closed in October 2020) focused on new policy directives that would:

- ensure that consumers obtain reliable & useful information on products, e.g., on their lifespan and repair options;
- prevent overstated environmental claims;
- prevent the sale of products with a covertly shortened lifespan; and

- set minimum requirements for sustainability logos & labels.<sup>107</sup>

The proposed directive resulting from the consultation has been published by the European Commission, and was open for feedback until May 29, 2022.<sup>108</sup> The proposed directive is focused on protecting consumers from, among other things, greenwashing practices and unreliable and non-transparent sustainability labels and information tools.

More specifically the proposed directive is aimed at, among other things:

- Ensuring that a trader can make an environmental claim related to future environmental performance only when this involves clear commitments;
- Ensuring that a trader can only compare products, including through a sustainability information tool, if they provide information about the method of the comparison, the products and suppliers covered, and the measures to keep information up to date;
- A ban on displaying a sustainability label which is not based on a certification scheme or not established by public authorities;
- A ban of generic environmental claims used in marketing towards consumers, where the excellent environmental performance of the product or trader cannot be demonstrated in accordance with Regulation (EC) 66/2010 (EU Ecolabel), officially recognised eco-labelling schemes in the Member States, or other applicable European Union laws, as relevant to the claim; and
- A ban on making an environmental claim about the entire product, when it actually concerns only a certain aspect of the product.<sup>109</sup>

A second public consultation (which closed in December 2020) was aimed at creating new regulations which would require companies to substantiate claims they make about the environmental footprint of their products/services by using standard methods for quantification.<sup>110</sup> Adoption by the European Commission of the results of this public consultation is expected in 2022.

### **c) United Kingdom**

In the United Kingdom, the CMA can investigate how products and services claiming to be eco-friendly are being marketed and whether consumers could be misled.<sup>111</sup> The leading consumer protection legislation

which governs environmental advertising in the United Kingdom is the *Consumer Protection from Unfair Trading Regulations 2008* (the “CPRs”), which contain a general prohibition against unfair commercial practices and specific prohibitions against misleading actions or omissions.

On September 20, 2021, after completing a public consultation on the draft, the CMA published the long-awaited Green Claims Code (the “**Green Claims Code**”)<sup>112</sup> which provides guidance to “help businesses to understand and comply with their existing obligations under consumer protection law when making environmental claims”.<sup>113</sup> The Green Claims Code includes guidance with respect to making environmental claims on goods and services,<sup>114</sup> as well as a user-friendly checklist for businesses to follow.<sup>115</sup>

The guides set out basic principles for businesses regarding environmental claims, including encouraging businesses to:

- **Be Truthful, Up to Date and Accurate:** Businesses must live up to the claims they make about their products, services, brands, and activities. Notably, features or benefits that are necessary standard features or legal requirements of that product or service type, should not be claimed as environmental benefits;
- **Be Clear and Unambiguous:** The meaning that a consumer is likely to take from a product’s messaging and the credentials of that product should match;
- **Not Omit/Hide Important Information:** Claims must not prevent someone from making an informed choice because of the information that is omitted. Information should be accessible to consumers and if it cannot fit in its entirety in a single advertising statement, it should be easily accessed by customers in another way (QR code, website, etc.);
- **Only make Fair and Meaningful Comparisons:** Any products compared should meet the same needs or be intended for the same purpose;
- **Consider the Full Life Cycle of the Entire Product:** When making claims, businesses must consider the total impact of a product or service. Claims can be misleading where they do not reflect the overall impact or where they focus on one aspect of a product but not another. Factors to consider in assessing the full cycle of the product

can include durability and disposability. Similarly, the claim should tell the whole story of a product or service; rather than relate to only one part of the product or service while misleading consumers about other parts or the overall impact on the environment; and

- **Be Able to Substantiate Claims:** Businesses should be able to back up their claims with robust, credible, and up to date evidence.<sup>116</sup>

In a press release published by the CMA on September 20, 2021, the CMA also emphasized that businesses should be “on notice”, and warned that the CMA will carry out a full review of misleading green claims, both on and offline (e.g., claims made in-store or on labelling), at the start of 2022.<sup>117</sup> On January 14, 2022, the CMA announced that it has commenced its first review of compliance with the Green Claims Code in the fashion retail sector and plans to review other sectors in due course. If it considers a business to be engaged in “greenwashing”, the CMA will take further action.<sup>118</sup>

Further, following a public consultation, the CMA recently proposed several recommendations for the government to amend the laws on providing environmental information to consumers.<sup>119</sup> The changes include setting standard legislative definitions for potentially misleading terms such as “carbon neutral” and “recyclable”. These standard definitions would complement the CMA’s work on the Green Claims Code. The CMA also announced the creation of a Sustainability Task Force comprised of employees from the CMA as well as experts from outside organizations. General Counsel at the CMA has indicated that the Sustainability Task Force will clarify what businesses can and cannot do under competition and consumer laws while simultaneously advising the government on changes to assist the UK economy in delivering on its environmental responsibilities.<sup>120</sup>

The CMA has also recently partnered with ICPEN to conduct investigations into the prevalence of greenwashing,<sup>121</sup> and has stated that it “will increasingly devote and prioritize [its] resources to providing advice and support to central, local and devolved government on the impact of policies on competition and consumers in relation to climate change ...”.<sup>122</sup> Environmental claims clearly appear to be a key focus of the CMA moving forward. The CMA is also particularly interested in claims which concern climate change, as the CMA believes such claims are having a significant and wide-ranging impact on the UK economy and are consequently changing market dynamics and consumer behaviour.<sup>123</sup> In fact, according to some

estimates, the UK market for sustainable products before the COVID-19 pandemic was worth £41 billion.<sup>124</sup>

The United Kingdom's independent self-regulated agency, the Advertising Standards Authority (the "ASA"), also works to censure companies for a variety of misleading advertising practices.<sup>125</sup> The ASA administers various advertising codes published by its sister organization (the Committee of Advertising Practice ("CAP")), including separate codes for broadcasted advertising, and non-broadcasted advertising. Similar to Ad Standards in Canada, the ASA responds to complaints (and monitors ads on its own initiative), and its main sanctions include "bad publicity" for companies that refuse to work with the ASA to comply with its advertising codes. However, the ASA may also in some cases refer an issue to other regulatory bodies (such as Trade Standards) which can take legal action or impose other sanctions.<sup>126</sup>

The ASA's codes contain specific sections on environmental claims.<sup>127</sup> Generally, these sections of the code specify that advertisers should always: explain the basis of environmental claims; qualify claims where necessary; acknowledge whether informed debate exists; unless stated otherwise, use a 'cradle to grave' assessment when considering a product's environmental impact and make clear the limits of the life cycle; hold robust evidence for claims and comparisons and avoid misleading consumers by using confusing or pseudo-scientific claims.<sup>128</sup>

## d) Recent Notable Events in Other Jurisdictions

### i) France

On July 20, 2021, France adopted its new climate and resilience law (the "**Climate Law**"),<sup>129</sup> which came into force in part on August 24, 2021. This new law introduces provisions that prohibit greenwashing advertisements, as well as stricter requirements on goods/services manufacturers and distributors and punishments for offences against the environment. The objective of the law is to accelerate the "greening" of companies and consumers behaviours, in a variety of industries, including manufacturing, transportation and agriculture. Among other things, the Climate Law introduces a definition of misleading commercial practices that expressly targets false or misleading claims concerning the environmental impact of a good or service or the scope of the advertiser's commitments (including with respect to environmental matters). The Climate Law also specifically bans the use of any wording on a product, its packaging, or in advertising promoting a product or service which indicates that the product, service or

activity of the manufacturer is carbon-neutral or has no negative impact on the climate unless specified requirements are met.<sup>130</sup> These mandatory elements are:

- a greenhouse gas emissions report including the direct and indirect emissions of the product or service;
- the process by which the greenhouse gas emissions of the product or service are primarily avoided, then reduced and finally offset; and
- the terms of compensation for residual greenhouse gas emissions respecting the minimum standards.

The Climate Law also introduces stricter punishments including an increased monetary penalty imposed for all misleading commercial practices. Under the Consumer Code a fine of EUR 300,000 is normally imposed for each offence and may be increased up to 10% of the average annual turnover of the company and up to 50% of the advertising expenses incurred.<sup>131</sup> Notably, Article 11 of the Climate Law increases this rate to up to 80% of the total cost of the company's advertising expenses when the advertising is based on misleading environmental claims.<sup>132</sup> Additionally, for failing to comply with the mandatory elements needed in order to make an advertising claim that a good or service is carbon neutral, an administrative fine of EUR 20,000 is imposed for a natural person and EUR 100,000 for a legal person, with the possibility of an increase to the full amount of the expenses devoted to the illegal operation.

Some of the provisions of the Climate Law came into force immediately after the law was promulgated, while others will apply in 2022, 2023, 2025, and up to 2034. Many of the misleading advertising provisions will come into force on various dates in 2022.

## ii) Australia

In 2016, the Australian Competition & Consumer Commission ("ACCC") brought an action against Kimberly-Clark Australia Pty Ltd alleging that it made false and misleading claims that its Kleenex Cottonelle toilet wipes were flushable.<sup>133</sup> The ACCC argued that labelling such products as "flushable" would mislead consumers into believing that the products would break up or disintegrate in a similar timeframe as toilet paper, when in fact these "flushable" wipes appeared to contribute to significant blockages in sewage systems. This case was dismissed at trial based on a failure by the ACCC to show that the wipes had caused real harm. This is notable, as

under Canadian competition law harm caused by the misrepresentation is not a required element under the false or misleading advertising provisions of the Act. The ACCC's subsequent appeal of this matter in 2020 was also dismissed. Notably, in 2019 a similar investigation was undertaken by the Bureau in Canada in response to a complaint filed by Friends of the Earth Canada and EcoJustice, on behalf of six individual Canadians,<sup>134</sup> regarding the “flushability” claims of wipes made by several companies. The complainants confirmed that the Bureau was investigating this matter, however the Bureau did not publicly confirm any investigations and did not publish any findings regarding this matter.<sup>135</sup>

In August 2021, an action was brought by the Australasian Centre for Corporate Responsibility against Santos Limited (“**Santos**”) for alleged breaches of the Australian Consumer Law (the “**ACL**”) (which contains a broad prohibition against misleading and deceptive conduct, and also contains a variety of false or misleading representation prohibitions with respect to specific aspects of goods and services) with respect to certain green claims made by Santos in its 2020 annual report.<sup>136</sup> The case also alleges breaches of Australian corporate law, namely the *Corporations Act 2001*. The action alleges, among other things, that the following statements made by Santos are misleading:

- that the natural gas Santos produces is a “clean fuel” and provides “clean energy”; and
- that Santos had a “clear and credible” plan to achieve “net zero” emissions by 2040.

Additionally, in March 2022, the Australian Securities and Investments Commission (“**ASIC**”) and the ACCC announced their plans to take more action against greenwashing, and included consumer and fair trading issues in relation to environmental claims and sustainability as one of their compliance and enforcement priorities for 2022 and 2023.<sup>137</sup> The outgoing and incoming chairmen of the ACCC have both noted the ACCC's commitment to addressing greenwashing, with the outgoing chairman putting the manufacturing and energy sectors on notice as particular focus areas. ASIC, on the other hand, has announced its intention to review management and superannuation funds claiming to offer ESG alignment. The ASIC chair also encouraged boards to assess whether company disclosure and their promotion of ESG-focused products accurately reflects their practices in this area.<sup>138</sup>



### iii) New Zealand

Recently, the New Zealand Commerce Commission (the authority responsible for enforcing New Zealand's competition laws) released updated guidelines with respect to how the Commerce Commission would apply the misleading advertisement provisions of the *Fair Trading Act* to environmental claims. The environmental claims guide, released in July 2020, sets out guiding principles, and also provides additional guidance with respect to lifecycle claims (including composition claims, production claims, and disposal claims), comparative claims, and certification claims (i.e., "certified organic").<sup>139</sup>

The principles set out in the guide include the following:

- Be truthful and accurate;
- Be specific;
- Substantiate your claims;
- Use plain language;
- Do not exaggerate;
- Take care when relying on tests or surveys; and
- Consider the overall impression.

The guide contains specific examples for each type of claim, showing businesses how these principals are applied. The guide also provides examples on key current issues including sustainability claims and carbon offset/carbon neutral claims.

### iv) Netherlands

The Netherlands' Authority for Consumers and Markets ("ACM"), the authority responsible for enforcing competition laws in the Netherlands, has recently launched investigations into misleading sustainability claims in a variety of specific sectors, including energy, dairy, and clothing.<sup>140</sup> The ACM noted that these sectors were the focus of its investigation because sustainability plays a major role in consumers' purchasing decisions in these sectors.

These investigations followed closely the publishing of the ACM's new guidelines on sustainability.<sup>141</sup> These guidelines set out various "rules of

thumb”, including that when making environmental claims companies should always:

- Make clear what sustainability benefit the product offers;
- Substantiate sustainability claims with up to date facts;
- Make only fair comparisons with other products, services, or companies;
- Be honest and specific about efforts regarding sustainability; and
- Make sure that visual claims and labels are useful to consumers, rather than confusing.

The ACM recognizes that ‘sustainability’ is a broad concept and that it may capture a variety of issues including environment, biodiversity, climate, public health, animal welfare, human rights, general working conditions and fair trade. More specifically, the ACM defines sustainability claims to refer to any environmental claims or ethical claims.

Additionally, in 2020, the ACM called out businesses for the use of misleading labels and logos. The ACM noted that there was a proliferation of labels and logos used by businesses touting environmental claims, but that “it is difficult for consumers to check whether these certificates are reliable and independent”.<sup>142</sup> In its call out, the ACM emphasized that labels, logos and certificates must be correct and easy-to-understand.

#### v) Italy

On December 19, 2019, the Italian Competition Authority (the “ICA”) fined Eni, an Italian oil and gas company, with the maximum monetary sanction of EUR 5 million for the dissemination of unfair commercial practices regarding environmental claims contrary to Articles 21 and 22 the *Italian Consumer Code*.<sup>143</sup> Eni’s advertisements promoted Eni Diesel+ fuel as having a positive environmental impact, resulting in fuel consumption savings and reductions in greenhouse emissions. The ICA stated the misleading nature of the messages arose from Eni’s so-called “Green Diesel” component and advertisements including the phrases “green component”, “renewable component” and “helps protect the environment”, which were wholly unfounded.<sup>144</sup>

The ICA found that Eni’s advertising campaign circulated false and omisive information relating to the fuel’s positive environmental impact. The

ICA also recognized that the increased sensitivity of consumers to environmental issues has made it easy for companies to mislead consumers by falsely representing the environmental benefits of their products or services. It clearly stated that “green” claims contained in advertising messages must: (1) precisely and unambiguously reflect the environmental benefits of the relevant products, (2) be scientifically verifiable, and (3) be communicated correctly.<sup>145</sup>

## 4. Looking Ahead

### a) New Canadian Guidance Required

In Canada, there is in general a culture of compliance among businesses. However, in order for companies to be able to comply with laws, they require adequate guidance from regulators. The need for official guidance is compounded by the fact that in Canada—as compared to the United States, for example—there is a dearth of litigation. As such, businesses have limited case law to look to for assistance in interpreting and applying the law. Unfortunately, the current Canadian guidance with respect to environmental claims is, as seen above, also severely limited. As noted, the only substantive guidance from the Bureau has been archived, and the remaining available guidance provides only highlevel principles which do not provide much assistance to companies trying to apply the law to specific and complicated scenarios.

Given these issues, and given the increased interest in environmental claims, it seems clear that new guidance should be anticipated from the Bureau. But what exactly should businesses expect this new guidance to look like? While it is not possible to predict exactly what this guidance will be, we would hope that it is, among other things, principled, consistent and practical.

First, regulators should strive to take a cohesive approach to guidance in this area, taking into consideration, among other things, consistency with other regulatory regimes—both domestic and international. With respect to other domestic regimes, the Bureau should be cognisant of, and strive for consistency with: (i) CAN/ISO standards, (ii) sustainability standards being developed by a number of self-regulatory agencies, including the International Sustainability Standards Board,<sup>146</sup> the Global Reporting Initiative,<sup>147</sup> and the Sustainability Accounting Standards Board,<sup>148</sup> (iii) standards being developed in relation to public company and financial disclosure, including by the Task Force on Climate-related Financial Disclosures, and (iv) general consumer protection laws.

Moreover, the Bureau should look to the updated guidance being provided internationally. Given that many companies doing business in Canada are large, multinational companies which are required to comply with a variety of regulatory regimes, achieving at least some international convergence on these issues would reduce the transaction costs companies face when complying with various legal regimes. This would lead to efficiencies for these multinational companies, meaning reallocation of resources away from legal compliance and towards activities such as product development or customer service. Moreover, to the extent Canadian laws are easily understood and complied with by multinational companies, this will decrease friction for these companies to begin (or continue) operating in Canada, hence making Canada a more attractive place to do business.

Second, guidance provided by regulators should be practical and applicable, without being overly granular. From the perspective of the regulators, practical and pragmatic guidelines which businesses can easily interpret and apply will lead to higher levels of compliance, which not only reduces behavior that is potentially harmful to consumers and competition, but also decreases the resources regulators must spend on enforcement. Moreover, this is an evolving and fastmoving area with many emerging issues. As such, guidance that is too granular will risk being irrelevant and out of date in a short period of time, leading to more resources being spent on enforcement and additional updates to guidance. As such, any new guidance should be principled and flexible enough to accommodate changes in industries, technology, or our understanding of environmental and sustainability issues.

That being said, while over granularity will not be useful in the long run, any guidance provided should be specific enough to actually be helpful to companies. For instances, practical examples should be included in any new guidance which show how the principles set out in the guidance are applied in specific situations.

### **b) What Should Businesses Do in the Meantime?**

While new guidance from the Bureau will be immeasurably helpful to companies moving forward, there are a number of best practices that can be adopted in the meantime.

To stay on side applicable laws (e.g., competition, securities, and consumer protection laws), companies should carefully consider all environmental claims they are making in order to assess whether these claims are potentially false or misleading.

Prior to making an environmental claim, companies should consider not only the existing guidance from the Bureau but should also look to the various other forms of guidance available. Among other things, companies can look to the current ISO guidelines, as well as the new guidance being provided by other jurisdictions internationally. Companies should also consider guidance and best practices being developed with respect to public company and financial disclosure regimes. As discussed above, these sources are the best available approximation of what the Bureau's enforcement approach in this area may look like, and the principles that any new guidance from the Bureau could follow.

Among other things, prior to making an environmental claim, companies should:

- to the extent that their products are marketed in multiple jurisdictions, take a holistic approach to ensure compliance with the laws of all applicable jurisdictions;
- thoroughly review any available guidance from applicable regulatory agencies, including any applicable CSA/ISO standards;
- ensure that the environmental claims comply with the available guidance, including that such claims:
  - ◇ Are not misleading, exaggerated, ambiguous or likely to result in misinterpretation;
  - ◇ Are accurate and specific: claims broadly implying that a product is environmentally beneficial or benign (“eco-friendly”) should generally be avoided in favour of specific claims; broad claims must be accompanied by a statement that provides support;
  - ◇ Are substantiated and verifiable: claims must be tested, and all tests must be scientifically sound, conducted in good faith and documented;
  - ◇ Are meaningful and relevant: claims must be specific to a particular product, and used only in an appropriate context;
  - ◇ Do not imply that the product is endorsed by a third-party organization when this is not the case;
  - ◇ Take into consideration all aspects of the product (rather than

singling out one aspect and ignoring others) and the entire life cycle of a product; and

- ◇ Use appropriate terminology that is not likely to give rise to misinterpretation taking into consideration the context of the representation and expected literacy level of intended viewers;
- use clear and prominent explanatory/qualifying statements to accompany environmental claims, as applicable and appropriate;
- update environmental claims as further testing is done or new information becomes available, such as changes in technology, competitive products or other circumstances that could affect the accuracy of the claim;
- make accurate and easy to understand verification material publicly available;
- consider performing studies on their waste and emission practices to better and more fully understand their environmental impact; and
- consider obtaining third-party certifications to validate environmental metrics.

In many instances, companies should consult their legal counsel prior to making any environmental claims.

## 5. Conclusion

As the proceeding makes clear, law enforcement authorities, both within Canada and internationally, are increasingly concerned with the rise of potentially false or misleading environmental claims. This increased interest is showing itself in the form of new and revised guidelines, new legislation, and increased enforcement. Accordingly, businesses should carefully consider all public representations which contain environmental claims to ensure that such claims are not in contravention of any legal regime. Unfortunately, in Canada there remains a dearth of guidance available to businesses which want to comply with greenwashing laws, particularly those laws under the *Competition Act*. In the absence of such guidance, businesses should consider the guidance available internationally, as well as guidance from other Canadian regulatory agencies (including Canadian Standards Association Group and Ad Standards) and the archived guidance available from the Bureau, as helpful (although imperfect) sources for navigating environmental claims in Canada.

## ENDNOTES

<sup>1</sup> With special thanks to articling students Rachel Wong and Montana Licari.

<sup>2</sup> For more examples, the EcoLabel Index is a global directory which provides a list of many of the ecolabels used on consumer products, online: *EcoLabel Index* <[ecolabelindex.com/ecolabels](http://ecolabelindex.com/ecolabels)>.

<sup>3</sup> The International Consumer Protection Enforcement Network is a consumer protection organization focused on developing and maintaining regular contact between consumer protection agencies. ICPEN's members include consumer protection law enforcement authorities from around the world. ICPEN encourages cooperation between these agencies with the goal of allowing each agency to more efficiently and effectively promote consumer protection and enforce its consumer protection laws and regulations.

<sup>4</sup> Competition and Markets Authority, "Global sweep finds 40% of firms' green claims could be misleading" (28 January 2021), online: *GOV.UK* <[gov.uk/government/news/global-sweep-finds-40-of-firms-green-claims-could-be-misleading](http://gov.uk/government/news/global-sweep-finds-40-of-firms-green-claims-could-be-misleading)>.

<sup>5</sup> European Commission, "Screening of websites for 'greenwashing': half of green claims lack Evidence" (28 January 2021), online: *European Union* <[ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_269](http://ec.europa.eu/commission/presscorner/detail/en/ip_21_269)>.

<sup>6</sup> European Commission, "2020 - Sweeps on consumer scams related to the COVID-19 pandemic", online: *European Union* <[ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps\\_en#2020-sweep-on-misleading-sustainability-claims](http://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/enforcement-consumer-protection/sweeps_en#2020-sweep-on-misleading-sustainability-claims)>.

<sup>7</sup> Nielsen Consumer LLC, "A 'natural' rise in sustainability around the world" (19 January 2019), online, Nielsen IQ <[nielseniq.com/global/en/insights/analysis/2019/a-natural-rise-in-sustainability-around-the-world](http://nielseniq.com/global/en/insights/analysis/2019/a-natural-rise-in-sustainability-around-the-world)>.

<sup>8</sup> Competition Bureau Canada, "The Competition and Green Growth Summit" (30 May 2022), online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04576.html>>.

<sup>9</sup> Additionally, 74.01(1)(b) and 74.01(a)(c) contain additional provisions against misleading representations in the context of warranties and guarantees. Specifically, section 74.01(1)(b) relates to false or misleading performance claims which provide a warranty or guarantee of the performance, efficacy or length of life of a product that is not based on adequate and proper testing and section 74.01(c) relates more generally to warranties, guarantees or promises to replace, maintain or repair an item. Section 74.01(1)(b) could likely apply in some environmental advertising contexts, for example, where a company makes compostability or biodegradability claims without adequate and proper testing.

<sup>10</sup> Competition Bureau Canada, *The Deceptive Marketing Practices Digest*, vol 1, Bulletin (10 June 2015) (*Deceptive Marketing Bulletin*), at 2.2, online at: <[competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03946.html](http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03946.html)>; see also *FTC v Sterling Drug, Inc*, 317 F (2d) 669 at 674; see also *Richard v Time Inc*, 2012 SCC

8 at para 78; see also *Canada (Competition Bureau) v Chatr Wireless Inc*, 2013 ONSC 5315 at para 128.

<sup>11</sup> Competition Bureau Canada, *The Deceptive Marketing Practices Digest*, vol 1, Bulletin (10 June 2015) (*Deceptive Marketing Bulletin*), at 2.2, online at: <[competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03946.html](http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03946.html)>; *Commissioner of Competition v Yellow Pages Marketing B.V.*, 2013 ONCA 71 at para 34. However, it should be noted that in certain circumstances, the “materiality” requirement is not included. Section 74.011(1), which is a prohibition against making false or misleading representations in an electronic message in the sender information or subject matter information of such message, does not require “materiality” be shown.

<sup>12</sup> *Competition Act*, RSC 1985, c. C-34, s. 52(5)(a).

<sup>13</sup> *Competition Act*, RSC 1985, c. C-34, s. 52(5)(b).

<sup>14</sup> For example, see the section 7(1) of the *Consumer Packaging and Labelling Act* and section 5(1) of the *Textile Labelling Act*.

<sup>15</sup> Competition Bureau Canada, “Competition Bureau assuming the presidency of the International Consumer Protection and Enforcement Network for 2020-2021” (30 June 2020), online: *Government of Canada* <[canada.ca/en/competition-bureau/news/2020/06/competition-bureau-assuming-the-presidency-of-the-international-consumer-protection-and-enforcement-networkfor-2020-2021.html](http://canada.ca/en/competition-bureau/news/2020/06/competition-bureau-assuming-the-presidency-of-the-international-consumer-protection-and-enforcement-networkfor-2020-2021.html)>.

<sup>16</sup> International Consumer Protection and Enforcement, “Global sweep finds 40% of firms’ green claims could be misleading” (29 January 2021), online: *ICPEN News*, <[icpen.org/news/1147](http://icpen.org/news/1147)>.

<sup>17</sup> Competition Bureau Canada, “Paint products company agrees to end alleged misleading environmental and Made in Canada claims” (31 August 2010), online: *Government of Canada*: <[competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03282.html](http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03282.html)>.

<sup>18</sup> *The Commissioner of Competition v Hyundai Auto Canada Corp.* (2 Aug 2013), CT-2013-004 2013, online: Competition Tribunal <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463251/index.do](http://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463251/index.do)>; *The Commissioner of Competition v Kia Canada Inc.* (2 Aug 2013), CT-2013-005, online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463257/index.do](http://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/463257/index.do)>; see also Competition Bureau Canada, “Competition Bureau secures consent agreements with automobile distributors Hyundai and Kia” (2 August 2013), online: *Government of Canada* <[competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03588.html](http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03588.html)>.

<sup>19</sup> *The Commissioner of Competition v Volkswagen Group Canada Inc. et al* (19 Dec 2016), CT-2016-017, online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/462826/1/document.do](http://decisions.ct-tc.gc.ca/ct-tc/cdo/en/462826/1/document.do)>; see also Competition Bureau Canada, “Volkswagen and Audi to pay up to \$2.1 billion to consumers and \$15 million penalty for environmental marketing claims” (19 December 2016), online: *Government of Canada* <[canada.ca/en/competition-bureau/news/2016/12/volkswagen-audi-pay-up-2-1-billion-consumers-15-million-penalty-environmental-marketing-claims.html](http://canada.ca/en/competition-bureau/news/2016/12/volkswagen-audi-pay-up-2-1-billion-consumers-15-million-penalty-environmental-marketing-claims.html)>.

<sup>20</sup> *The Commissioner of Competition v Volkswagen Group Canada Inc. et al* (12



Jan 2018), CT-2018-003, online: <[decisions.ct-tc.gc.ca/ct-tc/cdo/en/462826/1/document.do](https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/462826/1/document.do)>.

<sup>21</sup> Competition Bureau Canada, “Keurig Canada to pay \$3 million penalty to settle Competition Bureau’s concerns over coffee pod recycling claims” (6 January 2022), online: *Government of Canada*: <[canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html](https://canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html)>.

<sup>22</sup> Competition Bureau Canada, “Keurig Canada to pay \$3 million penalty to settle Competition Bureau’s concerns over coffee pod recycling claims” (6 January 2022), online: *Government of Canada*: <[canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html](https://canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html)>.

<sup>23</sup> Competition Bureau Canada, “Keurig Canada to pay \$3 million penalty to settle Competition Bureau’s concerns over coffee pod recycling claims” (6 January 2022), online: *Government of Canada*: <[canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html](https://canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html)>.

<sup>24</sup> Competition Bureau Canada, “Keurig Canada to pay \$3 million penalty to settle Competition Bureau’s concerns over coffee pod recycling claims” (6 January 2022), online: *Government of Canada*: <[canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html](https://canada.ca/en/competition-bureau/news/2022/01/keurig-canada-to-pay-3-million-penalty-to-settle-competition-bureaus-concerns-over-coffee-pod-recycling-claims.html)>.

<sup>25</sup> *Ratyach v. Bloomer*, [1990] 1 SCR 940.

<sup>26</sup> *Quenneville v Volkswagen*, 2017 ONSC 2448; see also Competition Bureau Canada, “Volkswagen and Audi to pay up to \$2.1 billion to consumers and \$15 million penalty for environmental marketing claims” (19 December 2016), online: *Government of Canada* <[canada.ca/en/competition-bureau/news/2016/12/volkswagen-audi-pay-up-2-1-billion-consumers-15-million-penalty-environmental-marketing-claims.html](https://canada.ca/en/competition-bureau/news/2016/12/volkswagen-audi-pay-up-2-1-billion-consumers-15-million-penalty-environmental-marketing-claims.html)>.

<sup>27</sup> *Quenneville v Volkswagen Group of Canada, Inc.*, 2018 ONSC 2516; see also Competition Bureau Canada, “Up to \$290.5 million in compensation for Canadians in Volkswagen, Audi and Porsche emissions case” (12 January 2018), online: *Government of Canada* <[canada.ca/en/competition-bureau/news/2018/01/up\\_to\\_290\\_5\\_millionincompensationforcanadiansinvolkswagenaudiand.html](https://canada.ca/en/competition-bureau/news/2018/01/up_to_290_5_millionincompensationforcanadiansinvolkswagenaudiand.html)>.

<sup>28</sup> *Kalra v Mercedes Benz*, 2017 ONSC 3795.

<sup>29</sup> Ad Standards, “The Canadian Code of Advertising Standards” (July 2019), online: *Ad Standards* <[adstandards.ca/code/the-code-online/](https://adstandards.ca/code/the-code-online/)>.

<sup>30</sup> Ad Standards, “Recent Complaints Case Summaries” online: *Ad Standards* <[adstandards.ca/complaints/complaints-reporting/recent-complaint-case-summaries/](https://adstandards.ca/complaints/complaints-reporting/recent-complaint-case-summaries/)>.

<sup>31</sup> Ad Standards, “2019 Consumer Complaint Case Summaries” online: *Ad Standards* <[adstandards.ca/wp-content/uploads/2019-Consumer-Complaint-Case-Summaries.pdf](https://adstandards.ca/wp-content/uploads/2019-Consumer-Complaint-Case-Summaries.pdf)>.

<sup>32</sup> Ad Standards, “2017 Consumer Complaint Case Summaries” online: *Ad*

*Standards* <[adstandards.ca/wp-content/uploads/2019/06/Ad-Complaints-Reports-2017.pdf](https://adstandards.ca/wp-content/uploads/2019/06/Ad-Complaints-Reports-2017.pdf)>.

<sup>33</sup> Ad Standards, “2017 Consumer Complaint Case Summaries” online: *Ad Standards* <[adstandards.ca/wp-content/uploads/2019/06/Ad-Complaints-Reports-2017.pdf](https://adstandards.ca/wp-content/uploads/2019/06/Ad-Complaints-Reports-2017.pdf)>.

<sup>34</sup> Competition Bureau Canada, “Environmental claims and greenwashing” (3 November, 2021), online *Government of Canada* <[competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04607.html#sec04](https://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04607.html#sec04)>.

<sup>35</sup> Competition Bureau Canada, “Environmental claims and greenwashing” (3 November, 2021), online *Government of Canada* <[competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04607.html#sec04](https://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04607.html#sec04)>.

<sup>36</sup> Competition Bureau Canada, “Environmental claims and greenwashing” (3 November, 2021), online *Government of Canada* <[competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04607.html#sec04](https://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04607.html#sec04)>. see also: Competition Bureau Canada, “Performance representations not based on adequate and proper tests” (22 February 2018), online: *Government of Canada* <[competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00520.html](https://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00520.html)>.

<sup>37</sup> Competition Bureau Canada & Canadian Standards Association, “Environmental Claims: A Guide for Industry and Advertisers” (June 2008), online: *Government of Canada* <[competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02701.html](https://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02701.html)>.

<sup>38</sup> For example, the International Sustainability Standards Board is an independent, private-sector body that develops and approves the IFRS Sustainability Disclosure Standards. By way of further example, GRI (Global Reporting Initiative) is another independent, international organization that has developed internationally adopted standards for sustainability reporting.

<sup>39</sup> Competition Bureau Canada, “It’s not easy being green. Businesses must back up their words” (23 January 2017), online: *Government of Canada* <[canada.ca/en/competition-bureau/news/2017/01/not-easy-being-green-businesses-must-back-up-their-words.html](https://canada.ca/en/competition-bureau/news/2017/01/not-easy-being-green-businesses-must-back-up-their-words.html)>.

<sup>40</sup> Competition Bureau Canada, “Be on the lookout for greenwashing” (26 January 2022), online: <<https://www.canada.ca/en/competition-bureau/news/2022/01/be-on-the-lookout-for-greenwashing.html>>.

<sup>41</sup> Competition Bureau Canada, “Competition Bureau to focus on competitive markets for economic recovery and growth in 2022-2023” (4 April 2022), online: *Government of Canada* <<https://www.canada.ca/en/competition-bureau/news/2022/04/competition-bureau-to-focus-on-competitive-markets-for-economic-recovery-and-growth-in-2022-2023.html>>.

<sup>42</sup> Ad Standards, “Advisory on Environmental Claims Advertising: When Green is Not Really Green” (2007), online: *Ad Standards 2007 Ad Complaints Report* <[adstandards.ca/wp-content/uploads/2018/03/2007Advisory.pdf](https://adstandards.ca/wp-content/uploads/2018/03/2007Advisory.pdf)>.

<sup>43</sup> See Part XXIII and Part XXIII.1 of the *Ontario Securities Act*.

<sup>44</sup> Stephen Erlichman and Sophie Langlois, “ESG Disclosure in Canada - Legal Requirements, Voluntary Disclosure and Potential Liability” (18 February 2021), online: *Fasken* <[fasken.com/en/knowledge/2021/02/](https://fasken.com/en/knowledge/2021/02/)>

[esg-disclosure-in-canada-legal-requirements-voluntary-disclosure-and-potential-liability](#)>.

<sup>45</sup> Greenpeace Canada “Alberta Securities Commission reviewing Greenpeace complaint of inadequate disclosure of climate risk by Kinder Morgan” (9 April 2018), online: *Greenpeace* <[greenpeace.org/canada/en/press-release/285/press-release-alberta-securities-commission-reviewing-greenpeace-complaint-of-inadequate-disclosure-of-climate-risk-by-kinder-morgan/](https://www.greenpeace.org/canada/en/press-release/285/press-release-alberta-securities-commission-reviewing-greenpeace-complaint-of-inadequate-disclosure-of-climate-risk-by-kinder-morgan/)>.

<sup>46</sup> Stephen Erlichman and Sophie Langlois, “ESG Disclosure in Canada - Legal Requirements, Voluntary Disclosure and Potential Liability” (18 February 2021), online: *Fasken* <[fasken.com/en/knowledge/2021/02/esg-disclosure-in-canada-legal-requirements-voluntary-disclosure-and-potential-liability](https://www.fasken.com/en/knowledge/2021/02/esg-disclosure-in-canada-legal-requirements-voluntary-disclosure-and-potential-liability)>.

<sup>47</sup> Ontario Securities Commission “OSC Notice 11-792– Notice Statement of Priorities for Financial Year to end March 31, 2022” (29 June 2021), online: *Ontario Securities Commission* <[osc.ca/sites/default/files/2021-06/sn\\_20210629\\_11-792\\_sop-end-2022.pdf](https://www.osc.ca/sites/default/files/2021-06/sn_20210629_11-792_sop-end-2022.pdf)>.

<sup>48</sup> Canadian Securities Administrators, “CSA Staff Notice 51-358 Reporting of Climate Change-related Risks” (1 August 2019), online: *Ontario Securities Commission* <[osc.ca/sites/default/files/pdfs/irps/csa\\_20190801\\_51-358\\_reporting-of-climate-change-related-risks.pdf](https://www.osc.ca/sites/default/files/pdfs/irps/csa_20190801_51-358_reporting-of-climate-change-related-risks.pdf)>.

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<sup>77</sup> *Pharmacy Act*, SO 1991, c. 36.

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<sup>130</sup> Art L121-2 *Code de la consommation*.

<sup>131</sup> *Loi no 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets (1)*, JO 24 August 2021, at Article L-132-2.

<sup>132</sup> *Loi no 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets (1)*, JO 24 August 2021, at article 11.

<sup>133</sup> Australian Competition & Consumer Commission, Appeal on Kleenex flushable wipes claim dismissed (15 June 2020), online: [Australian Competition & Consumer Commission <https://www.accc.gov.au/media-release/appeal-on-kleenex-flushable-wipes-claim-dismissed>](https://www.accc.gov.au/media-release/appeal-on-kleenex-flushable-wipes-claim-dismissed).

<sup>134</sup> In general, the Bureau is not required to pursue a complaint brought by a private party. However, under section 9 of the Act, where a complaint is made by six persons resident in Canada in the form required (known as a “six resident complaint”) the Bureau must, where there are grounds for complaint, cause an inquiry to be made into all such matters as the Commissioner considers necessary to inquire into with the view of determining the facts.

<sup>135</sup> CTV News, “Competition bureau investigating claims made by makers of ‘flushable’ wipes” (28 August 2019), online: [CTV News <https://www.ctvnews.ca/business/competition-bureau-investigating-claims-made-](https://www.ctvnews.ca/business/competition-bureau-investigating-claims-made-)

[by-makers-of-flushable-wipes-1.4568784?cache=szcuxcmsiqb%3FclipId%3D89950>](#).

<sup>136</sup> *Australasian Centre for Corporate Responsibility v Santos Limited (In House Counsel)*, [2021] FCA NSD 828; see also Australasian Centre for Corporate Responsibility, “Australasian Centre for Corporate Responsibility files landmark case against Santos in Federal Court” (26 August 2021), online: *Australasian Centre for Corporate Responsibility* <[accr.org.au/news/australasian-centre-for-corporate-responsibility-files-landmark-case-against-santos-in-federal-court/](http://accr.org.au/news/australasian-centre-for-corporate-responsibility-files-landmark-case-against-santos-in-federal-court/)>.

<sup>137</sup> Australian Competition & Consumer Commission, “Compliance and enforcement priorities for 2022/23” (3 March 2022), online: *Australian Competition & Consumer Commission* <<https://www.accc.gov.au/media-release/compliance-and-enforcement-priorities-for-2022-23>>; Australian Securities & Investments Commission, “ASIC’s corporate governance priorities and the year ahead” (3 March 2022), online: *Australian Securities & Investments Commission* <<https://asic.gov.au/about-asic/news-centre/speeches/asic-s-corporate-governance-priorities-and-the-year-ahead/>>; Australian Competition & Consumer Commission, “New Chair Gina Cass-Gottlieb starts at ACCC” (21 March 2022), online: *Australian Competition & Consumer Commission* <<https://www.accc.gov.au/media-release/new-chair-gina-cass-gottlieb-starts-at-accc>>.

<sup>138</sup> Australian Securities & Investments Commission, “ASIC’s corporate governance priorities and the year ahead” (3 March 2022), online: *Australian Securities & Investments Commission* <<https://asic.gov.au/about-asic/news-centre/speeches/asic-s-corporate-governance-priorities-and-the-year-ahead/>>.

<sup>139</sup> Commerce Commission, “Environmental Claims Guidelines—a guide for traders” (July 2020), online: *Commerce Commission New Zealand* <[comcom.govt.nz/\\_data/assets/pdf\\_file/0017/220247/Environmental-claims-guidance-July-2020.pdf](http://comcom.govt.nz/_data/assets/pdf_file/0017/220247/Environmental-claims-guidance-July-2020.pdf)>.

<sup>140</sup> The Netherlands Authority for Consumers and Markets, “ACM launches investigations into misleading sustainability claims in three sectors” (5 March 2021), online: *Authority for Consumers and Markets* <[acm.nl/en/publications/acm-launches-investigations-misleading-sustainability-claims-three-sectors](http://acm.nl/en/publications/acm-launches-investigations-misleading-sustainability-claims-three-sectors)>.

<sup>141</sup> The Netherlands Authority for Consumers and Markets, “Guidelines—Sustainability Claims” (28 January 2021), online: *Authority for Consumers and Markets* <[acm.nl/en/publications/guidelines-sustainability-claims](http://acm.nl/en/publications/guidelines-sustainability-claims)>.

<sup>142</sup> The Netherlands Authority for Consumers and Markets, “ACM: misleading information and certification labels regarding sustainability must stop” (17 July 2020), online: *Authority for Consumers and Markets* <[acm.nl/en/publications/acm-misleading-information-and-certification-labels-regarding-sustainability-must-stop](http://acm.nl/en/publications/acm-misleading-information-and-certification-labels-regarding-sustainability-must-stop)>.

<sup>143</sup> Global Advertising Lawyers Alliance, “The Italian Competition Authority hits the Italian oil-and-gas giant Eni with the highest possible fine in a “greenwashing” advertising case” (23 January 2020), online: *GALA* <<http://blog.galalaw.com/post/102fxe1/the-italian-competition-authority-hits-the-italian-oil-and-gas-giant-eni-with-the->>.

<sup>144</sup> Global Advertising Lawyers Alliance, “The Italian Competition Authority hits

the Italian oil-and-gas giant Eni with the highest possible fine in a “greenwashing” advertising case” (23 January 2020), online: *GALA* <<http://blog.galalaw.com/post/102fXe1/the-italian-competition-authority-hits-the-italian-oil-and-gas-giant-eni-with-the>>; see also Autorita’ Garante della Concorrenza e del Mercato, “PS11400 - ICA: ENI fined 5 million euros for misleading advertising in its ENI diesel+ campaign” (15 January 2020), online: *AGCM* <[en.agcm.it/en/media/press-releases/2020/1/PS11400](http://en.agcm.it/en/media/press-releases/2020/1/PS11400)>.

<sup>145</sup> Global Advertising Lawyers Alliance, “The Italian Competition Authority hits the Italian oil-and-gas giant Eni with the highest possible fine in a “greenwashing” advertising case” (23 January 2020), online: *GALA* <<http://blog.galalaw.com/post/102fXe1/the-italian-competition-authority-hits-the-italian-oil-and-gas-giant-eni-with-the>>; see also Autorita’ Garante della Concorrenza e del Mercato, “PS11400 - ICA: ENI fined 5 million euros for misleading advertising in its ENI diesel+ campaign” (15 January 2020), online: *AGCM* <[en.agcm.it/en/media/press-releases/2020/1/PS11400](http://en.agcm.it/en/media/press-releases/2020/1/PS11400)>.

<sup>146</sup> International Sustainability Standards Board (ISSB), “About the ISSB” (2021), online: *Deloitte IAS Plus* <[iasplus.com/en/resources/ifrsf/issb](https://iasplus.com/en/resources/ifrsf/issb)>.

<sup>147</sup> Global Reporting Initiative, “Building a sustainable future”, online: *GRI* <[globalreporting.org/public-policy-partnerships/sustainable-development/](https://globalreporting.org/public-policy-partnerships/sustainable-development/)>.

<sup>148</sup> Value Reporting Foundation, “SASB Standards”, online: *Sustainability Accounting Standards Board* <[sasb.org/](https://sasb.org/)>.