



October 7, 2009

Andrew McAlpine,
Senior Competition Law Officer
Competition Bureau
50 Victoria Street
Gatineau, QC K1A 0C9

Dear Mr. McAlpine,

Re: Draft Enforcement Guidelines Relating to "Product of Canada" and "Made in Canada" Claims

Introduction

The National Competition Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to comment on the Draft Enforcement Guidelines Relating to "Product of Canada" and "Made in Canada" Claims (the Draft Guidelines), which were released for public comment by the Competition Bureau on July 10, 2009. The CBA Section strongly supports the continuing efforts of the Bureau to clarify its enforcement policies by publishing enforcement guidelines, information bulletins, speeches, press releases and other interpretive aids.

General Comments

The Preface states that the Bureau is advancing the Draft Guidelines in light of, among other developments, the distinction between "Made in Canada" and "Product of Canada" claims in the guidelines recently issued by the Canadian Food Inspection Agency (the CFIA Guide). This conveys the impression that the Draft Guidelines adopt the same approach to "Made in Canada" and "Product of Canada" claims as in the CFIA Guide. However, as we discuss in detail below, the Draft Guidelines adopt a significantly more restrictive approach to "Made in Canada" and other claims. In the CBA Section's view, there is no valid reason for the more restrictive approach in the Draft Guidelines.

Detailed Comments

Section 3.2.2 – "Made in Canada" Claims

The Draft Guidelines approach to "Made in Canada" claims is significantly more restrictive than the approach in the CFIA Guide. The Draft Guidelines would allow a "Made in Canada" claim only where the product in question includes at least 51% Canadian content. There is no similar

requirement in the CFIA Guide. The CFIA's FAQs make it clear that a product can say "Made in Canada from domestic and imported ingredients" even if the Canadian content is minimal:

Q3: Can a product say "Made in Canada from domestic and imported ingredients" even if the Canadian content is minimal?

A: Made in Canada from domestic and imported ingredients could apply to all products which are substantially transformed in Canada using imported and Canadian ingredients. These claims are intended to indicate that a food product is manufactured or processed in Canada, not to specify the amount of Canadian ingredients. This claim recognizes the importance of the value added by the Canadian processing industry to Canadian jobs and local economies.¹

In the CBA Section's view, there is no reason to apply different standards to food products and non-food products, particularly since both are subject to the same false or misleading advertising provisions in the *Competition Act* and *Consumer Packaging and Labelling Act*. The Draft Guidelines should be revised to reflect the approach to "Made in Canada" claims in the CFIA Guide. Section 3.2.3 of the Draft Guidelines notes that "general terms ... such as 'produced' or 'manufactured' in Canada ... are likely to be understood by consumers as synonymous with a 'Made in Canada' claim", which is consistent with the approach in the CFIA Guide. Alternatively, the Bureau should explain why the more restrictive approach is necessary for non-food products.

In addition, the Draft Guidelines require that a qualifying statement be included with "Made in Canada" claims (e.g., "Made in Canada with imported parts"). If this requirement were followed, many Canadian businesses may have to change their existing packaging to include the necessary qualifying statement. Given the significant costs associated with packaging changes and the current state of the Canadian economy, the CBA Section questions whether this is the right time for the Bureau to be adopting a new approach to "Made in Canada" claims. At a minimum, the Bureau should provide Canadian businesses with a significant grace period during which they can continue to use their existing packaging.

Finally, the CBA Section recommends that words "or manufacturing" be added after "limited production" in the third line of the first paragraph in this section.

Section 3.2.3 – Other Claims

The Draft Guidelines also take a more restrictive position on other claims. For example, the CFIA Guide provides that "[o]ther more specific statements or claims, including 'Prepared in Canada', 'Processed in Canada', and 'Refined in Canada' that describe the Canadian value-added may be used without further qualification, provided they are truthful and not misleading for consumers". However, the Draft Guidelines recommend that other claims be qualified, such as "Assembled in Canada with foreign parts" or "Sewn in Canada with imported fabric". In the CBA Section's view, further qualification should be required only where an unqualified statement would likely mislead consumers.

¹

CFIA: Frequently asked Questions on Product of Canada and Made in Canada Claims, <http://www.inspection.gc.ca/english/fssa/labeti/prodcan/queste.shtml>

In addition, it is unclear why the last paragraph in this section refers to "typical consumers" and what is meant by this reference. We recommend that the word "typical" be deleted or, alternatively, the Draft Guidelines define what is meant by "typical consumers".

Section 3.2.4 – Implicit Declarations

The CBA Section recommends that the Draft Guidelines state, in either the main text or a footnote at the end of the first sentence of the first paragraph, that the use of the Canadian Flag is protected under the *Trade-marks Act* and cannot be used on a product or in an advertisement or other representation unless permission is obtained from the Department of Canadian Heritage.

The CBA Section also recommends that the examples at the end of section 3.2.4 either be deleted or that more context be added to the Draft Guidelines. On their own, the examples do not provide much guidance to the reader.

Section IV – Penalties and Remedies

To accord more accurately with the *Competition Act*, the CBA Section recommends that the words "in a material respect" be added after the words "false or misleading" in the first sentence of the first paragraph.

Conclusion

The CBA Section thanks the Bureau for the opportunity to submit these comments and hopes they are of assistance. The CBA Section would be pleased to discuss its comments further at the Bureau's convenience.

Yours sincerely,

(original signed by Paul J. Collins)

Paul J. Collins
Chair, National Competition Law Section