Thinking About "Going Green"? Proceed with Caution

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"Going Green" is the latest trend in consumer marketing the corporate advertiser's must-have accessory for the 21st century. Companies are in fierce competition to create green products and market them as such, or to highlight some previously unknown "green" aspect of an existing product. However, green advertising can degenerate into greenwashing a term for companies that "spin" their products to be green, when in fact the product has no environmental benefits or, even worse, may have a detrimental environmental impact. If you or your company is considering jumping on the "green" bandwagon, you should take a careful look at the law surrounding this kind of advertising.

A new and significant development regarding green advertising is contained in Environmental claims: A guide for industry and advertisers (the "Guidelines") which was released in June 2008 and produced by the Canadian Standards Association in association with the Competition Bureau (the "Bureau"). The Guidelines delineate the standards against which the Bureau will assess "green" advertising. The Guidelines, although not binding, are enforced by the Bureau, and identify best practices to help you or your company avoid making false or misleading representations, in the context of environmental advertising, under the *Competition Act* (the "Act"), the *Consumer Packaging and Labelling Act*, as well as the *Textile Labelling Act*.

While misleading advertising may seem trivial, it can have significant consequences and not only to your company's reputation. Engaging in false or misleading representations under the Act can have criminal or civil repercussions, depending on the nature of the offence. The Bureau has the option of pursuing either route, but cannot pursue both. Recent amendments to the Act have increased the penalties associated with either and they can be substantial, affecting the financial bottom line of your company or, possibly, your freedom.

Under the criminal route, penalties depend upon the seriousness of the offence. Penalties can range from fines under $200,000 to fines within the total discretion of the court, as well as jail time, or both. Jail terms can be for less than one year, but in extreme cases, a criminal indictment can result in a 14-year jail sentence.

Generally, the Bureau will pursue the civil route thus keeping your freedom intact but your pocketbook in play. A person can be ordered to cease the false or misleading conduct, publish a notice to those who may have been affected and/or refund the amount paid by any person who purchased the relevant product. In addition, individuals can be fined up to $750,000 for an initial violation of the Act and up to $1,000,000 for each subsequent violation. The corresponding fines for a corporation are up to $10,000,000 for the first violation and up to $15,000,000 for each subsequent violation.

So how can you avoid these possible penalties? The Guidelines provide detailed assistance in this regard. Some recommendations are intuitive. For example, vague environmental claims such as "environmentally friendly", "green" or "safe for the environment" should not be used. Others are a bit more obscure. For example, did you know that the life cycle of the product (i.e., the life of the product from the production phase, up to and including disposal) should be considered when making an environmental claim? Or that you should not restate a single environmental claim, using different terminology, to imply multiple benefits for a single environmental

change? The Guidelines provide a great example of the latter misuse: “By using 65% recycled content, we are reducing waste at the production phase. Trees are being saved by the use of recycled wood fibres and therefore the air we breathe is cleaner.” Instead, the following is recommended: “By using 65% recycled content, we are reducing waste at the production phase compared with our last model.” This latter example does not overstate the benefits of recycled content; does not use different terminology (i.e., recycled wood fibres); and is more precise, since it is compared to a previous model. Clearly, the situation can become complicated.

There is even specific guidance on the use of the Mobius Loop to ensure that it is used in a clear manner, since it can either mean “recyclable” or “recycled content”. Speaking of recycling, unless one-half of the population where the product is used has access to collection facilities, a claim of “recyclable” should not be made without an explanatory statement. In Canada, where collection facilities are plentiful, this is less of an issue; however, as a prudent company you should ensure that is the case wherever the product is shipped. If that is not the case, then, where reasonably possible, “specific location of the recycling programs or facilities should be identified”. These are only some examples of the suggested practices provided in the Guidelines. Applying them to your business may be complex.

With the one-year transition period having expired and the Bureau having already announced that it has settled claims against various hot tub and spa retailers for their misleading promotion suggesting an association with the ENERGY STAR program, this may be the time to ensure that you or your company complies with the Guidelines.

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