Via Email

February 28, 2025

Deceptive Marketing Practices Directorate
Competition Bureau
Place du Portage I
50 Victoria Street, Room C-114
Gatineau, Quebec K1A 0C9

Attention: **Mr. Matthew Boswell**
Commissioner of Competition

Mr. Stéphane Lamoureux
Senior Deputy Commissioner

Email: ***environmentalclaims-declarationsenvironnementales@cb-bc.gc.ca***

Dear Commissioner Boswell and Senior Deputy Commissioner Lamoureux:

Re: Comments regarding December 23, 2024 Draft Guidelines on June 2024 Changes to the *Competition Act* (Canada)

We are writing in response to the public consultation regarding the draft guidelines (**Draft Guidelines**) that the Competition Bureau (**Bureau**) released on December 23, 2024 with respect to the application of the new provisions in the *Competition Act* (Canada) (**CA**) aimed at greenwashing.

Scope of & Basis for BD&P Comments

Thank you for the opportunity to provide you with our comments. While we very much appreciate the clarity that the Bureau provided in the Draft Guidelines with respect to its interpretation of and approach to enforcement of the new provisions, there are questions that remain unanswered. Similar to our comment letter submitted to the Bureau on September 5, 2024, the focus of our comments below is on the scope and applicability of Section 74.01(1)(b.2).

Burnet, Duckworth and Palmer LLP is a Calgary-based law firm that advises clients across a variety of industries and sectors, with many being heavily involved in the energy industry. We work with and advise clients ranging from small private companies to large public companies and those in between. We currently represent over 50 public companies listed on the Toronto Stock Exchange and the TSX Venture Exchange, with many of our clients also listed on U.S. stock exchanges and other international stock exchanges. In addition to our other areas of practice, we have significant expertise in both private and public company mergers and acquisitions, corporate finance, corporate governance, continuous disclosure, corporate and securities litigation, general securities law, commercial law, energy law and competition law.

Burnet, Duckworth & Palmer LLP
2400, 525-8th Ave SW Calgary, AB T2P 1G1 PH: 403.260.0100 FX: 403.260.0332 bdplaw.com

Meaning and Applicability of Internationally Recognized Methodology (IRM)

The Bureau's Draft Guidelines provide insight into which types of methodologies will be considered IRMs for the purposes of substantiation under the CA, including generally those recognized in two or more countries. While this clarity is helpful, we recommend increased flexibility.

As noted in our September comment letter, IRMs are not designed specifically for the purposes of the CA's greenwashing provisions. As such, despite the truth and validity of certain environmental claims, they may not be able to be substantiated under any IRM. In some instances, businesses use evidence and data derived from multiple sources but not necessarily in accordance with an IRM because no IRM exists to substantiate such data. Some elements may be substantiated in accordance with IRM, but other elements may preclude such substantiation. We recommend that evidence and data used by businesses, so long as it is reasonable and appropriate having regard for the information that is available to the business at the time, should be determined to be substantiated in accordance with IRM.

The Draft Guidelines state that if a company complies with a methodology required or endorsed by Canadian governmental programs for certain environmental claims, then they "should [still] exercise due diligence to ensure that the methodology is internationally recognized". Such a burden should not be placed on businesses. Companies should be confident that if they adhere to the standards and methodologies determined to be suitable by Canadian governments, regulators, and industry, they will not face potential prosecution or penalties under the CA for those disclosures.

The new provisions are ambiguous (as evidenced by the widespread backlash to and confusion around the applicability of the new provisions) and the Draft Guidelines are of little utility to non-legal professionals. The complexity of legal analysis required to make sense of the new rules unfairly prejudices startup businesses, small companies, those involved in emerging technologies including cleantech, companies experiencing financial difficulty, as well as larger more established companies operating within tight margins. In other words, companies that do not have deep pockets and/or large legal teams (i.e., the majority of companies) are unfairly prejudiced by the complexity of the new rules and the Draft Guidelines.

Given that part of the Bureau's mandate is to "ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy", it should ensure that it is not enforcing the new rules in a way that disproportionately disadvantages smaller enterprises.

While the Competition Bureau does not have the ability to change the wording of the legislation, it does have the ability to be flexible in its application of the new rules. There are other examples of federal government agencies responsible for enforcement of new legislation taking a relaxed or phased-in approach to enforcement, such as Public Safety Canada's approach to the enforcement of the *Fighting Against Forced Labour and Child Labour in Supply Chains Act* (the **Modern Slavery Act**).

The Modern Slavery Act was initially proposed as Bill S-211 and received royal assent on May 11, 2023. The first federal government guidance was published on December 20, 2023 and the legislation came into effect on January 1, 2024. There was significant public backlash to the new legislation generally and widespread confusion with respect to the applicability of the new reporting requirements. In response, Public Safety Canada has stated that its priority at this early stage is not to impose penalties, but rather to increase industry awareness. It released more robust guidance in August 2024 setting out more detailed instructions with respect to effective compliance and stating its intention not to enforce certain elements of the legislation.[1] The Bureau should take a similar relaxed/phased-in approach to its enforcement of the new provisions.

Recommendation #1

The Bureau's guidance should state that disclosures developed in accordance with standards adopted by Canadian federal and provincial organizations, such as the Canadian Securities Administrators (CSA), the Canadian Sustainability Standards Board or the Canadian Accounting Standards Board, and/or substantiated in accordance

[1] Specifically, section 9(a) of the Modern Slavery Act requires certain reporting of entities "producing, selling or distributing goods in Canada or elsewhere". The subsequent guidance state that "[e]ntities solely involved in distributing and selling are not expected to report under the Act. Public Safety Canada will not seek enforcement action in those instances" (see: Guidance for entities: <https://www.publicsafety.gc.ca/cnt/cntrng-crm/frcd-lbr-cndn-spply-chns/prpr-rprt-en.aspx>).

with methodologies accepted by industry and governments to substantiate federal, provincial and industry-specific reporting obligations, will be considered to be substantiated in accordance with IRM.

Overlap and Potential Double Liability of the CA and Securities Laws

The Draft Guidelines provide that the Bureau is focused on environmental representations made in marketing and/or promotional materials, and not representations made for a different purpose, including those made to investors and shareholders in the context of securities filings. It is unclear what the Bureau considers to be a "different purpose" than marketing/promotion and what "*in the context of* securities filings" means.

The Bureau appears to suggest that documents required by provincial securities laws to be filed with the respective regulator fall outside the CA, while promotional and advertising materials are subject to the CA. There are numerous types of communications, however, that are neither filed with securities regulators nor are they strictly promotional, but are intended for shareholders and investors, and it is unclear whether the new rules apply to those communications. Examples include ESG Reports and Sustainability Reports (**ESG Reports**) and investor presentations.

For disclosures made by reporting issuers (**RI**s), provincial securities legislation already provides the public with protection from corporate greenwashing (i.e., companies may not engage in selective disclosure, misleading the public, making false statements, etc.). Provincial regulators review and monitor RI disclosure and communicate with businesses accordingly, providing regular feedback on disclosure that fails to meet the (stringent) requirements of securities laws. Therefore, provincial securities legislation already addresses the risk of greenwashing.

In addition, RIs also face potential liability for representations (including with respect to environmental matters) made in communications to shareholders and investors even if such communications are not made in filings required under securities laws. As such, a potential double liability regime would negatively impact Canadian companies' ability to communicate with their shareholders and investors. In the present case, certain disclosures could be subject to liability under both the CA and securities laws. Companies may find themselves in scenarios where their obligations under each regime exist in tension. This would paralyze companies' ability to communicate with shareholders and investors. Thus, the potential double liability regime that flows from the CA and securities laws undermines companies' effective communication with shareholders and investors.

The intent of the new rules was to target greenwashing, meaning, as described by Canada, false or misleading environmental ads or claims which harm competition by misleading consumers into believing they are making environmentally friendly choices when they aren't.[2] Depending upon how the new rules are interpreted, they could reach significantly beyond this definition.

Businesses operating in the energy industry are disproportionately harmed by the new rules, because it is unclear what they can and cannot say about their environmental initiatives. This is evident looking at corporate disclosure since the introduction of the new rules, as countless companies have removed their ESG Reports from the public domain out of fear that they will be prosecuted for inadvertently making a representation that conflicts with the new rules. In order to foster competition, the Bureau should be doing everything it can to encourage this type of reporting. What would be an even worse unintended consequence than companies minimizing their disclosure on their "green" projects, is companies potentially minimizing their continued participation and investment in such initiatives. Corporate participation in environmentally friendly activities should be encouraged, as should disclosure related to such participation.

Recommendation #2

The Bureau's guidance should clearly distinguish between (a) disclosures provided to investors and other stakeholders, and (b) disclosures to consumers who wish to buy a product or service that purports to have certain environmental attributes or benefits. In the case of disclosures provided to investors and other stakeholders, the Bureau should enter into a Memorandum of Understanding with the CSA agreeing to cede enforcement of the new provisions to environment and climate-related disclosures that are already governed by or subject to applicable

[2] Government of Canada, Environmental claims and greenwashing: <https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/environmental-claims-and-greenwashing>.

securities legislation, to the applicable provincial securities regulator. Similarly, the Bureau's guidance should adopt a safe harbour for general responses made by businesses that is the same as or similar to the safe harbour provisions applicable under securities laws for FLI as it relates to sustainability and climate-related disclosures.

Formulation of the "General Impression" Test

An added layer of complication is the legal analysis involved in assessing the "general impression" of a claim separately from the literal meaning of each data point that makes up a claim. The sections of the Draft Guidelines outlining the "general impression" test often reference the "advertiser" making the claim. The general impression test makes sense to consider in the context of true advertisements, for instance, a catchy one-liner on a billboard, where the intent of the advertiser is for the statement to be read by potential customers in isolation and without any context or background information.

Applying the "general impression" test to every statement made in longer disclosure, however, is less intuitive. For instance, companies that have changed the way they do things to be more environmentally friendly (e.g., invested in clean technologies, reduced emissions and/or emissions intensity, etc.) should be allowed to talk about such initiatives without fear of reprisal; it is absurd to suggest that companies can no longer feel comfortable making true and substantiated statements with respect to their sustainability initiatives ("sustainability" being a widely used term for which it is currently uncertain whether a singular definition exists which is substantiable in accordance with internationally recognized methodologies), where the explanation of what that means to the company is described in the presentation or report by way of examples.

Communications prepared for investors and other stakeholders – not for the general public – should be understood by the Bureau to have a different audience. People who read ESG reports and listen to investor presentations are not "credulous consumers" and they should not be treated as such; they are typically stakeholders and have, at a minimum, a base level of understanding regarding the particular business and the industry in which the business operates.

Recommendation #3

The Bureau's guidance should make clear that the "general impression" of any single disclosure should be assessed on the basis of the presentation guidelines recommended by the applicable methodology or methodologies, and that if selective (substantiated) information is disclosed in a potentially public-facing document, it will not be determined to give a contradictory "general impression", provided the more fulsome analysis is made easily accessible to the reader.

Draft Guidelines' Non-Applicability to the Competition Tribunal

The Bureau regularly advocates for competition by making submissions to policy-makers and regulators (including federal and provincial boards, commissions, tribunals and international organizations) on how to reduce barriers to competition.[3] Market participants are concerned that while the Competition Tribunal *may* consider the Bureau's approach, it is not bound by the Bureau's Draft Guidelines (including once finalized), and that once private parties gain access to the Tribunal as of June 2024, there will be a flood of vexatious and unfounded claims. Businesses can sustain irreparable damage, both reputationally and financially, by being named in a claim, even if the claim does not proceed or proceeds but is not successful. As such, we recommend that the Bureau advocates for full and transparent disclosure by encouraging the Tribunal to adopt a restrained, predictable and pragmatic approach to enforcement.

Recommendation #4

In advance of June 2024, the Bureau should make submissions to the Tribunal encouraging the Tribunal, in the context of private actions, to 1) provide clarity with respect to what will qualify as being in the "public interest" and 2) restrict the types of claims that will be granted leave to proceed, in order to deter private litigants from making unfounded or vexatious claims. Following June 2024, the Bureau should exercise its right to intervene in cases

[3] Regulatory advice/interventions by the Competition Bureau: <https://competition-bureau.canada.ca/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau#wb-auto-4>.

brought directly to the Tribunal, further advocating for it to consider its finalized guidelines in interpreting the new rules.

Additional Recommendations

In addition to the above, we encourage the Bureau to consider the additional recommendations that we set out in our September 2024 comment letter, which were not addressed in the Draft Guidelines, including:

- The Bureau's guidance should address circumstances where an executive, purporting to act in their personal capacity, could be found in violation of these provisions for directly or indirectly promoting the business interests of the executive's company; and

- The Bureau's guidance should address circumstances, if any, for potential liability or increased risk of liability for a business that either: (a) funds an industry advocacy group that makes a representation in violation of Section 74.01(1)(b.2); or (b) advocates for or funds energy advocacy groups to advocate for, changes or modifications to, or the repeal of, environmental and/or climate change legislation.

CONCLUSION

Thank you, once again, for the opportunity to provide you with our comments. We hope they provide you with a better understanding of the concerns that have been raised by many businesses, and that they will be useful in your preparation of finalized guidance related to Section 74.01(1)(b.2) of thess CA.

If you have any questions on our comments or if we can clarify or expand on any of them, please feel free to contact Alicia Quesnel (akq@bdplaw.com), Ted Brown (ebb@bdplaw.com), Mardi McNaughton (mmcnaughton@bdplaw.com) or Rob Martz (rmartz@bdplaw.com) of our office.

Yours truly,

BURNET, DUCKWORTH & PALMER LLP

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