THE CANADIAN BAR ASSOCIATION
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November 23, 2001

Konrad von Finckenstein, Q.C.
Commissioner of Competition
Competition Bureau
50 Victoria Street
Hull QC K1A 0C9

Dear Mr. von Finckenstein,

Re: Proposed Guidelines Concerning Environmental Labelling and Advertising Submission of the National Competition Law Section of the Canadian Bar Association

Please find enclosed a copy of the submissions of the National Competition Law Section of the Canadian Bar Association in relation to the above matter.

If you have any questions or comments concerning this submission, please do not hesitate to contact me directly or through Richard Ellis at the CBA National Office (tel: (613) 237-2925, ext. 144; email: richarde@cba.org).

Yours truly,

Richard Ellis for

J. Tim Kennish
Chair, National Competition
Law Section

c.c. Suzanne MacPhee, Competition Bureau

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Submission on

Environmental Labelling and Advertising Guidelines

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NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

November 2001

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PREFACE

The Canadian Bar Association is a national association representing over 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the National Competition Law Section of the Canadian Bar Association.

Submission on Environmental Labelling and Advertising Guidelines

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the Section) is pleased to provide its comments on the Competition Bureau's proposal to replace the "Principles and Guidelines for Environmental Labelling and Advertising" (the existing Guideline) with the Canadian Standards Association's "Environmental labels and declarations — Self-declared environmental claims (Type 11 environmental labelling)"[1] (the Guidelines).

II. GENERAL COMMENTS

The Guidelines are a National Standard of Canada. Accordingly, we do not comment on their substance, as this is not the appropriate forum to do so. Our primary concern is whether they are appropriate as the primary source of direction to Canadian marketers and advertisers concerning environmental labelling and advertising.

We are concerned that the Guidelines are not readily available and, even more significantly, that they are written in technical language with cross references to other technical documents. This makes them difficult for a non-specialist to use and comprehend, unlike other guidelines issued by the Commissioner. As a result, the Guidelines are unlikely to have the desired effect of promoting accurate

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1 CSA International, National Standard of Canada CAN/CSA-IS0 14021-00.

and informative advertising and labelling. The Bureau should develop its own set of guidelines or an interpretive guide, which reflects the Guidelines but which is specifically targeted to advertisers. Most of our comments address this suggestion.

Further, the Guidelines may be too rigid. The Commissioner should explicitly acknowledge that technical deviations from the Guidelines, in some circumstances, will not render a claim "materially false or misleading" such as to offend the *Competition Act*. The Commissioner made a similar acknowledgement in the context of price advertising.

III. DETAILED COMMENTS

If the Bureau establishes its own guidelines or interpretive guide, it should address a number of specific concerns with the existing Guideline, as outlined below.

Clause 2 incorporates by reference the International Organization for Standardization (ISO) documents ISO 7000 and ISO 14020:1988. Elsewhere, there are references to other documents (for example, ISO/TR 14049, ISO 14041, and numerous others in the bibliography). The Commissioner should issue one consolidated document containing all of the necessary principles. This would avoid the need for advertisers to purchase and cross-reference multiple documents.

A number of the terms used, such as "coproduct" and "functional unit" are technical in nature. We are concerned that they are unlikely to be comprehensible to the average reader. This should be addressed.

Clause 3 sets out the terms and definitions. The definition of "environmental claim" includes a note explaining where a claim can be made or found. This note

should be incorporated into any commentary that the Bureau may draft. It would help clarify the scope of environmental labelling covered by the Guidelines.

Clause 5 sets out requirements applying to all claims. Clause 5.2 refers to the principles in ISO 14020, which would apply to environmental labelling and advertising situations, in addition to the requirements of the Guidelines. For ease of reference, the relevant principles in ISO 14020 should be distilled and appended to the document. Alternatively, the Bureau should provide a brief commentary setting out the key principles and guidelines of ISO 14020, together with their application to environmental labelling and advertising.

Clause 5.3 refers to vague or non-specific claims. The clause provides a more extensive list of claims than the existing Guidelines. A note states that the list of claims set out is illustrative and not exhaustive. This should be highlighted in any commentary which the Bureau may produce.

Clause 5.4 deals with claims that a product is "free" of a particular substance. Such claims can only be made when the specified substance is at or below the level of an acknowledged trace contaminant or background level. Although the application of this clause will vary depending on the product, the Bureau should define "acknowledged trace contaminants" and "background levels".

Clause 5.6 sets out when explanatory statements are to be used. It asks for a subjective review of the likelihood that a claim will be misunderstood. This obligation is vague and could create compliance problems. The Bureau should provide some guidance as to how it will interpret this provision.

Clause 5.7 establishes a list of 18 specific requirements which apply to all claims and any explanatory statements. Clause 5.7(f) requires that claims not be "restated using different terminology to imply multiple benefits for a single environmental

change". This needs clarification in an advertising context. We assume it does not mean that the advertiser would be limited as to the precise presentation or description of the benefit. If there are multiple benefits from a single change, we assume that it would be acceptable to describe them, as long as the description is not misleading.

Clause 5.7(h) provides that a claim must be true taking into consideration all relevant aspects of the product life cycle. This is unclear. It is not obvious what the phrase "take into consideration" means. As well, a lifecycle assessment is not always necessary, depending upon the circumstances.

Clause 5.7(n) states that the environmental claim "shall be relevant in terms of how recently any improvement was made". This is unclear. Does it mean that there is a limit on how long a legitimate environmental benefit can be claimed? The Bureau should clarify whether a time limit is appropriate, as might be the case, for example, when the claim is that the benefit is "new".

Clause 5.7(p) appears to address products which have never included certain ingredients or features. In some cases, it may be misleading to refer to the absence of an irrelevant ingredient. However, it can be important to tell consumers about the absence of an ingredient or feature where consumers believe that the product does include that ingredient or feature. This might be the case, for example, where some brands of the product do contain the named substance or where there is widespread belief that the product contains that ingredient.

Clause 5.7(q) states that claims must be reassessed and updated "as necessary to reflect changes in technology". We agree that advertisers can no longer make claims which they know are no longer true. However, advertisers need to know whether they have an implied obligation to do confirmatory testing absent any knowledge of relevant change.

Clause 5.8 deals with the use of symbols to make claims. Subclause 5.8.5 refers to the use of "natural objects". The Bureau should define "natural object". Further, the existing Guidelines provide examples of the proper use of symbols and statements. This should be included in any commentaries which the Bureau may provide concerning this clause. A note to clause 5.8 states that as new symbols are developed, a consistent approach to the use of the same symbol should be encouraged. The Bureau should consider more detailed guidelines regarding the development of new symbols. Further, clause 5.8 should cross-reference clause 5.10, which deals with the use of specific symbols.

Clause 6 deals with evaluation and claim verification requirements, including the claimant's responsibility to evaluate and provide the data necessary for such verification. Clause 6.2 directs readers to references in the bibliography for guidance regarding reproducibility and reliability of data. The bibliography directs readers to other sources for examples of standards which may inform and guide the collection of reliable data. The Bureau should distill these standards and examples for any commentary it may publish.

Clause 6.3.1 states that comparative claims can only be made using a published standard or recognized test method. However, clause 6.4 indicates that a claimant may develop a method where none exists, provided the new method meets the other requirements of clause 6 and is available for peer review. The Commissioner's commentary should clarify that a recognized test method may be one developed by the advertiser, in the absence of other standards. Further, the law requires testing to be "adequate and proper", but does not require scientific testing, or peer review, in all cases. We do not believe that this is the standard for substantiation of performance claims under the *Competition Act*, and the commentary should make this clear.

Clause 6.4 deals with the selection of methods for evaluation and claim verification. The Guidelines state that these methods must follow international standards or industry or trade methods which have been subject to peer review. The clause provides a note, which references the bibliography for a list of typical international and national standards, as well as some specific industry methods. The Bureau should provide examples of the standards, together with a more detailed description of how these evaluation and claim verification methods should apply to the claims.[2]

Clause 6.5.1 states that a claim shall only be considered verifiable if such verification can be made without access to confidential business information. Does this mean that once the test method exists (including a test method developed by the advertiser), the claim is verifiable? Or, does the test method have to be published before the claim is made? This should be clarified. In our view, the advertiser should be permitted to verify testing by a controlled release of data to the complainant's experts, subject to a confidentiality order. We hope that the Guidelines do not intend to restrict this.

IV. COMMENTS RESPECTING PARTICULAR TYPES OF CLAIMS

Clause 7 deals with specific requirements of selected claims. It establishes interpretation and usage qualifications for specific terms that are commonly used in environmental claims. We comment briefly on the requirements regarding these selected claims.

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2 See also our commentary in paragraph 4(xiv).

A. Clause 7.2 - Compostable

Clause 7.2 deals with the claim of compostability. A compostability claim shall not be made for a product that negatively affects the overall value of the compost as a soil amendment. The Bureau should provide some guidance on how a product can "negatively affect" the overall value of the compost. Further, a compostability claim is not to be made where a product significantly reduces the rate of composting. The Bureau should clarify the meaning of "significant reduction".

This clause goes on to set out qualifications on compostability claims and additional requirements where claims refer to home composting or other processes or facilities. These qualifications and additional requirements would significantly lengthen any claim and may therefore be problematic when used on the packaging or in the advertising of products. The Bureau should consider providing alternate means of disclosure, such as printed material available at point of sale or web-site references on packages.

B. Clause 7.3 - Degradable

Claims of degradability are only to be made in relation to a specific test method, which is to include the maximum level of degradation and test duration. If the Guidelines contemplate specific test methods, they should be stated. If not, advertisers need more clarification on what is required.

C. Clause 7.4 - Designed for Disassembly

Clause 7.4 deals with claims regarding disassembly of a product. Although this Guideline provides detailed qualifications regarding the use of such a claim, it also directs users to ISO/IEC Guide 14 for further guidance on the provision of consumer information. ISO/IEC Guide 14 should be appended to the Guidelines or, alternatively, the Bureau should provide a summary of the Guide.

Clarification of where and how this very detailed information may be provided would also be useful.

D. Clause 7.5 - Extended Life Product

Clause 7.5 deals with claims regarding extended life. Clause 7.5.2 states that where a claim of extended life is based on an upgradability feature, an infrastructure to enable upgrading must be available. The Bureau should clarify the kind of infrastructure that is required to support such a claim.

Because extended life claims are comparative claims and require certain evaluations, this clause makes cross-references to clause 6. Clause 7.5 should also include examples of the application of relative measurements and absolute measurements to extended life claims. Further, clause 7.5.3 states that the average extended life period must be measured in accordance with appropriate standards and statistical methods. Our commentary on clause 6.4, above, regarding evaluation methodologies, are also relevant here.

E. Clause 7.6 - Recovered Energy

Clause 7.6 deals with claims that a product has been manufactured using recovered energy. To make such a claim, the claimant must ensure that adverse effects on the environment resulting from this activity are managed and controlled. The Bureau should clarify what these "adverse effects" are and should state how and to what extent a claimant must manage and control these effects.

Clause 7.6.3 provides a detailed evaluation methodology, which includes a complex mathematical formula. The Bureau should provide further guidance in calculating a claim of net recovered energy, including some examples.

F. Clause 7.7 - Recyclable

This clause states that collection or drop-off facilities for recycling must be available to a reasonable proportion of purchasers, potential purchasers and users of the product. The Bureau should clarify what a "reasonable proportion" of purchasers may be, by providing specific examples, a range of proportions depending on the type of material being considered or a safe harbour level.

Clause 7.7.4 deals with the evaluation methodology for recyclable products. It requires that extensive information be included in this evaluation, including the availability of resources in the collection, sorting and delivery of materials, the availability of recycling facilities to accommodate the collected materials and information that the product is being collected and recycled.. The evaluation is to be stored and provided upon request under clause 6. This degree of evaluation may be excessive for some products which are widely recyclable.

G. Clause 7.8 - Recycled Content

Clause 7.8.1.1 sets out three separate terms: recycled content; recycled material; and recovered [reclaimed] material. Clause 7.8.1.2 provides that material recycling is only one of a number of waste prevention strategies and that "the recycled content claim, in particular, should be used with discretion". The Guidelines should explain what this clause intends to achieve. For example, a list of possible strategies would be useful. Further, the Guidelines should clarify better how to distinguish the use of the Mobius loop when used for a recycled claim as opposed to recyclable claim.

H. Clause 7.9 - Reduced Energy Consumption

We are concerned that the distinction made in clauses 7.9, 7.10 and 7.11 between the words "consumption" and "use" may not be clear to Canadian consumers. The

terms are used and are understood as interchangeable. These portions of the Guidelines, therefore, unnecessarily restrict advertisers' creative freedom.

Clause 7.9.1 sets out when the phrase "reduced energy consumption" is to be used. A note to this clause gives examples of commonly used claims regarding reduced energy consumption. The Bureau should clarify whether the list of claims in this note is exhaustive. The Guidelines should provide examples of the types of qualifications required for all such claims.

I. Clause 7.10 - Reduced Resource Use

Clause 7.10.1 comments on the use of claims of reduced resource use. The Bureau should provide a detailed guide which explains the calculation of percentages, uses examples of the use of comparative claims and provides explanatory statements. These three items are all used in claims of reduced resource use. In particular, clause 7.10.27 requires further clarification.

J. Clause 7.11 - Reduced Water Consumption

Clause 7.11 deals with claims of reduced water consumption. A note to this clause lists common claims regarding reduced water consumption. The Guidelines should clarify that this list is not exhaustive. As all claims regarding water efficiencies or reductions must be qualified, the Bureau should include the types of claims which can be made and a list of examples.

This clause also sets out an evaluation methodology for reduced water consumption and states that water consumption must be measured in accordance with established standards and methods for each product. The Guidelines should provide an appendix setting out the established standards and methods for different products.

K. Clause 7.12 - Reusable and Refillable

Clause 7.12 provides qualifications for the claims of reusable and refillable. Claims that a product or packaging is reusable or refillable may only be made where there is a program for collecting the product or packaging or where there facilities or products allowing purchasers to reuse or refill the product or package. Further, these programs or facilities must be conveniently available to a "reasonable" proportion of purchasers. To assist readers, the Bureau should provide further guidance on the application of these qualifications.

L. Clause 7.13 - Waste Reduction

Clause 7.13 deals with claims regarding waste reduction. A note to this clause sets out different uses of the word "waste". The Guidelines should expand the discussion of the term "waste". Further, the Guidelines provide that all claims regarding waste reduction must be qualified. The use of claims and qualifying statements should be explained further, using examples.

V. CONCLUSION

It is helpful to have guidelines in this area. However, they could be improved further by specifically addressing their application to packaging and advertising. The very technical approach and language of the Guidelines is appropriate for an international standard but does not provide "user-friendly" guidance for Canadian advertisers. The Bureau should create user-friendly guidelines to assist Canadian business in complying with their obligations.

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