

advertising and marketing bulletin

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waving the flag in product promotions: Competition Bureau revamps meaning of “made in Canada” and “product of Canada” claims

The Competition Bureau (“Bureau”) is in the middle of a public consultation ending October 8, 2009 on its draft *Enforcement Guidelines Relating to “Product of Canada” and “Made in Canada” Claims* (“Guidelines”), which propose to replace its existing *Guide to “Made in Canada” Claims* (“Old Guidelines”). The Guidelines clarify how the Bureau will interpret certain “Canadian” claims in relation to the false or misleading representations provisions of the *Competition Act*, the *Consumer Packaging and Labelling Act*, and the *Textile Labelling Act* (the “Acts”). In addition, they come less than a year after the Canadian Food Inspection Agency (“CFIA”) shifted its reliance on the Old Guidelines to its own directive, *Guide to Food Labelling and Advertising*, featuring a new interpretation of “Made in Canada” and “Product of Canada” claims relating to food products.

None of the Acts require that the country of origin of a product be identified.¹ They do, however, prohibit the making of false or misleading representations. Accordingly, if a business chooses to “wave the flag” and make a “Made in Canada” claim with respect to their products, the Bureau will apply the approach described in the Guidelines to determine when it should investigate a claim for non-compliance or undertake enforcement action.

implications for businesses

Businesses should be aware of three important aspects regarding the proposed Guidelines: what products are affected; which “Canadian” claims are affected; and the potential penalties for violating provisions of the Acts relating to false or misleading representations.

¹ That said, the *Textile Labelling and Advertising Regulations* require that if a label on a textile fibre product includes a representation that the product or any fibre in it is imported, the label on the product must name the country of origin. Statutes and regulations other than the Acts may require country of origin information to be provided in certain circumstances. The Guidelines, however, only address the legislation enforced by the Bureau.

First, the Guidelines continue to apply to non-food products only. Second, the Guidelines propose new definitions and a clear distinction between “Made in Canada” versus “Product of Canada” claims. They also provide guidance for other “Canadian” claims which do not fit into either category. Third, penalties for violating any of the Acts’ false or misleading representations provisions can be onerous. Under the *Competition Act*, for instance, civil penalties for corporations include fines of up to \$10 million (for the first offence) and up to \$15 million (for each subsequent offence); for individuals, the civil penalties include fines of up to \$750,000 (for the first offence) and up to \$1 million (for each subsequent offence). Civil sanctions may also include orders for restitution, modifying future behaviour and publishing a corrective notice. Criminal penalties under the *Competition Act* may include fines in the discretion of the court and imprisonment up to 14 years.

the new “made in Canada”

The Bureau is proposing three requirements for “Made in Canada” claims, only the last of which is new. First, the products must undergo their last substantial transformation change in Canada. A substantial transformation will have occurred where a product undergoes a fundamental change, resulting in a new product that is different in nature from the previous product. Second, 51% or more of the total direct costs of the production or manufacturing of the product must be incurred in Canada. Such costs of production or manufacturing may include expenditures on materials or labour incurred in the manufacturing or production of the product, but typically do not include general overhead, unless it directly relates and can be reasonably allocated to the production or manufacturing of the product. Third, a qualifying statement must complement the claim, such as “Made in Canada with imported parts” or “Made in Canada with domestic and imported parts.” If additional information is known, such as the particular percentages of Canadian and imported contents, it may be used in the qualifying statement.

Let’s consider a pencil manufacturer, for example. If the products undergo their last transformation in Canada (where wood and lead are combined to form pencils), the material and labour costs incurred during their production in Canada total more than 51% of total direct costs, and are represented as “Made in Canada with domestic and imported parts,” then it appears that all conditions are met. Moreover, if the contents of the pencils are known to be 80% Canadian, then a possible representation might also be “Made in Canada with 80% Canadian content and 20% imported content.”

the new “product of Canada”

The Bureau proposes that “Product of Canada” claims will be considered as compliant with the Acts if two requirements are fulfilled. The first mirrors the new “Made in Canada” requirements - that is, the product must undergo its last substantial transformation in Canada. The second requires 98% or more of the total direct costs of production or manufacturing of the product be incurred in Canada. This second condition sets the bar high for “Product of Canada” claims.

Returning to our example, if the erasers for our pencils are imported from China and they make up more than 2% of the costs of the entire pencil, or if their last substantial transformation occurs in China, then a “Product of Canada” claim would not be appropriate.

other “Canadian” connection claims

When a product falls short of “Made in Canada” and “Product of Canada” claim requirements, all isn’t lost. In fact, the Bureau encourages using specific qualified claims to provide additional accurate, relevant and clear information to the consumer. The Bureau recommends using specific terms to qualify a product’s Canadian connection, such as: “Assembled in Canada with foreign parts”, “Sewn in Canada with imported fabric”, “Designed in Canada”, and “[specific part of the product] made in Canada from domestic and imported parts”. For example, if the erasers on our pencils fit the “Made in Canada” criteria, then a possible representation might be “Eraser made in Canada from domestic and imported contents.” However, the Bureau discourages the use of general qualifying terms like “produced” or “manufactured”, as customers are likely to understand them to be synonymous with “Made in Canada” or “Product of Canada” claims.

impressions matter

To determine whether a product’s claim is false or misleading, the Bureau examines the “general impression” given by the representation. The general impression is generated from a wide range of factors including any words, images, illustrations, layouts, implied claims or context representing a product. These components are examined in their entirety to form a general impression. If the Bureau determines that the general impression of a representation is that the product is “Made in Canada” or a “Product of Canada” when it does not meet the respective criteria, then such a representation will likely violate a provision of the Acts. As such, the Bureau suggests exercising caution when using the following claims: “Shop Canadian,” “Proudly Canadian,” “Think Canadian,” Canadian or Provincial flag symbols, or the Maple Leaf symbol. For instance, a Canadian maple leaf displayed on our pencils might imply a “Made in Canada” claim if the representation’s general impression doesn’t indicate otherwise.

why now?

Curiosity, if anything, might beg the question “Why revamp the Old Guidelines now?” The Guidelines give us one reason - the Bureau recognizes the need for transparency and predictability regarding “Canadian” claims to assist consumers in making informed product purchasing decisions. Another possibility is the Guidelines are reacting to the Government of Canada’s survey of consumers and stakeholders in the food product industry, The *Canadian Food Labelling Initiative*, where respondents approved CFIA’s new “Made in Canada” and “Product of Canada” interpretations and certain respondents suggested extending CFIA’s guidelines to other industries. Or perhaps, the handful of reported alternative case resolutions in recent years is representative of an increasing number of Bureau investigations involving false or misleading “Made in Canada” and “Product of Canada” claims, to which the Guidelines are meant to respond.

In any case, publication of the Guidelines probably signals that “Product of/Made in Canada” claims are one of the Bureau’s emerging enforcement priorities. Moreover, the Guidelines (especially once finalized) will provide businesses with information and valuable insight into the Bureau’s approach to enforcement. This, in turn, will help businesses develop strategies to ensure compliance with the false or misleading representations provisions of the Acts when they “wave the flag” in connection with promoting their products. While the Guidelines confirm that the Bureau will evaluate each situation on a case-by-case basis, they also offer the promise that if the Guidelines are followed by businesses, it is unlikely that they will raise false or misleading representations concerns under the Acts.

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a cautionary note

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