Changes to the *Competition Act* – Greenwashing & Mergers

Bill C-59 received royal assent on June 20, 2024 and contains the most significant changes to the *Competition Act* that Canada has seen in decades.

The greenwashing changes described below create significant risk for all business sectors and particular risk for the energy sector. All representations on websites or other public forms relating to environmental benefits of a product, business or activity will need to be reviewed for compliance with the new changes. This will include claims of carbon neutrality or claims of emission reduction or mitigation.

Key areas of amendment

- Inclusion of representations about the environmental benefits of a product, business or business activity in the civil misleading advertising provisions of the Act;
- Overhauling of the Competition Tribunal's merger review process to introduce new factors for consideration and increased weight given to pre-existing factors; and
- Significant expansion of private rights of action, including empowering the Tribunal to make monetary awards to applicants.

While the amended private rights of action will not take effect until June 20, 2025, the new merger review and environmental representation provisions are effective immediately.

Greenwashing

Greenwashing generally refers to false, misleading or deceptive environmental claims made for the purpose of promoting a product or business interest. The Act's misleading advertising provisions are amended to deem representations regarding the environmental benefits of a product, business or business activity to be misleading unless:

- Product representations are based on "adequate and proper testing," proof of lies with the party making the representation. Some case law exists indicating this test must be controlled to exclude variables and must be fit and suitable in regard to the risk of harm in question.
- Business/business activity representations are based on "adequate and proper substantiation in accordance with internationally recognized methodology," proof lies with the party making the representation. Currently, no case law exists regarding this test and its meaning remains to be clarified.

Parties who contravene section 74.01 of the Act are subject to the following penalties:

- For individuals, the greater of:
  - $750,000 on first orders and $1 million on subsequent orders; and
  - 3x the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined.
- For corporations, the greater of:
  - $10 million on first orders and $15 million on subsequent orders; and
  - 3x the value of the benefit derived from the deceptive conduct or, if that amount cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues.

The Competition Bureau has not released recent guidance on the new provisions, but its archived 2008 Guide on environmental representations, referencing standards by the Canadian Standards Association and ISO, may help predict future guidance. We note that the Competition Bureau has announced plans to open a consultation process in the near future during which industry proponents are encouraged to provide their feedback and concerns prior to the Competition Bureau publishing updated guidance. More information can be found **here.**

The amendments also introduce a new process that allows the Bureau to certify certain environment-related agreements and arrangements such that those will be exempt from the criminal and civil competitor collaboration provisions under the Act.

- The Commissioner may issue a certificate where satisfied that:
    - A party or parties propose to enter into an agreement or arrangement that is for the purpose of protecting the environment; and
    - That the agreement is not likely to prevent or lessen competition substantially in a market.

Mergers

New factors to be considered in merger review include:

- Effects on labour markets
- Changes in market share/concentration likely to result from the merger
- Likelihood that the merger will result in express or tacit coordination between competitors

Consideration of market share/concentration is being given increased weight. The amendments introduce a "reverse onus," making it easier for the Tribunal to block mergers that significantly increase market share/concentration unless the parties can prove the merger will not substantially lessen or prevent competition.

Other important merger-related changes

- Pre-merger notification required for more transactions as thresholds have been revised to require aggregation of assets and revenues in transactions involving the acquisition of assets and shares;
- Limitation period to review non-notifiable mergers increasing from one to three years; and
- Interim injunctions available to the Commissioner of Competition to prevent mergers from closing until Tribunal disposes of injunction application.

Private Actions

Private parties' ability to apply to Federal Court for leave to bring applications for remedies related to civilly reviewable anti-competitive conduct will be expanded to include the following sections:

- **Section 74.1,** which contains the charging provisions for the "deceptive marketing practices" provisions of the Act (this will capture the new greenwashing provisions); and
- **Section 90.1,** which prohibits agreements between competitors that are likely to result in a substantial lessening or prevention of competition in a market.

The Tribunal will be permitted to make monetary awards "not exceeding the value of the benefit derived" from conduct prohibited by certain sections of the Act. These amounts are to be distributed to the applicant and other persons affected by the conduct. This will essentially create a new form of "quasi" class action remedy under the following sections:

- **Section 75** (refusal to deal);
- **Section 76** (price maintenance);
- **Section 77** (exclusive dealing, tied selling, market restriction);
- **Section 79** (abuse of dominance); and
- **Section 90.1** (anti-competitive agreements between competitors).

The Tribunal will **not** be permitted to grant monetary awards to private persons in relation to applications under section 74.1, suggesting that this new monetary remedy will not be applicable to the new greenwashing prohibitions. That being said, the **penalties** set out in the Greenwashing section above could still be ordered in private actions based in "greenwashing."

The expansion of private actions will not come into effect until June 20, 2025.

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