THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: greenwashingconsultationecoblanchiment@cb-bc.gc.ca

Commissioner Matthew Boswell
Deputy Commissioner Josephine Palumbo
Deceptive Marketing Practices Directorate
Competition Bureau
50 Victoria Street
Gatineau, Quebec K1A 0C9

Dear Commissioner Boswell and Deputy Commissioner Palumbo:

Re: Public Consultation on Competition Act's new greenwashing provisions

The Competition Law and Foreign Investment Review Section of the Canadian Bar Association ("CBA Section") welcomes the opportunity to submit comments in response to the Competition Bureau's ("Bureau") Public Consultation on *the Competition Act's* new greenwashing provisions.[1]

The Canadian Bar Association is a national association representing over 40,000 jurists, including lawyers, notaries, law teachers, and students across Canada. We promote the rule of law, access to justice, effective law reform, and improvements to the administration of justice.[2] The CBA Section comprises approximately 1,000 lawyers and promotes greater awareness and understanding of legal and policy issues relating to competition law and foreign investment.[3]

The CBA Section appreciates the Bureau's proactive approach in seeking input before issuing draft enforcement guidance given the uncertainties associated with the new greenwashing provisions (the "New Provisions") that would (i) extend performance claim rules to environmental claims related to products (Section 74.01(1)(b.1) ("Section b.1"), and (ii) establish substantiation requirements for enterprise-level environmental claims 74.01(1)(b.2) ("Section b.2"). In our view, the New Provisions could raise significant uncertainty for Canadian businesses and their advisors. For example, Section b.2 in particular has created uncertainty due to the inherent vagueness of the novel "internationally recognized methodology" standard of substantiation. The CBA Section appreciates that the Bureau is moving quickly to provide guidance regarding how it intends to enforce the New Provisions.

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1 Competition Bureau Canada, Competition Bureau seeks feedback on the Competition Act's new greenwashing provisions, available online.

2 See online.

3 See online.

Conclusion and Summary of Recommendations

Given the breadth, uncertainty, and significant potential legal exposures associated with the New Provisions, the CBA Section encourages the Bureau to take a measured approach to enforcement until final enforcement guidance is issued. The CBA Section recommends that the Bureau's enforcement approach in early cases should be used to educate the business and legal communities about how the Bureau intends to enforce the New Provisions and how to best comply with them.

The CBA Section makes the following recommendations for the development of the Bureau's enforcement guidance:

1. provide clarity regarding the practical application of critical terms such as "adequate and proper testing," "adequate and proper substantiation," and "internationally recognized methodology" ("IRM");
2. address the relationship between required regulatory disclosures and the New Provisions, including whether compliance with the relevant standards established by other domestic and foreign regulators complies with the New Provisions;
3. provide clear guidance regarding the use of disclaimers, cautionary statements, or other similar clarification approaches;
4. clarify how the due diligence defense applies under the New Provisions;
5. provide useful, commercially relevant examples that help companies understand the Bureau's enforcement approach (examples provided should not be so generic or obvious that they are not meaningful); and
6. clearly address how the Bureau will enforce the New Provisions with respect to representations made prior to the coming into force of the New Provisions.

The CBA Section also believes that the Bureau's enforcement approach should strike a balance between the goal of ensuring that consumers can rely on environmental representations made to them by organizations and the risk that overly vigorous enforcement may deter organizations from communicating meaningfully with consumers, regulators, and other stakeholders. This is especially important given that many companies are innovating and investing to reduce the environmental impacts of their operations and products. Such an approach to the New Provisions would help to avoid disincentivizing companies from taking positive environmental action or putting Canadian companies at a disadvantage to competitors internationally.

Below, we provide the CBA Section's responses to the questions set out in the Bureau's consultation.

Section b.1 – Environmental claims regarding product benefits

1) What kinds of claims about environmental benefits are commonly made about products or services in the marketplace? Why are these claims more common than others?

The common types of product-related environmental benefit claims vary significantly by industry and product. They include representations regarding reduced emissions associated with the production of a product, the recyclability of a product and/or packaging, and the environmental benefits associated with using a product, among others. It would be helpful if the Bureau's enforcement guidance could specifically address how the Bureau intends to apply the New Provisions to these types of product-related environmental benefit claims. For example, there should be clear guidance regarding the use of a recyclability claim that may depend on the capabilities of municipal recycling programs, which can differ between regions.

2) Are there certain types of claims about environmental benefits of products or services that are less likely to be based on adequate and proper testing? Is there something about those claims that makes them harder to test?

Clarification of what qualifies as an "internationally recognized methodology."

The creation of an internationally recognized methodology (IRM) standard differs from the substantiation approach taken by other Canadian regimes and the regimes of major trading partners. The CBA Section notes that this creates significant uncertainty and, absent a flexible approach, may result in companies restricting their investment in Canada or deciding not to launch environmentally beneficial products or undertake other environmental activities or communications in Canada. This may occur because of the cumulative effect of the vague IRM standard, private enforcement, and potentially substantial administrative monetary penalties based on global revenues despite the relatively small size of the Canadian market for many companies.

The CBA Section recommends that the Bureau guidance interpret IRM requirements in a way that enables, rather than unnecessarily restricts, the ability of companies to make environmental claims regarding their efforts to mitigate the environmental impacts of their business activities. Taking a restrictive approach will preclude companies from effectively communicating their environmental mitigation efforts to consumers and stakeholders. This would have the opposite effect intended by the New Provisions, which is to increase transparency and consumer access to information regarding the environmental actions of businesses.

In considering what constitutes an IRM, the CBA Section notes that the term "methodology" is defined broadly as "a system of ways of doing, teaching, or studying something" or "a set of methods used in a particular area of study or activity."[4] It will be important to adopt a flexible approach to the IRM standard as the science related to environmental and sustainability claims continues to evolve rapidly.

When considering what constitutes an IRM, the CBA Section suggests that the Bureau should not specifically approve a list of standards accepted as IRMs. Such an approach would be unnecessarily restrictive and static. It could prevent companies from making valid claims simply because there is no listed IRM for that claim, even if it may be capable of reasonable substantiation. Instead, the Bureau guidance should set out criteria and principles that will allow companies to evaluate whether a particular approach is likely to qualify as an IRM. Some examples include:

- approaches endorsed by an international agency, such as the United Nations, International Chamber of Commerce, OECD, etc., should generally be accepted as IRMs;
- approaches endorsed or mandated by a provincial or federal body or regulatory agency (such as securities regulators or Environment and Climate Change Canada, among others) should generally be accepted as IRMs;[5] and
- approaches developed or endorsed by industry experts or industry associations in Canada or internationally should be considered as IRMs where they are based on transparent, good faith processes.

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4 Cambridge University Press, *Cambridge English Dictionary*, (Cambridge: Cambridge University Press, 2024) sub verbo "methodology," online.

5 This would be consistent with the interpretation of the provision put forward by the Standing Senate Committee on National Finance. See "Bill C-59, An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023, and certain provisions of the budget tabled in Parliament on March 28, 2023" [PDF], 3rd reading, Debates of the Senate (Hansard), 44-1, 153, No. 214 (18 June 2024) at 6736.

Claims relating to new technologies or materials may be difficult to substantiate through testing because there may not be a clear test protocol that applies. Similarly, substantiating certain environmental claims may be difficult where variables are beyond a company's control (for example, with respect to Scope 3 emissions). In addition, the environmental performance of a product may change with prolonged use, exposure to different use conditions, or as a result of higher-than-average usage, poor maintenance, etc. In these situations, the CBA Section suggests that the Bureau guidance could take the position that a commercially reasonable, good faith approach to substantiating the claim would be "adequate and proper."

3) What should the Bureau consider when it evaluates whether testing to support claims about the environmental benefits of products or services is "adequate and proper"?

The CBA Section considers that the case law with respect to product performance claims in Section 74.01(1)(b) sets out useful general principles with respect to whether a performance claim is supported by adequate and proper testing:

- whether a particular test is "adequate and proper" will depend on the nature of the representation made and the meaning or impression conveyed by that representation;
- subjectivity in the testing should be eliminated as much as possible;
- the test must establish the effect claimed;
- the testing need not be as exacting as would be required to publish the test in a scholarly journal, and
- the test should demonstrate that the result claimed is not a chance result. [6]

When assessing whether testing of environmental claims is "adequate and proper," the CBA Section encourages the Bureau to assess whether the approach used is commercially reasonable, having regard to the nature of the claim at issue and available science or test protocols. Consistent with the notion of commercial reasonableness, the standard applied by the Bureau should not be so onerous that it imposes unnecessarily burdensome costs on businesses.

When the Bureau considers whether environmental testing is "adequate and proper," the CBA Section believes it should also have regard to other regulatory requirements that may apply to a particular product. For example, many companies are subject to a range of regulatory requirements that are being developed at both the federal and provincial levels. Examples include ongoing efforts by Environment and Climate Change Canada to develop regulations for plastic packaging and single-use plastics. These regulations include recycled content requirements, as well as rules for the use of terms such as recyclability and compostability.[7] Compliance with regulations that set standards of this kind should be considered "adequate and proper" for Section b.1.

Where a company adjusts or changes the test it uses to substantiate a claim, the CBA Section respectfully suggests that this should not give rise to an inference that the prior test was not "adequate and proper ."The Section believes that clear guidance is that switching to a newer or better test does not create an enforcement risk (including where the switch results in a modification to a prior product-related claim) would incentivize ongoing improvements to tests and claims.

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6 *Canada (Commissioner of Competition) v Chatr Wireless Inc*, 2013 ONSC 5315 at paras 293, 295 and 536.

7 See ECCC's consultation paper, online.

4) What challenges may businesses and advertisers face when complying with this provision?

The methods used for the substantiation of environmental claims may continue to evolve rapidly. The CBA Section encourages Bureau guidance to recognize that scientific validation may lag behind innovations, meaning established test protocols may not yet exist for new technologies. While it is important that companies take appropriate care to ensure that their product-related claims are substantiated, it would be counter-productive to apply Section b.1 in a way that unnecessarily discourages companies from investing in the implementation or development of new environmental mitigation approaches or technologies.

5) What other information should the Bureau be aware of when thinking about how and when to enforce this provision?

The CBA Section urges the Bureau to give clear guidance as to whether all product-related environmental statements will be treated as "representations" and, if not, what will be considered to constitute a representation. For example, the guidance should clarify whether the use of a slogan or trademark can, on its own, be considered a "representation" under the New Provisions.

Section b.2 - Environmental claims regarding businesses or business activities

Application of the due diligence defense to the New Provisions.

Providing clear guidance on applying the due diligence defense set out in Section 74.1(3) of the Act is crucial. This defense provides a measure of protection when a person making a representation has acted with reasonable care in selecting an approach for substantiating a claim, considering both methodology and testing.

Another challenging area relates to environmental claims that may be affected by inputs used to supply a product, such as packaging, shipping, raw materials, etc. The Section recommends that the Bureau guidance indicate that companies are allowed to rely on the advice of experts or the environmental representations of their suppliers when making claims that are affected by the inputs into a product.

Use of disclaimers, cautionary notes, and other qualifying language.

The CBA Section encourages the Bureau to provide clear guidance regarding the use of disclaimers or other qualifying language, including by providing useful illustrative examples regarding how they may be used in different circumstances, such as on websites, advertising, social media, and more comprehensive documents such as sustainability reports. For example, the CBA Section notes that the federal government's recently released *Greening Government Strategy: A Government of Canada Directive.*[8] states that its "operations will be net-zero emissions by 2050". The document then clarifies that what is meant by reaching "net-zero emissions" in real property and conventional fleet operations is to reduce emissions "by at least 90% below 2005 levels by 2050". This goal specifically includes only Scope 1 and Scope 2 emissions, with a footnote explaining Scope 1, Scope 2, and Scope 3 emissions and clarifying that Scope 3 emissions are not included in the net-zero target.

If the Government of Canada considers such an approach to be acceptable, companies should be entitled to make net-zero claims that are similarly qualified, so long as they use appropriate disclaimers and qualifying language. This type of approach is generally consistent with the Bureau's

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[8] Treasury Board of Canada Secretariat, *Greening Government Strategy: A Government of Canada Directive* (Ottawa: TBSC, 2024) online.

existing guidance relating to the use of disclaimers. The Section considers that Bureau guidance confirms this approach would be useful.

Historical Representations

Another major concern for companies dealing with historical representations is that they believe that information should continue to be made available to the public as a resource. It would be useful to have guidance about when a historical representation will be viewed as a continuing representation that may attract liability under the New Provisions. The CBA Section recommends that when a representation is clearly made as of a certain date, it should not be considered a continuing representation (e.g., a statement in a sustainability report for a specific reporting period).

Where a historical representation is not clearly made as of a certain date, it would be useful for the Bureau to confirm that the use of appropriate language indicating that the representation is archived and should no longer be relied upon would be sufficient. This approach would be consistent with the Bureau's treatment of its own guidance documents that have been superseded (e.g., the historic greenwashing guidance *Environmental Claims: A Guide for Industry and Advertisers*).[9]

6) **What kinds of claims about environmental benefits are commonly made in the marketplace about businesses or business activities? Why are these claims more common than others?**

Net-zero claims are currently pervasive. Businesses – particularly publicly traded companies – are under intense pressure from various stakeholders (including regulatory authorities, shareholders, proxy advisers, and lenders) to set ambitious emissions reduction targets and take steps to meet these targets. If aspirational targets are considered claims about the environmental benefits of businesses or business activities, this will be a critical area in which practical guidance will be needed.

7) **Are there certain types of claims about the environmental benefits of businesses or business activities that are less likely to be based on "adequate and proper substantiation in accordance with internationally recognized methodology"? Is there something about those types of claims that makes them harder to substantiate?**

What qualifies as a "representation to the public with respect to the benefits of a business or business activity"?

It is unclear what kinds of statements are subject to Section b.2. This provision can be interpreted as applying to any statement relating to a company's environmental mitigation efforts, regardless of how trivial. For example, do the New Provisions apply to a slogan or trademark that might draw an environmental inference, such as the use of a slogan like "Working for a greener tomorrow"? If the New Provisions capture this type of slogan, how must it be substantiated? If the Bureau seeks to apply the New Provisions to the use of benign language such as this, it will require many companies to incur high costs to remove such statements from websites, forms, company vehicles, packaging, etc., despite the fact that such statements are unlikely to mislead consumers or impact consumer behavior.

Because of the vague language of the New Provisions, many companies and their advisors are uncertain regarding the application of the New Provisions to trivial statements. The CBA Section encourages the Bureau to adopt in its enforcement guidance an approach that focuses on the types of statements most relevant to consumers.

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9 Canada Standards Association, *Environmental Claims: A Guide for Industry and Advertisers* (Ottawa: CSA, 2008) online.

Clarification regarding what constitutes "adequate and proper substantiation in accordance with internationally recognized methodology."

The requirement that environmental claims be based on "adequate and proper substantiation in accordance with internationally recognized methodology" differs from other standards set out in the *Competition Act* or in legislation in other countries. As a result, even if an organization determines that its environmental representations are factual and that it has calculated the underlying data based in accordance with internationally recognized methodologies, it may remain uncertain whether its environmental representations have been based on adequate and proper substantiation under an IRM.

This issue is compounded by the undefined scope of Section b.2, as discussed above under the heading "What qualifies as a 'representation to the public with respect to the benefits of a business or business activity'?" If a slogan like "Working for a greener tomorrow" is subject to Section b.2, it would be important to understand what the Bureau would consider to be adequate and proper substantiation.

As with the concept of an "adequate and proper test," the CBA Section suggests that the Bureau should apply a commercially reasonable approach to its interpretation of what it means to base an environmental representation on adequate and proper substantiation in accordance with an IRM. In this regard, companies should be required to take a reasonable and good faith approach to substantiate their environmental claims but not be second-guessed because there could be an alternative approach that the Bureau may consider preferable.

8) **What internationally recognized methodologies should the Bureau consider when evaluating whether claims about the environmental benefits of the business or business activities have been "adequately and properly substantiated"? Are there limitations to these methodologies that the Bureau should be aware of?**

See above, under the heading "Clarification of what qualifies as an 'internationally recognized methodology.'"

9) **What other factors should the Bureau take into consideration when it evaluates whether claims about the environmental benefits of businesses or business activities are based on "adequate and proper substantiation in accordance with internationally recognized methodology"?**

New Approaches and Technologies

The CBA Section also recommends that the Bureau consider the difficulty that businesses will have in substantiating representations with respect to new mitigation approaches or technologies. As discussed above, the methods used to substantiate environmental claims continue to evolve rapidly. The Bureau's enforcement approach should take into account that science can lag behind developments, resulting in the absence of established test protocols for new technologies. While companies must take appropriate care to ensure that their claims are substantiated, Section b.2 should not be applied in a way that unnecessarily restricts the willingness of companies to invest in the implementation or development of environmental mitigation approaches or technologies.

One possible approach to representations with respect to the environmental benefits of new environmental mitigation approaches, or technologies would be to draw a distinction between representations that claim to describe the environmental benefits of such approaches or technologies and representations that are clearly statements of the anticipated or hoped-for environmental benefits of such approaches or technologies.

10) What challenges may businesses and advertisers face when complying with this new provision of the law?

Clarification regarding the scope of the New Provisions

While it is clear that the New Provisions apply to for-profit businesses, the Bureau should clarify how the New Provisions apply to not-for-profit organizations and trade associations.

11) What other information should the Bureau be aware of when thinking about how and when to enforce this new provision of the law?

Early Enforcement Activities

The CBA Section recommends that the Bureau exercise restraint in early cases, given the lack of clear guidance regarding the application of the New Provisions. Initial enforcement efforts (absent clearly egregious facts) should be used as an opportunity to educate stakeholders on the application of the New Provisions, as opposed to making examples of companies that are attempting to adjust to the new regulatory regime.

Yours truly,

(original letter signed by Noel Corriveau for Neil Campbell)

Neil Campbell
Chair, Competition Law and Foreign Investment Review Section