Intelligence MEMOS

From: Grant Bishop

To: Attorneys General of Provincial Governments

Date: July 24, 2024

Re: **Ottawa's New Greenwashing Rule Infringes Freedom of Expression**

The new greenwashing rule hastily crammed into the *Competition Act* in last month's omnibus budget bill has cast a chill over communications by Canadian companies – many of whom have scrubbed content from their webpages in response.

The legislation is vague, overbroad and an inappropriate departure from the established aims of Canadian competition law. This limit on free speech must be urgently challenged. To this end, provincial governments should immediately initiate references to their courts of appeal.

The clumsy, poorly tailored new provision targets not just false commercial marketing but also imposes a sweeping "reverse onus" on representations concerning environmental benefits for an informational or political purpose.

The consequent chilling effect inhibits the flow of information essential to public debate on critical environmental policy questions. The new provision therefore represents an unjustified infringement of the freedom of expression guaranteed under the Charter of Rights and Freedoms.

To be clear, this is not an argument against combatting greenwashing by companies. At the 2022 Green Growth summit organized by the Competition Bureau, I argued fervently for enforcing the existing *Competition Act* provisions against false and misleading environmental claims. I share concerns about the loose use of "net zero" or "carbon neutral" branding based on flimsy voluntary offsets (particularly for GHG reductions rather than actual carbon removals). As with any product claim, misleading statements about environmental performance impede vigorous market competition by seeding distrust and interfering with consumers' quality comparisons.

However, the *Competition Act* already included provisions that capture such false or misleading representations, which include a requirement for "adequate and proper test" of claims about a product's performance. In contrast, the new subsection requires "substantiation in accordance with internationally recognized methodology" for any representation about "the benefits of a business or business activity".

Unlike the *Competition Act's* existing "adequate and proper test" requirement, the new subsection is not about the context-specific and flexible validation of the objective truth of a product-specific claim. Rather, this provision outsources what is acceptable speech (regardless of ordinary understanding or objective scientific testing) to some nebulous official or semi-official "internationally recognized methodology."

Notably, this new clause was not included in the original legislation presented to Parliament under Bill C-59. Indeed, after first reading, the Standing Committee on Finance stuffed subsection 74.01(1)(b.2) into an already jam-packed omnibus bill against the express recommendation from the Competition Bureau.

In his testimony to the committee, Competition Commissioner Matthew Boswell specifically recommended "further study on expanding [the *Competition Act*] to include business general claims, environmental claims or brand general environmental claims." Boswell specifically stated that "the *Competition Act* probably isn't the right vehicle" for "very prescriptive rules about what a company can and can't say when it comes to environmental claims."

Now the Bureau must scramble to provide guidance on how it will enforce a power it didn't want. And it will face a quandary to interpret a provision that so markedly departs from the *Competition Act's* general framework, sweeps in a wide breadth of representations, and includes ambiguous terms that are not otherwise defined.

Such a vague, poorly tailored provision cannot be considered to only minimally impair the freedom of expression. To be constitutionally justifiable, legislation must be carefully tailored to infringe a Charter-protected right only so far as necessary to achieve a pressing and substantial objective.

Moreover, under additional reforms to the *Competition Act*, private parties other than the Bureau can now seek monetary penalties against businesses for contravening the new subsection. And there is no reason to think any guidance from the Bureau will necessarily deter complaints. Companies understandably fear this "open season" since they face sanctions for speech that lacks blessing from whatever counts as an "internationally recognized methodology."

This impairs companies' contributions to vital public debate. Indeed, as exhibited by its widespread chilling effects across Canadian businesses, subsection 74.01(1)(b.2) infringes the very core of the Charter guarantee for freedom of expression. It goes far beyond protecting the competitive dynamics of product markets. It attempts to regulate the marketplace of ideas.

Such informational or political speech – even from a "dirty" industry or a company that certain activists may dislike – is the essence of what our freedom of expression must protect. The chilling of speech by such vague legislation is so concerning because it hinders citizens' ability to critically read and listen and decide for themselves.

This is why courts should find this new provision is an unjustified infringement of Charter-protected expressive freedoms. Such overbroad legislation, which freezes the flow of information to the public on environmental benefits and climate change, should not be permitted to stand.

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