Misleading Advertising in Canada's Evolving Competition Law Landscape

Tony Di Domenico and Robin Spillette

Between 2022 and 2024 significant competition law reforms (the Amendments) have taken place in Canada with respect to, among other things, the misleading advertising provisions of the *Competition Act* (the Act).[1] These Amendments came in the wake of various public interest groups and political parties calling for greater emphasis on consumer protection and increased transparency by companies.

Changes contained in the Amendments include:

- Reversing the burden of proof under the "fake sale" (ordinary selling price) provisions;
- Introducing provisions explicitly targeting "drip pricing";
- A focus on greenwashing through introduction of new "performance claim" provisions requiring testing or substantiation for certain environmental and climate related claims;
- Increasing the administrative monetary penalties available for contraventions of misleading advertising provisions; and
- Expanding private rights of action for misleading advertising provisions.

These changes will have a resounding and far-reaching impact on companies doing business in Canada. They will, among other things, require that companies maintain sufficient pricing records to support discount claims; carefully consider when and how prices are disclosed to consumers; and substantiate certain types of environmental claims. Companies that fail to do so could be subject to public and private enforcement and significant financial penalties.

By way of background, the Act not only contains traditional antitrust provisions focused on mergers, unilateral conduct and competitor collaboration but also criminal and civil consumer protection related provisions focused on advertising and marketing practices. In fact, the Competition Bureau (Bureau) is not only Canada's law enforcement agency for antitrust/competition matters but also, as a practical matter, Canada's primary consumer protection enforcer.[2]

The Amendments also introduce private rights of action before Canada's Competition Tribunal, which significantly changes the risk landscape in Canada. Previously, risk of enforcement

Antonio Di Domenico *is a Partner and Co-Leader of Fasen's Competition, Marketing and Foreign Investment Group.* ***Robin Spillette*** *is an associate in Fasken's Antitrust/ Competition & Marketing Group.*

[1] Competition Act, R.S.C., 1985, c. C-34 (Can.). In particular, amendments to misleading advertising provisions were contained in *An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures* (Bill C-19), which received royal assent on June 23, 2022, *An Act to amend the Excise Tax Act and the Competition Act* (Bill C-56), which received royal assent on December 15, 2023, and *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* (Bill C-59), which received royal assent on June 20, 2024.

All the provisions of these bills which relate to misleading advertising are now in force, with the exception of the provisions relating to private rights of action at the Competition Tribunal, which will come into force as of June 20, 2025.

[2] However, it bears noting that the deceptive marketing practices in the *Competition Act* are focused on advertising and marketing practices; conceptually, whether representations to the public are false or misleading. There is provincial consumer protection legislation, which is primarily focused on unfair practices.

depended greatly on the Bureau's priorities and resources. Parties could also historically take comfort in guidance or statements from the Bureau to predict the Bureau's enforcement approach and its interpretation of the Act. The introduction of expanded private actions means that private parties may bring challenges to conduct for which the Bureau may not have sought enforcement, including business to business (B2B) disputes, public interest litigation, and a form of class action/collective redress. Private parties may also bring suits which argue interpretations of the law which differ from (and may be more aggressive than) the Bureau's approach.

Notably, any guidance provided by the Bureau will not be binding or determinative on the Tribunal or the courts. The Tribunal does historically give some weight to Bureau guidelines, and as such, it may take such guidance into consideration when adjudicating on private environmental claims actions or applications for leave. That said, once private right of action under deceptive marketing provisions of the Act comes into force in June 2025, following Bureau guidance will not necessarily protect a business from the initiation of a greenwashing allegation as private applicants may bring actions based on their own interpretations of the Act.

"Fake Sale"—Ordinary Selling Price Provisions

By way of background, the ordinary selling price provisions (the OSP Provisions) of the Act[3] are aimed at ensuring that consumers are not mislead with respect to the magnitude of a sale by deceptive statements regarding the "regular price" of a product. Specifically, the OSP Provisions prohibit a supplier from making materially false or misleading representations to the public as to the ordinary selling price (i.e., the regular, non-sale price) of a product. These provisions cover comparisons made by a supplier to (i) the supplier's *own* ordinary selling price (Section 74.01(3)), and (ii) the ordinary selling price of all suppliers in the market generally (Section 74.01(2)). In either case, when making representations which refer to the ordinary selling price (which commonly include comparative advertising claims, i.e. "was $3.99, now $2.99" or a strike through advertisement), the claimed ordinary selling price must be supported by one of two tests: either (i) a substantial volume of the product must have been sold at the claimed ordinary selling price (or a higher price) within a reasonable period of time; or (ii) the product must have been offered for sale, in good faith, for a substantial period of time at the claimed ordinary selling price (or a higher price).

The Amendments have shifted the burden to suppliers to prove that the claimed ordinary selling price* does *meet one of the two specified tests, when a supplier makes a comparison to its own selling price.

Under these provisions, the Commissioner of Competition, through the Bureau, has historically borne the burden of proving that the claimed ordinary price (and thus, the magnitude of the claimed discounts) are not genuine. That is, the Bureau has had the burden of proving the tests noted above are *not* met.

The Amendments have shifted the burden to suppliers to prove that the claimed ordinary selling price *does* meet one of the two specified tests, when a supplier makes a comparison to its *own* selling price. (The Amendments do not shift the burden with respect to comparisons to the ordinary selling price in the market generally.) Ultimately, this change reinforces the importance for suppliers to maintain sufficient pricing records to ensure that they can prove that advertised discounts are genuine when the advertised price is compared to their own ordinary prices. Failure to maintain such records could significantly increase risk under the OSP Provisions.

"Drip Pricing" Provisions

Conceptually, "drip pricing" generally refers to advertising a product or service at a price that is unattainable, because consumers must also pay additional non-government-imposed charges or

[3] *Competition Act*, s. 74.01(2)-(5).

fees to buy the product or service. Prior to the Amendments, "drip pricing" cases were brought under the general false or misleading representation prohibition in Section 74.01(1)(a) of the Act (when commenced by the Commissioner of Competition) and under Section 52 of the Act (when commenced by private parties by way of a private action for damages). The analysis of drip pricing under these general provisions generally involved asking: (1) whether the initial advertised price representation was false or misleading; and (2) if so, whether the false and/or misleading representation was material.

Following the Amendments, the Act now explicitly applies to drip pricing. Specifically, Section 74.01(1.1) was introduced by the Amendments, which deems the practice of drip pricing to be a false and misleading representation to the public for the purposes of Section 74.01(1)(a) of the Act. The Act now defines the practice of drip pricing as the making of a representation of a price that is not attainable due to fixed obligatory charges or fees, unless the obligatory charges or fees represent only an amount imposed on a purchaser of the product by or under an Act of Parliament or the legislature of a province. Accordingly, with the new drip pricing provision, in order to demonstrate the elements of the general false or misleading representation prohibition (Section 74.01(1)(a)), the Commissioner no longer needs to prove that such representations are false and misleading. However, the Commissioner *does* need to demonstrate the remaining elements of Section 74.01, including materiality. Virtually duplicative provisions are contained in the criminal deceptive marketing provisions of the Act.

It bears noting that the exception to the drip pricing provisions is limited to "obligatory charges or fees . . . imposed on a purchaser of the product by or under an Act of Parliament or the legislature of a province." According to the Bureau, this captures charges or fees that represent federal, provincial, or territorial sales taxes imposed on the customer and does not capture charges, fees, or other costs incurred by or imposed on a business for the purpose of complying with various laws, which are then passed on to customers.

Notably, there has been limited enforcement under the new drip pricing provisions of the Act to date, aside from *Commissioner of Competition v Cineplex*[4] and class actions that are generally at an early stage. As such, there is little jurisprudence available to provide guidance with respect to the new drip pricing provisions. While the Act includes a technical definition of drip pricing (as noted above), we have yet to see this applied widely in practice. There are several nuances which could arise in practice, including, for instance, how variable (rather than fixed) fees will be dealt with and the question of whether the disclosure of the *existence* of an obligatory fee is sufficient to avoid the application of the drip pricing provisions.

Notably, the decision in *Cineplex* (which is currently under appeal) was, in some respects, conservative in not providing a general interpretation of the provision that may apply in all/most circumstances. The Competition Tribunal in *Cineplex*: (i) did not find that the drip pricing provisions of the Act require "all inclusive" pricing, (ii) did not take a position with respect to how the drip pricing provisions of the Act should be applied in the case of variable fees, and (iii) did not take a position with respect to how the terms "attainable", "fixed," or "obligatory" should be defined in all cases. The court also specifically declined to decide or comment on whether fees such as shipping charges are by definition not "fixed," as it was not an issue in that case. These findings

[4] Commissioner of Competition v Cineplex Inc, 2024 Comp Trib 5 (Can.), available online at: https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/521298/index.do. In this case, the Tribunal concluded that Cineplex had engaged in drip pricing in contravention of Section 74.01(1)(a) of the *Competition Act* by imposing a mandatory and inadequately disclosed online booking fee of $1.50 for the online sale of movie tickets to its theatres.

are significant, recognizing that the drip pricing provisions in the Act ought to be applied in a contextual manner.

Environmental and Climate Claims a.k.a. "Greenwashing"

Colloquially, "greenwashing" involves making environmental (i.e., "green") claims that overstate or misrepresent the extent to which a product or service is "environmentally friendly." In Canada, greenwashing—as a form of misleading advertising—is largely governed by the civil and criminal false or misleading advertising provisions in the Act.

Greenwashing is not a new issue for the Bureau, which has investigated many instances of potential greenwashing in the past. Prior to the Amendments, alleged greenwashing could be (and was) investigated under the following general misleading advertising provisions:

- The general provision prohibiting the making of a representation to the public that is false or misleading in a material respect (Section 74.01(1)(a)); or
- The general "performance claim" provision prohibiting a person from making a representation to the public with respect to the performance, efficacy, or length of life of a product (or service) that is not based on an adequate and proper test, the proof of which lies on the person making the representation (Section 74.01(1)(b)).

In response to the increasing prevalence of alleged greenwashing, many jurisdictions around the world are revisiting their legislation, policies, and guidance relating to the regulation of environmental and climate claims.

However, environmental and climate claims by companies and complaints of alleged greenwashing have become increasingly prevalent in recent years. In response to the increasing prevalence of alleged greenwashing, many jurisdictions around the world are revisiting their legislation, policies, and guidance relating to the regulation of environmental and climate claims. Consistent with this focus on greenwashing, the Amendments introduced two new civil provisions which specifically seek to address unsubstantiated environmental and climate claims:

- A provision prohibiting a person from making a representation to the public with respect to *a product's (or service's)* benefits for protecting or restoring the environment or mitigating the environmental, socia,l and ecological causes or effects of climate change that is not based on an *adequate and proper test*, the proof of which lies on the person making the representation (Section 74.01(1)(b.1)).
- A provision prohibiting a person from making a representation to the public with respect to the benefits of a *business or business activity* for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change that is not based on *adequate and proper substantiation in accordance with internationally recognized methodology*, the proof of which lies on the person making the representation (Section 74.01(1)(b.2)).

These provisions do not prohibit an entity's ability to make claims related to the environmental or climate impacts, effects, or benefits of its products, services, business, or business activities. These provisions do, however, seek to create an obligation for entities to demonstrate that such claims are based on an "adequate and proper test" or "adequate and proper substantiation in accordance with internationally recognized methodology," depending on the type of representation.

A claim regarding the environmental or climate impacts, effects, or benefits of a product, service, business, or business activity could raise potential concerns under the "performance claim" provisions of the Act if it does not meet the required testing or substantiation requirements. Such claims, as well as other, more general environmental or climate claims, could also raise potential concerns under the Act if they are alleged to be false or misleading in a material respect, regardless of any testing or substantiation which has been conducted.

Notably, prior to the Amendments, it was arguable that only a much narrower group of performance claims (namely those related to a *product or service* and its *performance, efficacy, or length of life*) required testing under the *Act*. It is arguable that the Amendments expanded the types of product/service performance claims which require testing, due to the fact that statements regarding a "benefit" of a product/service for protecting or restoring the environment or mitigating the environmental, social, and ecological causes or effects of climate change may capture more statements than those falling within the confines of a statement regarding "performance, efficacy, or length of life."

More importantly, however, the existing performance claim provision of the *Act* arguably only applied to claims regarding a product or service, and did not, on a plain reading, apply to more general environmental representations (i.e., such as those relating to the environmental goals of a company or the sustainable nature of its operations). The Amendments extend the performance claims regime to explicitly capture "representation[s] to the public with respect to the benefits of a *business, or business activity* for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change" and to require substantiation for such claims. [5]

Adequate and Proper Tests

As noted above, environmental or climate performance claims relating to a product or service must be supported by "adequate and proper tests". In the context of the Act's long standing "general" performance claim provision (noted above), each of the Bureau, the Competition Tribunal, and the courts have discussed what could satisfy such testing in the circumstances of the matters before them.[6] These principles include:

- Testing is required. Courts have generally rejected evidence that has been presented as an alternative to testing, such as evidence of consumer use over a long period of time and a company's belief in the superiority of its product or service.
- Testing does not require absolute certainty and does not necessarily need to meet the standards typically required for studies published in peer-reviewed scholarly journals. Rather, testing should establish that the results are not mere chance or a one-time effect, by establishing that the product causes the desired effect in a material manner.
- Testing must be "fit, apt, suitable or as required by the circumstances"—stressing the importance of considering the entire context surrounding a performance claim.

---

[5] With respect to aspirational claims regarding the future, it remains to be seen the level of testing or substantiation which is required in this regard. That said, the Draft Guidance from the Bureau does note that claims about the future could raise concerns under both the provision of the Act that prohibits false or misleading representations generally, as well as the provision that requires adequate and proper substantiation for certain environmental claims about a business or business activity. The Draft Guidance notes that before making aspirational claims, businesses should have:

- A clear understanding of what needs to be done to achieve what is being claimed;
- A concrete, realistic, and verifiable plan in place to accomplish the objective, with interim targets; and
- Meaningful steps underway to accomplish the plan.

[6] For instance, see Competition Bureau Canada, "Performance claims not based on an adequate and proper test" [Available online: https://competition-bureau.canada.ca/deceptive-marketing-practices/types-deceptive-marketing-practices/performance-claims-not-based-adequate-and-proper-test]; *The Commissioner of Competition v Imperial Brush Co Ltd*, 2008 CACT 2, 2008 Comp Trib; *Canada (Competition Bureau) v Chatr Wireless Inc*, *Canada (Competition Bureau) v Chatr Wireless Inc*, 2013 ONSC 5315, (sub nom Canada (Commissioner of Competition) v Chatr Wireless Inc) 288 CRR (2d) 297; *R v Big Mac Investments Ltd* (1988), 24 CPR (3d) 39 (Man QB); *R v Alpine Plant Foods Ltd* (11 June 1981) (Ont Prov Ct).

- Testing should be done under controlled circumstances, controlling for external variables. Subjectivity should be eliminated as much as possible.

Notably, the phrase "adequate and proper test" appears in both the existing marketing provisions of the Act (Section 74.01(1)(b)) as well as the new provision 74.01(1)(b.1). In draft guidance[7] provided by the Bureau (the Draft Guidance), the Bureau expressly states that it assumes the same interpretation and considerations previously set out by courts in the context of the existing deceptive marketing provisions will also apply to the terms "adequate and proper" and "test" in respect of the new provision 74.01(1)(b.1), as well as the term "adequate and proper" in respect of the new provision 74.01(1)(b.2).

With respect to terms that have not yet been interpreted by the courts, but which have a clear ordinary meaning, the Bureau indicates in the Draft Guidance that it will rely on this ordinary meaning until those terms are subject to interpretation in the courts. This guidance applies in respect of terms such as "climate change", "environment", "ecological," and "business activity."

Adequate and proper substantiation

Environmental or climate performance claims relating to a business or business activity must be supported by "adequate and proper substantiation in accordance with internationally recognized methodology."

This is a new requirement that has not been previously considered by the Competition Bureau or the courts. The Draft Guidance defines 'substantiation' as "establishing by proof or competent evidence" (but does not necessarily involve testing) and 'methodology' as "a procedure used to determine something." As noted above, the Draft Guidance also confirms that the Bureau intends to follow the existing jurisprudence and guidance with respect to the term "adequate and proper."

The Draft Guidance goes on to indicates that the Bureau will likely consider a methodology to be internationally recognized if it is "recognized in two or more countries," although not necessarily by governments in those countries. The Bureau emphasizes that the chosen methodology must also be shown to be "adequate and proper" substantiation of the claim, as that term has been interpreted by prior jurisprudence. While there is no requirement to select the "best" methodology, the Draft Guidance notes that businesses are still expected to exercise due diligence to ensure they base their substantiation on an internationally recognized methodology that is reputable and robust.

Notably, the Draft Guidance makes it clear that "while the Bureau starts with the assumption that methodologies required or recommended by government programs in Canada for the substation of environmental claims are consistent with internationally recognized methodologies," it is still up to businesses to exercise due diligence to ensure the methodology is internationally recognized and is suitable ("adequate and proper") to support the particular claim. In other words, businesses must give consideration to the specific requirements under the Act, and may not be able to rely on methodologies that are required or accepted for compliance with other government programs to demonstrate "adequate and proper substantiation in accordance with internationally recognized methodology."

With respect to new climate technologies, the Draft Guidance highlights that the new regime is flexible such that, in the face of new technologies, a business may be able to rely on multiple internationally recognized methodologies that are used to substantiate similar claims or that can be

---

[7] Competition Bureau, « Environmental Claims and the *Competition Act*" (Draft) (23 December 2024), available online at: https://competition-bureau.canada.ca/how-we-foster-competition/consultations/environmental-claims-and-competition-act.

used together to substantiate the claim. However, the Bureau cautions that if a business concludes that there is no way to substantiate its claim, it should avoid making that claim.

Increased Financial Penalties

The Amendments have significantly increased the size of administrative monetary penalties (AMPs) that can be awarded against both individuals and corporations found to have breached the civil deceptive marketing practices provisions, including each of the provisions discussed above. In particular:

- Individuals: Maximum available AMPs have been increased from C$750,000 (C$1 million for subsequent violations) to the greater of (1) C$750,000 (C$1 million for subsequent violations) or (2) three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined.[8]
- Corporations: Maximum available AMPs have been increased from C$10 million (C$15 million for a subsequent violation) to the greater of (1) C$10 million (C$15 million for a subsequent violations) or (2) three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, three percent of the corporation's annual worldwide gross revenues.[9]

The penalties under the criminal track (which include imprisonment for a term not exceeding 14 years and/or a fine in the discretion of the court) have not been changed.

Historically, enforcement under the civil misleading advertising provisions of the Act has been done exclusively by the Bureau.

Private Access to the Competition Tribunal

Historically, enforcement under the civil[10] misleading advertising provisions of the Act has been done exclusively by the Bureau. Prior to the Amendments, private parties were able to (with leave) bring actions before the Competition Tribunal under only a very limited number of civil provisions, which did not include the misleading advertising provisions.

Pursuant to the Amendments, private parties will be able to, as of June 20, 2025, bring private rights of action with respect to all the civil misleading advertising provisions, including those discussed above.[11] While such private parties will still be required to seek leave prior to bringing such an application, the Amendments will also, as of June 20, 2025, have the effect of significantly lowering the leave test.[12] In the context of the misleading advertising provisions, the Competition Tribunal may grant leave for a private party to bring an application if it is satisfied that it is "in the public interest to do so." Notably, this is a new test, and no guidance is available with respect to how it may be interpreted or applied. While the scope of public interest is currently unknown, a public interest test could open the door to representative-style proceedings in the form of class actions/collective redress and public interest litigation. ●

---

8 Notably, there has to date been no adjudicated case which addresses how the "benefit derived" should be calculated.

9 *Competition Act,* Section 74.1.

10 It bears noting that private parties have been able to bring civil court actions alleging contraventions of the parallel criminal misleading advertising provisions in Section 52 of the *Competition Act.* Such cases are brought before provincial or federal courts (rather than the Competition Tribunal) and do not require leave. That said, such cases require showing that any false or misleading statements were made "knowingly or recklessly." Moreover, not all civil deceptive marketing provisions have a parallel criminal provision in the *Competition Act.* For instance, there are no parallel criminal provisions with respect to performance claims and the need for testing or substantiation.

11 *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*, Section 254(1).

12 Prior to the Amendments, in order for a private applicant to be granted leave to bring an application, they were required to show that they were directly and substantially affected in their business, among other things.