

# Green Marketing and Advertising Law Update

## Overview: A Rip-Roaring Year

Well, it's been an exciting year for those of you who (like us) get excited about new green guidelines and cases.

### GREEN GUIDELINES

We've been on the edge of our seats for two years, but the US Federal Trade Commission ("**FTC**") finally put us all out of our suspense and dropped its final revised Green Guides in October. With some bold new moves, according to some commentators. The International Organization for Standardization ("**ISO**") also finally got the necessary votes in to finalize its amendments to ISO 14021, its key standard governing environmental claims made by advertisers themselves.

Some of the focus, of course, is on catching up with renewable claims and carbon claims, being used more frequently these days. The FTC was also clearly determined to slam the door on an array of misleading practices that had developed in the increasingly important area of certificates and seals of approval. Why are they so important? Well, it's not that consumers don't trust companies' own claims. It's just that consumers don't trust companies' own claims. So it's considered a good thing for authoritative third parties to verify environmental benefits, allowing an assuring seal or logo to be placed on-pack. Regulators are keen to preserve the integrity of those assurances.

Moving elsewhere in the world, Brazil (2011) came out of the gate as the first South American country (so far as we've seen) to birth detailed new green guidelines. New Zealand got new self-regulatory guidelines. And then there was Australia. ►



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## OVERVIEW

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That Australian Competition & Consumer Commission (“ACCC”). (That’s the Australian false advertising regulator.) It banged out guidelines to head off misleading claims relating to Australia’s new carbon price scheme even BEFORE the scheme went into effect and companies had a chance to start making the misleading claims. But didn’t it call it right. Despite the early warning (which some companies evidently missed), misleading claims did start coming out just as the ACCC predicted and, without missing a beat, it went after them.

### GREEN CASES GALORE

In terms of cases, the UK self-regulator had a banner year, adjudicating almost 50 green cases in 2012 before we even started carving our Thanksgiving turkeys. Other countries, as usual, paled in comparison. The US had several green cases, but Canada had none. Not that this should make you relax if you’re doing green advertising here. What the Competition Bureau’s been busy doing is exercising its new ability to exact C\$10 million penalties for misleading advertising, up from C\$100,000 in 2009. (You can read all about that in our *2012 Canadian Marketing, Advertising & Regulatory Law Update*.) Which ups the ante for misleading green advertising as well, of course.

We found some snippets we couldn’t resist reporting in other far-flung places - from South Africa to New Zealand and Ireland, just to whet your international whistle. Altogether, green cases ran a large gamut, they ranged from good old overly-broad general claims to those involving renewable energy, electric cars, energy and money saving, organic and natural claims, and more. We gave up counting the “natural” cases in the US, so we included just a couple from other countries to keep you interested.

### AND MORE...

For those who think of waste diversion as less than sexy, give yourself a wake-up slap on the cheek. Stewardship programs and eco fees are way “in” and getting more extensive and serious all the time, as you can read about below.

Finally, two hot topics that screamed for articles were, the hard-hitting and sophisticated campaigns coming out of environmental groups when they want to go after a company and, the ever-intriguing and developing world of biofuels – the liquid renewable alternative to fossil fuels. We hope you find these issues as interesting as we do. So fasten your seatbelts. You probably won’t want to read everything (we know), but we wanted to include a little something for everyone. ■

In terms of cases, the UK self-regulator had a banner year, adjudicating almost 50 green cases in 2012 before we even started carving our Thanksgiving turkeys.



# AT LAST!! US & ISO Green Guide Updates Done And that's not all

Go ahead. Ask us what's new and exciting.

**The big news, of course, is that on October 1, 2012, the Federal Trade Commission ("FTC") finally released its final revised *Guides for the Use of Environmental Marketing Claims* ("US Guide"). The revisions went into effect on October 11, 2012.**

That wasn't all though. The granddaddy of international green guidelines, ISO 14021<sup>1</sup>, was also updated on December 15, which may affect the countries that look to those guidelines for their rules. Canada is one of them, as the Competition Bureau's guide, *Environmental Claims: A Guide for Industry and Advertisers* ("**Canada's Guide**") is based on ISO 14021. Further steps would need to occur before our guidelines reflected the ISO 14021 amendments. The 2010 *Green Claims Guidance* of the UK Department for Environment, Food and Rural Affairs ("**UK Guide**") also draws on ISO 14021. It already contemplated and referenced the ISO 14021 amendments.

**Brazil** has extensively revised its green provisions as well. They went into effect in August 2011. **New Zealand's** self-regulator issued a revised *Code for Environmental Claims*, coming into force January 2013.

The final guideline news we'll mention is **Australia's** new *Carbon Price Claims: Guide for Business*. This was introduced on November 15, 2011 (and updated in May 2012) in light of the carbon-pricing regime that went into effect in Australia on July 1, 2012. What's a carbon-pricing regime? It requires some large businesses to buy carbon credits to offset their emissions. That means their costs will go up and some consumer prices will also go up as the costs are passed down the chain. Having a vivid imagination, Australia's false advertising regulator thought some companies might want to raise their prices and (falsely) blame the full hikes on the carbon price. Or perhaps scare consumers into thinking that electricity prices were going to go sky high so they should waste no time in buying low-carbon energy alternatives like solar panels. The Guide was brought in to head them off at the pass.

## THE SKINNY: WHAT'S NEW?

**1. US Guide** – Most notably:

- Six sections have been added: **Carbon Offsets, Certifications and Seals of Approval, Free-of, Non-toxic, Made with Renewable Energy, and Made with Renewable Materials.**

- Six sections have been substantively modified: **General Environmental Benefit, Compostable, Degradable, Ozone, Recyclable, and Recycled Content.** (Certain non-substantive changes were made as well for purposes of simplification and easier reference.)

**2. ISO 14021** – Most notably:

- Definitions have been added for "**biomass**", "**greenhouse gases**", "**life cycle GHG emissions**", "**offsetting**", "**sustainable development**" and "**traceability**".
- Direction has been given on the terms "**renewable**", "**renewable energy**", "**sustainable**", "**product carbon footprint**", and "**carbon neutral**", such as: how to use these claims, required qualifications, and/or evaluation methodology to substantiate them.

**3. Brazil**

- The new provisions in Brazil's self-regulatory code include green guideline basics seen everywhere – truth and accuracy, verifiability, the need to consider the whole life cycle, etc., but also address **corporate social responsibility and sustainability advertising**. See the side bar box, which addresses Brazil's guidelines in more detail.

**4. New Zealand**

- See the revised Code for Environmental Claims at [www.asa.co.nz](http://www.asa.co.nz)

**5. Australia**

- If you're interested in more detail on the *Carbon Price Claims: Guide for Business*, have a look at the Australia section of our article below on Green Cases Around the World.

## SO WHO NOW HAS THE STRICTEST STANDARDS IN THE LAND (WORLD)?

It depends which issues you're looking at, but the US is the frontrunner on strictness on a number of important issues. To put matters into perspective, we highlight below some comparisons between the new US Guide, Canada's Guide, ISO 14021 and certain other guidelines, so you can get a slightly larger sense of how issues may be handled in

<sup>1</sup> ISO 14021:1999, Environmental Labels and Declarations - Self-declared environmental claims (Type II environmental labeling)

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various places. (Obvious note: we have only focused on certain aspects of the claims referenced below, so please check with local counsel and see the relevant guidelines themselves.)

### Where The US Guide Is Stricter or More Exacting in Specifics

So far as we've seen, the US Guide is the only green guide providing the following:

**a. Degradable:** To be called "degradable" (without qualification), products entering the solid waste stream (e.g., in contrast with liquids) must completely decompose into elements found in nature within a specified time period (**one year**) after customary disposal. If beyond a year, the US Guide says you should specify the **rate and extent of degradation**, among other things.

Having said that, Canada's Guide, ISO 14021 and others such as Finland's, focus on an aspect of degradability that the US Guide doesn't. These guides state that if a product/package/component releases substances in concentrations that are **harmful to the environment when it degrades**, it shouldn't be marketed as "degradable" without an appropriate qualification. With respect to **liquids**, Canada's Guide provides the example that a biodegradable claim for cleaners with phosphates that can promote algae growth (which can wipe out ecosystems in waters) can be deceptive. (Note that the UK's Department for Environment, Food and Rural Affairs put out specific **Guidance on "Biodegradable" and other environmental claims in the Cleaning Products Sector**.)

**b. Recyclable:** To be called "recyclable" (without qualification) under the US Guide, recycling facilities have to be available to a **"substantial**

**majority"** or **"60%"** of the population where the product is sold. That's more than the **"reasonable proportion" required under ISO 14021**, which has been interpreted as at least **"50%"** in Canada's Guide. New Zealand uses "most", which is apparently also the position in Australia.

**c. Compostable:** To be called "compostable" (without qualification) under the US Guide, commercial composting facilities must be available to **"60%"** of the population, where the item is sold, versus "50%", "most" or a "reasonable proportion" elsewhere.

**d. Renewable energy:** Under the US Guide, these claims must disclose the **type of renewable energy** - e.g., solar, etc., as well as the percentage if it is less than all or virtually all. Other jurisdictions just require the **percentage** where it is less than 100%, not the type of energy.

On the other hand, the **US Guide may be a little more liberal, specifically allowing** a "made with renewable energy" claim when you've actually used fossil fuel energy, but purchased a renewable energy certificate to match the amount of fossil fuel used. We haven't seen that elsewhere as yet.

**e. Renewable materials:** With "renewable material" claims, the US Guide recommends **disclosing what the material is AND explaining how it is renewable** - in addition to disclosing the percentage of renewable material. (Other guidelines just require the percentage.)

This is interesting. The FTC found through consumer perception studies that **consumers may understand "made with renewable materials" to mean that the product is made with recycled content, recyclable and/or biodegradable**. It therefore set out sample disclosures that could head off that misunderstanding - i.e., *"Our flooring is made from*

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*100 percent bamboo, which grows at the same rate, or faster, than we use it.” Or even more elaborately, “Our packaging is made from 50% plant-based renewable materials. Because we turn fast-growing plants into bioplastics, only half of our product is made from petroleum-based materials.”*

**f. Certificates and seals of approval:** As consumers have come to trust companies’ own claims less and less, certifications by trusted, independent parties have become increasingly important. However, these can also be confusing for consumers. Which seals and certificates are meaningful and trustworthy, which are less so, and what attributes do the trumpeted certifications cover?

The US Guide has the most detailed requirements of any guidelines we’ve seen on this issue, aiming to obliterate the ambiguity and deceptiveness that has had consumers throwing up their hands in confusion. Was the seal awarded by an independent, authoritative party (most trusted), a trade association (often less trusted) or the company itself (query how many of these we will even see going forward)? This is an issue that has spawned litigation as well – e.g., the class actions launched against SC Johnson in connection with its [Greenlist™](#) logo, which was developed by the company itself.

Does the company have a **material connection** with the entity whose seal or certificate displayed, such that its credibility or weight might be affected? Which certifications are based on solid, **consensus-based** and exacting requirements as opposed to being not-so-rigorous endorsements by trade associations or others? **Which environmental aspects of the product were actually evaluated** and what was the specific basis for a certification? Here it also gets interesting. Anticipating the obvious question of ‘how do you explain the basis of complex, multi-attribute certifications on a little label’, the FTC allows you to refer consumers to a website for the details. Don’t get excited, though. Even though you can reference a website, you would still have to accompany the seal with a statement like, *“Virtually all products impact the environment. For details on which attributes we evaluated, go to [a website that discusses this product.]”*

The FTC has tackled all of these potential devices for ambiguity and deception - and more, it provides numerous recommendations and examples. It also spells out that, use of the name, logo or seal of approval of a third-party certifier or organization may be an endorsement, which should meet the criteria for endorsements provided in the FTC’s Endorsement Guide. The name of the new game, then, is to **disclose, disclose, disclose.**

On this front, **ISO 14021 and Canada have been left a little pale**, with only a few general principles laid out, mainly under the part dealing with **“symbols.”**

### WHERE THE US GUIDE IS LESS EXTENSIVE

**a. Carbon Claims:** While the US Guide focuses on carbon offsets, other guidelines cover not only that but also “carbon neutral” and similar claims – namely, **New Zealand , Australia , Norway , the UK and ISO 14021.**

Guidelines in the latter jurisdictions specify what you need to put in your ads by way of qualification – for example, identifying: i) **which elements of the life cycle** you have “offset”; ii) **which “Scopes” of emissions** have been offset (Scopes 1, 2 and/or 3, under the Green house Gas Protocol); iii) what offset scheme you’ve used; and/or iv) sources of further information about the **offset scheme.**

**b. Public Access to Your Substantiation:** The US Guide doesn’t recommend, as do ISO 14021 and jurisdictions like Canada and the UK , that companies either release to the public information that verifies a claim or at least provide access to the information on request.

Indeed, ISO 14021 and the UK add the strict kicker that if your **claim relies on confidential information** for its verification, you **shouldn’t make the claim.** Canada’s Guide doesn’t go quite that far. It says that if your claim is based on confidential information, you should be prepared to make the substantiation available to a regulator, if asked.

Don’t get excited, though. Even though you can reference a website, you would still have to accompany the seal on the label with a statement like, *“Virtually all products impact the environment. For details on which attributes we evaluated, go to [a website that discusses this product.]”*

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**c. Encouraging Bad Environmental Practices:** The US Guide doesn't prohibit ads from showing scenes that would encourage pollution or harm to the environment, as some European guidelines and Brazil's guidelines do.

**d. Making Consumers Feel Guilty:** The US Guide doesn't prohibit, "techniques which manipulate consumers' emotions or conscience," as Norway's guidelines do. Examples of unfair claims in Norway are, "Think of the polar bears: buy energy-efficient insulation." and "Drink coffee with a better conscience."

**e. Guidelines for Specific Products:** The US Guide doesn't include special guidelines directed to certain product categories, as some other countries have done for vehicles, electricity, energy for house heating, decorative coatings, growing media, greeting cards and cleaning products, for example.

**f. Sustainability Claims:** The FTC declined to delve into claims of "sustainability." Not so in some other guides. ISO 14021 was clear in its original form that **no claim of achieving sustainability should be made**. The amendments to ISO 14021 say that no "unqualified" claim of sustain-ability should be made (though without offering any details on the kinds of qualifications that would be appropriate).

Granted, "sustainability" is a bit of a thicket. A good illustration comes from a 2008 case in which [Cotton USA](#) was told by the UK self-regulatory Advertising Standards Authority ("**ASA**") **not to call its cotton "sustainable"**. The advertiser argued that its cotton was **natural, biodegradable and renewable** and met the criteria of sustainability put forward by a number of major organizations (including the UN) – namely, economical viability, environmental protection and social responsibility.

The challenger was not having any of it and submitted that cotton was a pesticide and insecticide-intensive crop that could seriously deplete groundwater; and, furthermore, that cotton growers in West Africa were having a terrible time because of subsidies granted in the US cotton industry.

The advertiser came back saying that **current pesticides were more targeted, less toxic and less persistent** in the environment, that the vast majority of cotton was genetically modified, which reduced its need for intensive agriculture, that cotton was not water-intensive, and, furthermore, that there were a number of reasons the cotton growers in West Africa were having a terrible time apart from US subsidies. Of course, there was a **division of scientific opinion on a lot of these issues and ASA wasn't sure how clear it was that**

**genetic modification of the cotton, which had allowed some of these benefits, wasn't harmful** – etc., etc. One can see why the FTC would say – OK, this is a quagmire; we're not going there (at least yet).

## US COMING ON BOARD WITH OTHER GUIDELINES

**Trade-Offs - Net Environmental Benefit**

The US has now come on board with most other guidelines in requiring you to consider whether an improvement you've made on one environmental front (e.g., reducing the amount of petroleum-based plastic you use) has worsened other environmental impacts your product has. Let's not paraphrase this important wording, which is: "*If a qualified general claim conveys that a product is more environmentally beneficial overall because of the particular touted benefit(s), marketers should analyze trade-offs resulting from the benefit(s) to determine if they can substantiate this claim.*" (US Guide, §260.4(c); emphasis is ours.)



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Canada's Guide provides, among other related principles, that, "*It is not permissible to **shift the environmental burden** from one stage of a product's life to another and then make a **claim concerning the improved stage** without considering whether there is, in fact, a **net overall environmental benefit.***" (Emphasis is ours.) It also incorporates the ISO 14021 provision saying that claims must not only be true for the finished product, but must also consider all relevant aspects of the life cycle, "*to identify the potential for one impact to be increased in the process of decreasing another.*"

Trade-offs...shifts of environmental burden...increasing one impact while decreasing another – what they are asking is whether the change you're touting really yields a net environmental benefit or whether your product is now LESS environmentally friendly.

**And by the way, your general claim may still be sunk if misleading in the larger picture**

In most places, even if the **specific change you've made** hasn't resulted in any particular environmental downsides itself, you could still get into

trouble saying, "*Eco-friendly: 30% less plastic*". When? Say the materials you use – and have always used – are sourced from incredibly polluting plants and shipped from overseas when everyone else sources them locally, you pillage local water supplies that are scarce, and commit all sorts of other environmental sins. In that scenario, do you think that giving a specific attribute (30% less plastic) to explain your general "eco-friendly" claim will save your general claim from being misleading?

### GREEN ADVERTISING PRACTICES HAVE CHANGED

The changes discussed above are part of the rush of activity we've seen around the world over the last five to seven years. At least 17 countries and two international organizations have introduced or updated their green advertising provisions (sometimes product or issue specific) since 2005<sup>2</sup>. These have certainly influenced the way green claims are being made in the marketplace these days, although not so much that we can't still find a LOT of cases to tell you about in our article below on "*Green Claim Cases Around the World*". ►

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<sup>2</sup> 2012 – US; 2011 – Brazil and ISO 14021; 2010 – UK, Costa Rica and International Chamber of Commerce; 2007-2009 – Canada, Greece, Ireland, Malaysia, Singapore, the Netherlands, Norway, Australia, New Zealand, Finland, France, Hungary; 2005 – Denmark and Iceland.



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## Humans Are Eco-Friendly! ★

**Biodegradable!**

**Renewable!**

Replenished exponentially faster than used up

**Made from recovered materials!**

Sperm and egg delightfully diverted from their respective waste streams

**Can be disassembled at end of life for re-use of parts \***

**Lasts 30% longer than previous generations ❖**

**Conserves more energy than ever ☺**



★ Aside from causing continual air, soil and water pollution, using up fresh water and other resources at an unsustainable pace, radically changing the planet's climate and wiping out millions of other species.

❖ Some parts may be more reusable than others

\* Using 60% more health dollars

☺ Stored safely in increasing quantities of bodyfat

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# ANOTHER “FINALLY!”

## ISO 14021 AMENDMENTS CRAWL OUT OF A LENGTHY REVISION PROCESS

The centerpiece of international green guidelines for advertisers recently underwent its first amendments in over a decade, finally being nailed down on December 15, 2011. These, of course, are the guidelines of the International Organization for Standardization [ISO], called *ISO 14021:1999, Environmental Labels and Declarations – Self-declared environmental claims (“ISO 14021”)*.

ISO 14021 has spread its seeds all over the world. Canada’s own *Environmental Claims: A Guide for Industry and Advertisers (“Canada’s Guide”)* was squarely based on and incorporated ISO 14021. The *International Chamber of Commerce’s (“ICC”) International Code of Environmental Advertising* incorporates it and the *UK’s 2010 guidelines from the Department for Environment, Food and Rural Affairs (“UK Guide”)* refers to it as well, among others.

## WHY SHOULD YOU CARE ABOUT ISO 14021?

Even if your jurisdiction’s regulator or self-regulator doesn’t refer to ISO 14021, it is a great source of best practices in using and substantiating green claims.

### The Guts of the Amendments: Focus on “Renewable” and “Carbon” Claims

Similarly to the US Guide, what the amendments to ISO 14021 did was bring in brand new provisions to address some more modern claims and concepts. Thus, ISO 14021 now includes (in addition to two new symbols, which aren’t particularly exciting) direction on how to use and qualify the terms “renewable”, “renewable energy”, “sustainable”, “product carbon footprint”, and “carbon neutral” as well as direction on methodology to evaluate them. It also adds a number of new definitions – for “biomass”, “greenhouse gases”, “life cycle GHG emissions”, “offsetting”, “sustainable development” and “traceability.”

Let’s look at some highlights:

### 1. Renewable Materials

Think bamboo as a good example. ISO 14021 defines “renewable” in relation to materials as biomass from a living source that can be continually replenished. It also contains an important kicker: when virgin materials are the subject of the claim, they have to come from sources that are verified to show they are **replenished at a rate equal to or greater than the rate of depletion**.

If materials are less than 100% renewable, allowing for de minimus amounts of non-renewable materials, you have to disclose the percentage. As well, the percentage for products and packaging must be stated separately – they can’t be aggregated.

### 2. Renewable Energy

Renewable energy is defined as energy coming from sources that are non-exhaustible or capable of continuous replenishment. Examples given (non-exhaustively) are sunlight, wind-power, biomass and geothermal. NOTE, that the amendment goes out of its way to exclude energy sources associated with movements of water – unless the sources are managed in accordance with the principles of sustainable development. (Operations that interfere with aquatic life, for example, aren’t desirable.)

As in the US, unqualified claims for renewable energy can only be made when 100% of the energy supply is renewable (although the US Guide generously allows it as well if “virtually all” is renewable). Otherwise, the percentage has to be stated.

ISO 14021 also warns that you need to be especially careful with claims about products or processes that use energy from the grid and you want to claim that they contain a percentage of renewable energy.

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**3. Sustainable**

The amendments to ISO 14021 re-emphasize that advertisers should NOT make an **unqualified** claim of “sustainable” or “sustainability”. So saying that you are selling “sustainable bags” or that your business is sustainable, and leaving it at that, is out.

**4. Carbon-related Claims****a. “Carbon Footprint” (for a product)**

Lots of companies like to make claims about how they are reducing greenhouse gas emissions. If you want to talk about your product’s **“carbon footprint”** (essentially how much carbon its existence is responsible for), ISO 14021 nails down a **formal definition**. The carbon footprint is the net amount of life cycle greenhouse gas emissions, including long term net removals of CO<sub>2</sub>. ISO 14021 also specifies how a carbon footprint should be evaluated, not surprisingly referencing the applicable ISO standards – i.e., ISO 14040 series, ISO 14064 and product category rules as specified in ISO 14025.

Carbon footprint, of course, is just one of the environmental impact categories that is considered in a life cycle assessment. Note that ISO 14021 focuses on the carbon footprint of products rather than companies.

**b. “Carbon Neutral”**

“Carbon neutral” claims were really on the rise, although it seems a bit less so recently. In any event, under ISO 14021, a carbon neutral product has a carbon footprint of – guess...! Yes, zero.

To call a product “carbon neutral”, you have to make sure that ALL greenhouse gas emissions from ALL stages of the life cycle have been reduced (or removed altogether if you’re doing that well) and/or accounted for through a system of offsets or credits or by other means.

*“An unqualified claim of “carbon neutral” shall not be made.”*

So sayeth Clause 7.17.3.1. Under this provision, carbon neutrality claims must always include a statement that the **product carbon footprint is zero**, thus explaining explicitly what carbon neutral means, and a clear statement about **which elements of the product lifecycle have been offset**. No being vague about that. And that’s not all. ISO 14021 wants ads to detail **what has been offset, which offset scheme was used** and how one can get **further information** to explain the offset program.

Looking for standards to assess your product’s carbon neutrality? Look at ISO 14040 series and ISO 14064. ■



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# Brazil's New Green Guidelines

**Brazil's new green self-regulatory guidelines came into effect on August 1, 2011 as, *Standards for Advertising Containing Appeals of Sustainability* ("Guidelines").**

Not surprisingly, the Guidelines include some of the basics found in most green guidelines – e.g., claims must be verifiable, precise and accurate and the touted benefit has to be significant in terms of the total impact of the product/service on the environment throughout its life cycle.

### **DON'T ENCOURAGE DISRESPECT FOR THE ENVIRONMENT**

The Guidelines also have some provisions we don't see much in North America, although you do in Europe: basically, that ads shouldn't directly or indirectly encourage bad environmental behaviour - for example, creating pollution (whether of air, water, forests, other natural resources, cities or noise), degrading flora, fauna or other natural resources, or wasting resources. An extreme example of the type of ad meant to be discouraged might be one showing an SUV racing through a forest and trampling plants, with the driver dumping garbage out the window into the creek as he drives.

The approach taken by the above provisions – i.e., wanting ads to influence behaviour as opposed to just not being deceptive - is akin to what is often done in guidelines relating to alcoholic beverage advertising in Canada (e.g., don't show people consuming alcohol and doing tasks requiring skill) or advertising to kids (e.g., don't show kids consuming enormous portions of food that's bad for them).

### **CORPORATE SUSTAINABILITY ADS**

Brazil's Guidelines also have their eye on companies that advertise about their own responsible and "sustainable" conduct. If they talk about their efforts, they have to have already done what they are talking about or, if they're talking about what they're going to accomplish in the future, they have to disclose what they're doing to realize that. (Clause 1, Concreteness).

### **WHAT'S THE OVERALL IMPACT OF THE BUSINESS?**

One provision that might be interesting in its application is Section 6, dealing with "relevance". This requires the environmental benefit touted to be **significant** in terms of the **overall impact** that the business (or the brand, product or service, as the case may be) **has on society and the environment** throughout their process and cycle, from production and marketing to use and disposal. We will look forward to seeing how the new guidelines affect green advertising in Brazil, and how and whether other Latin American countries will follow suit. ■



## GREEN GUIDELINES

## DID YOU KNOW?

**Q: WHAT IS THE “ISO”?**

A: Based in Geneva, it develops voluntary International Standards in various areas from green marketing to food safety to computers, agriculture and healthcare. Its members are standards bodies from 164 countries. It has 3,335 technical bodies and accesses experts from around the world to reach a consensus (that must be fun) when developing new standards. It was born in 1947.

**Q: WHO ARE ITS CANADIAN AND AMERICAN MEMBERS?**

A: The Standards Council of Canada and the American National Standards Institute (“the ANSI”), respectively. You probably didn’t need the “respectively” part.

## Canada’s Position on Life Cycle

The FTC struggled with some legitimate issues when debating how and whether to incorporate life cycle provisions into the US Guide.

Canada’s Guide, however, has for some time (like most guidelines around the world) made consideration of a product’s life cycle a central issue in environmental claims. What exactly does it require? And what guidance does it provide on determining the net environmental benefit it also expects?

### WHAT DOES “CONSIDERING” THE LIFE CYCLE ENTAIL?

Right upfront, Canada’s Guide states that, “A principle of environmental claims is consideration for the life cycle of the product.” (Clause 3.3)

If you are having visions of elaborate accounting exercises being required, don’t panic. As Canada’s Guide says, “CAN/CSA-ISO 14021 does not require a full life cycle analysis to be carried out to verify an environmental claim, but it does require consideration of the life cycle of the product.”

What’s the difference between an “analysis” and “consideration?” Although the terms aren’t defined in Canada’s Guide, life cycle analysis generally refers to the type conducted under life cycle analysis/assessment protocols that involve specific measurements of impacts and detailed inventory analysis.

“Consideration” is obviously less than that – although unfortunately there isn’t a lot of detailed guidance on what it entails (except with certain claims like recovered energy and reduced energy, as discussed below). What Clause 5.9 says is that, “Environmental claims should be

*based on the best available information in each life cycle phase of the product to assess the net environmental benefit associated with a claim.”*

### EXCEPTION – WHEN ANALYSIS SHOULD BE DONE

One situation in which the Guide does refer to a life cycle “analysis” is where a sustainability claim is made. “A claim about a product’s sustainability requires life cycle analysis and cannot be based on a single attribute of the product such as how it was managed and extracted.” (Clause 4.6)

### NET ENVIRONMENTAL IMPACT

As indicated above, Canada’s Guide says that, “It is not permissible to shift the environmental burden from one stage of a product’s life to another and then make a claim concerning the improved stage without considering whether there is, in fact, a net overall environmental benefit.” It also incorporates the ISO 14021 provision saying that claims must not only be true for the finished product but must also consider all relevant aspects of the life cycle “to identify the potential for one impact to be increased in the process of decreasing another.”

The words “in the process of” decreasing another and reference to “shifting” the environmental burden from one stage of the life cycle to another suggest that you only need to identify a negative environmental factor that “results from” whatever you are doing to make the “improvement” (at least under this provision). An example given is using a gas for refrigeration that is non-ozone depleting, but makes the refrigerator less energy efficient (which apparently happens with some of them). If you make a claim about the non-ozone-depleting gas, the example

## GREEN GUIDELINES

says, you must either verify the net benefit OR clearly state the reduction in efficiency. (Canada's Guide, Clause 5.9; emphasis is ours.)

Other principles may require you to have a broader look, however. What if – quite apart from the new gas, which hasn't introduced a particular environmental downside – the metal used in your refrigerator is sourced from an operation in Nigeria that poisons all the local rivers and competitors are all using recycled material because it's easy to do, and you are a terrible environmental performer in all other ways. Can you still say: "Environmentally friendly: non-ozone-depleting gas?" You may well still be vulnerable to attack under general misleading advertising principles of material non-disclosure, among others.

### EVEN STRICTER ELSEWHERE

Note how some countries get even more explicit here. Under Finland's guidelines, for example, a general statement like "Environmentally friendly" can only be used if a product, *"has considerably less environmental impact during its entire life cycle 'from cradle to grave' than other products in the same product group."* So, good luck with that.

### MORE GUIDANCE ON NET ENVIRONMENTAL BENEFIT

There are some claims where Canada's Guide gets more specific on net environmental impact.

For example, with claims that your product is made with, or you are selling, **"recovered energy"** (energy that would have otherwise been wasted or dissipated, but instead is recovered and used - think cogen-

eration, for example), Canada's Guide instructs you first on how to calculate the recovered energy (Clause 10.6) and then says that the amount of energy recovered has to be **greater than the energy used to power the recovery process** itself. It also requires adverse effects on the environment resulting from the production of the energy from waste to be "managed and controlled". By way of example, Canada's Guide says that "recovered energy" claims shouldn't be made for energy produced from agricultural waste if the energy used to **transport and process** the waste exceeds the energy produced from the waste.

Clause 10.10 provides the same principles for **reduced resource use claims**, including how to calculate relevant quantities. The example given here is a new process enabling an appliance to be made from thinner and lighter sheets of steel. The downside is that production of the thinner sheets increases the energy required in the process. In this case, the recommended claim is, ***"This product has reduced its use of steel by X% for a net environmental benefit, although energy used in production was increased by Y%."*** ■

Under Finland's guidelines, for example, a general statement like "Environmentally friendly" can only be used if a product *"has considerably less environmental impact during its entire life cycle 'from cradle to grave' than other products in the same product group."* So, good luck with that.



## GREEN ADVERTISING NEWS

## Green Cases Around the World

### THE GREENEST/MOST ENVIRONMENTALLY FRIENDLY “ON EARTH” OR “KNOWN TO MAN”

#### UK: **Clearview Stoves Ltd. (ASA, April 11, 2012)**

Often, claims of being the “something-est on earth” are treated as puffery. Not in the green context. Here, ASA investigated the claim on Clearview Stoves’ website that its wood and fuel burning stoves are, “**The greenest stoves on earth,**” amongst other claims regarding the stoves’ specifications and fuel efficiency.

#### How Green Were They?

To support its “greenest” claim, Clearview submitted a number of measures it took to be “green”. For example, it sourced local fuel, components and materials (“when possible”) and returned all waste material for re-use. It was the first company, it maintained, to build a “clean burning” multi-fuel stove. It had provided recycling facilities for almost 30 years. It had its own nursery for future planting as well as its own sawmill. It had an efficient delivery system to ensure that its vehicles were dispatched fully loaded. Clearview submitted that its products were renowned for longevity and were often maintained by customers themselves, thus reducing the need for service calls. To top it off, Clearview heated much of its business premises with waste heat from production processes and had planted and maintained forests for 20 years, which produced environmental benefits.

That was all a definite wow! As impressive as the list was, however, Clearview fell into that dastardly pit of **picking a claim so broad that it was virtually impossible to support**, and ASA wasn’t going to cut it any slack. ASA found “greenest stoves on earth” to require robust substantiation showing they were more environmentally friendly than any other stove on the global market, when the environmental impact of those products was assessed over their full lifecycle. Just not happening.

**Green Claim Tip:** Over-reaching is the mortal enemy of the great story you’ve worked hard to develop. Just like a balloon, pump it up that extra bit too much and it can all explode.

#### SOUTH AFRICA: **Crammix (Advertising Standards Authority of South Africa, June 11, 2008)**

A manufacturer of clay bricks in South Africa didn’t fare much better with its superiority claim than Clearview had in the UK. (Okay, this is an older case but it seemed so à propos the issues being discussed these days.)

Here, the manufacturer, Crammix, said in a magazine ad that its clay bricks were, “*one of the most environmentally friendly and energy efficient masonry materials known to man.*” The ad also contained a logo of a brick and a leaf, with the phrase “**Environmentally Friendly**” featured under the logo.

Based on Appendix J (Advertising Containing Environmental Claims) of the South African Code of Advertising Practice (“**Schedule J**”)<sup>1</sup> the Directorate of the Advertising Standards Authority of South Africa (“**Directorate**”) found both the claim and the logo misleading.

Appendix J requires that claims such as “environmentally friendly” or “green” be qualified by a description of the environmental benefit. Crammix’s claim was found in breach because it contained no explanations as to why clay brick was “environmentally friendly” and “energy efficient.”

Similarly, Appendix J **requires environmental signs or symbols to clearly indicate their source and not imply official approval.** The logo in the Crammix ad did not indicate any source. Moreover, the logo appeared next to two other marks indicating approval by the South African Bureau of Standards. The Directorate concluded that “the hypothetical reasonable person” would think that Crammix’s clay bricks had been approved by the latter Bureau or a similar accredited independent body. On this basis as well, then, Crammix’s ad was found misleading.

**Green Claim Tip:** Using broad claims and self-created (but not so identified) seals of approval is like wearing a “Kick Me” sign on your back. Especially these days. See our article above on the FTC’s newly updated Green Guides for more issues to consider when using certificates or seals of approval.

<sup>1</sup> As of October 2012, it is now schedule G.

## GREEN ADVERTISING NEWS

### “ENVIRONMENTALLY FRIENDLY” BIO-PLASTIC PACKAGING

#### GERMANY: Danone Deutschland (Munich District Court, 2011)

Bioplastics is a burgeoning industry, with all manner of brands now being sold in plastic packages made at least in part from renewable crops instead of petroleum.

**Green Tip:** As with biofuels, bio-plastics may also become the focus of environmental groups. Caution is advised when making claims.

In the European Union, Danone Deutschland (“**Danone**”) introduced a new tub for “Activia” brand yogurt that was made from corn and labeled, “New environmentally-friendly tub.”

The new tub was said to use less raw material and to generate less CO<sub>2</sub> emissions and less end-of-life waste. It even won the annual award given by Bioplastics Magazine.

This didn’t impress the German environmental group called Deutsche Umwelthilfe (“**DUH**”), however. It went to the Munich District Court and filed a complaint. Why? It felt Danone’s “environmentally-friendly claim” was greenwashing. The new packaging was not recyclable and did not, in DUH’s view, present a real environmental improvement over its polystyrene predecessor as the new packaging was made, in part, from genetically-modified corn.

Whilst Danone disagreed with DUH’s position, the matter reportedly settled. Wishing to avoid further public debate, Danone agreed to remove “environmentally-friendly tub” from its container and websites and have the packages at issue off store shelves by December 27, 2011.

### “THE ETHICAL CHOICE”

#### NEW ZEALAND: Dole New Zealand (New Zealand Commerce Commission, June, 2012)

The New Zealand Commerce Commission sent a letter to Dole this summer relating to, among other things, whether the “Ethical Choice” stickers on its bananas and pineapples were misleading contrary to the *Fair Trading Act*.

Among the Commission’s concerns, apparently, were that consumers **may be misled into believing that an independent third party had verified the claim** and that Dole’s fruit is in fact “more ethical” than competitive fruit. On the latter point, the Commission apparently

pointed out a number of allegations being made about Dole’s ethical and environmental conduct, including its **allegedly exposing Philippine banana plantation farmers to toxic chemicals** (for which Dole was being sued) and alleged incidences of **forced working hours, frequent accidents and concerns relating to pesticide use** raised by Fair Food International. The letter also apparently raised issues relating to certain ISO standards and certifications referenced on Dole’s website and expressed concern over “eco” and “eco-friendly” representations which were allegedly without whole-life cycle support.

Dole has reportedly told the Commission that it has fixed references to the standards the Commission referenced, and taken down potentially misleading point of sale materials (see <http://bit.ly/NwsfPe>). Its website also explains how the “Ethical Choice” claim is Dole’s own and not a third party certification. The Commission indicated in late October, 2012 that it had no plans to pursue further action against Dole.

**Green Claim Tip:** Regardless of the foundation (or lack thereof) of the Commission’s concerns, this is another instance of an attempted positive “green marketing” initiative backfiring, at least initially, with an avalanche of negative publicity, including splashes across the Internet of alleged “ungreen” conduct by the advertiser. The more careful you are coming out of the gate, the less likely this will be to happen.





## GREEN ADVERTISING NEWS

**ORGANIC FOOD: MORE NUTRITIOUS, WITHOUT ADDITIVES, PESTICIDES, DRUGS, ENVIRONMENTAL DAMAGE AND BETTER TASTING?****IRELAND: The Organic Supermarket – Blackrock (Advertising Standards Authority of Ireland, September 10, 2012)**

In its internet advertising, the Organic Supermarket “shortened” and “summarized” some information about organic foods that it borrowed from the website of the authoritative Organic Trust. It discovered that shortening was not okay, however, when qualified statements were turned into categorical ones. While that isn’t a new principle, the case is interesting as it **hits a lot of controversial issues in the organic food versus conventional food debate** – like:

**i. “More vitamins, minerals and detoxifying antioxidants.”**

What the Organic Trust’s website said was that, “Research continues to show that essential vitamins and minerals are higher in many organic foods. On average, organic food contains higher levels of vitamin C and essential minerals such as magnesium, iron and chromium as well as cancer fighting antioxidants.” (emphasis ours)

You can guess what the Complaints Committee of the Advertising Standards Authority of Ireland (“**Committee**”) found. The claim went too far, suggesting that all organic food had more of all vitamins, etc., than conventional food. An additional French study submitted by the advertiser also only showed that some organic foods had higher levels of some vitamins, etc.

Moving from the case to current headlines, the issue of whether organic food is more nutritious continues to generate debate – e.g., a recent [meta-study from Stanford University](#) hit the news on September 4, 2012, generating headlines that organic foods do not have a nutritional advantage – although the headlines, of course, overstate the conclusions of the study.

**i. “No nasty additives: No colourings, flavourings, sweeteners”.**

This claim was found to be fine. The Committee agreed that additives are allowed, but as they are **naturally occurring**, the Committee didn’t consider them “nasty.” “Nasty” additives, which were banned by organic regulations, were those such as hydrogenated fats, aspartame, monosodium glutamate and all artificial colourings, flavourings and sweeteners.

**ii. “No Pesticides. We don’t like to spray our veggies.”**

Even though the advertiser said it meant that it “limited” pesticides and emphasized that it didn’t “like” to spray its veggies, the claim was found

misleading. A form of pesticide is in fact used in organic farming. Categorical is categorical.

**iii. “No environmental damage. Drinking water free from pesticides & fertilizers.”**

The complainant said that organic food production would cause environmental damage such as **GHG emissions from tractor use, destruction of natural habitat from farming and emissions from shipping organic food to retail**. In response, the advertiser submitted a paper suggesting that organic is better for the environment. It was found, however – and not surprisingly - that “better” is not “no damage”, so the paper provided no real support.

The Committee also pulled a proverbial smoking gun quotation out of the paper that, “*While it is considered that the beneficial effects of organic farming outweigh the adverse, there is a clear need for further scientific research into the complex relationships between organic farming and the environment ...*”.

**iv. “Delicious Organic food simply tastes better.”**

“Delicious organic food simply tastes better” was not treated as simply a subjective taste claim. The Committee said that since it was not qualified as the advertiser’s opinion, it had to be substantiated. Which it wasn’t.

**v. “No Drugs. No antibiotics are used before, during or after”**

This was found misleading as antibiotics could be used to treat sick animals at the direction of vets.

**Green Claim Tip:** Punchy is good, but categorical can be fatal.

**“ORGANIC” – IN COSMETIC PRODUCT NAME****UK: Boots UK Ltd. (ASA, October 17, 2012)**

Boots, a UK drug store chain, advertised a baby shampoo on its website, called “*Little Me Organics Oh So Gentle Hair and Body Wash*”. The website stated, “*Little Me Organics Oh So Gentle Hair and Body Wash has pear, mallow and organic aloe vera to clean and moisturize your baby’s delicate hair and sensitive skin.*”

The complainant challenged whether “**Organics**” in the name was misleading because it implied that the product met an independent organic standard.

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Boots submitted that “**Little Me Organics Oh So Gentle Hair and Body Wash**” was simply the product’s brand name! Boots also argued that it was just electronically reproducing claims directly found on the product label. In its view, that was no different than in-store shelf displays showing the product. ASA wouldn’t let Boots off the hook, however.

**Green Claim Tip:** Be aware that the approaches to issues aren’t necessarily uniform across all jurisdictions.

On the first point, ASA acknowledged that the product did contain certified organic pear, mallow and aloe vera, which had been certified by four independent bodies. These organic ingredients made up less than 5% of the total ingredients. Even though there was no UK standard for organic cosmetics, ASA acknowledged that a number of independent certification bodies did exist and all defined a product as “organic” only if it contained a high proportion of organic ingredients.

Swayed by this, ASA found that consumers would understand “**Little Me Organics**” to mean that the product met an independent organic standard or used a high proportion of organic ingredients. Because neither the former nor latter were true in this case, ASA found “Organics” to be misleading.



### Retailers Take Note!!!

On the second point, ASA was unmoved by the fact that Boots was simply reproducing the product’s label claims. Presenting a bracing message for retailers who simply want to advertise on their website the products that they carry, ASA told Boots not to promote the product in future marketing communications unless it included a prominent statement disclaiming the implied “organic” claim.

### “NATURAL” – IN COSMETIC PRODUCT NAME

#### **SOUTH AFRICA: Reckitt Benckiser South Africa (Pty) Ltd., Dettol Natural Soothing Soap (ASASA, January 13, 2012)**

Poor Boots! If only the UK ASA had as liberal a view about words used in product names as the Advertising Standards Authority of South Africa (“ASASA”).

ASASA dealt with the “name” issue in relation to a Reckitt Benckiser South Africa (Pty) Ltd. product, “*Dettol Natural Soothing Soap*”. The product label claimed, “*New Dettol Natural Soothing Soap combines trusted Dettol protection with the natural goodness of calendula and chamomile to gently cleanse and hydrate your sensitive skin.*”



Reviewing prior ASASA decisions on use of the word “natural” in product names, ASASA held here (again) that the reasonable person would not understand the product to be completely natural based on the name of the product alone. In this case, the packaging contained no indications of natural ingredients, and the get up in no way implied natural ingredients. “Natural” was used only as part of the product name and in the claim that the product offers “the natural goodness of calendula and chamomile.” The term was accordingly not found to be misleading and the advertiser was not required to show that the entire product was natural.

**Green Claim Tip:** Be aware that approaches to issues are not necessarily uniform across all jurisdictions.

### “NATURAL” – FOR PROCESSED PRODUCTS

#### **UK: Kerry Foods Ltd. (ASA, October 24, 2012)**

ASA received a whopping 371 complaints about Kerry Foods’ television advertisement for its Richmond ham product. Most of the complaints

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objected to the fact that the ad included a shot of a man's naked bottom, but four complainants challenged whether claims that the product was "made with 100% natural ingredients" and was "as nature intended" were misleading.

Kerry Foods acknowledged that the ham was a processed product and therefore the product itself was not natural. However, all of the ham's ingredients were "natural" in compliance with the UK Food Standard Agency (FSA)'s definition of the term "natural".

ASA accepted both "natural" claims, finding that the product was made with all "natural" ingredients in accordance with the UK FSA guidelines. ASA acknowledged that some complainants viewed the "as nature intended" claim as a misleading description of a processed product, but ASA concluded that most consumers would be aware that all mass-produced packaged ham was processed, so the claim was unlikely to mislead.

Note that the Canadian Food Inspection Agency ("CFIA") similarly distinguishes between "natural" claims and "made with natural ingredients" claims (see the [CFIA Guide to Food Labelling and Advertising, Chapter 4](#)). To claim that your food product is "natural", you'll have to meet much more stringent requirements about the product overall (e.g. the product can't contain any added vitamins, minerals, artificial flavouring agents or additives, and the product can't have any constituent or fraction thereof removed or significantly changed).

Oh, by the way, as for the naked bottom in the ad, ASA proved it had a sense of humour by giving a pass to the ad's "light-hearted" nudity.

**Green Claim Tip:** A product that contains "natural ingredients" is not necessarily a "natural" product.

## NATURALLY RAISED

**US: Chipotle Mexican Grill (NAD, April/May, 2012)**

"Naturally-raised" and similar claims have been hot buttons in many countries over the last while – both with regulators and consumers. Here, NAD decided – just on its own - to take a look into a video made by Chipotle Mexican Grill ("Chipotle").

The video was shown on Chipotle's website, Facebook, YouTube, in cinemas and later on TV. It depicted a farmer beginning with simple farming in a humane environment, going industrial and then more happily returning to simple farming, ultimately placing a crate into a Chipotle truck.

NAD felt the video suggested that all meat served at Chipotle restaurants was "naturally-raised." Which led them to ask – is it?

**What does naturally-raised mean and did Chipotle meat comply?**

NAD first noted that it didn't take a position on what constitutes sustainable farming or humane treatment. It wasn't a regulatory agency, nor was it the Federal Trade Commission – and even the latter didn't want to go there. The US Department of Agriculture ("USDA") had a definition of "naturally-raised", however, and as Chipotle's own standard was even more stringent, NAD did not make an issue of Chipotle's definition. (In a nutshell, Chipotle's standard restricted antibiotics and hormones, which the USDA also did, but also required humane treatment, which the USDA did not). To the extent that all meat sourced by Chipotle complied with its definition, NAD would be satisfied. Apparently the meat did and the NAD was.

**The plight of the good guys**

You have to sympathize with companies who have strong, good convictions, put their resources into doing things a better way and then get hit with a big challenge to their claims. They might think – with all the reams of bad actors out there, why on earth are resources and time spent coming after us? From the regulator/self-regulators' perspective, they want to ensure that claims about really helpful things (like "naturally-raised" meat and others) are protected and clean whenever they're used – to avoid them being rendered meaningless and ultimately ignored by consumers. As frustrating as it is to those trying to make a difference, the reality is that the good guys have to be as careful as anyone else – indeed, perhaps more so as they have so much invested, fundamentally, in their positioning.

**Canada's stricter position**

Just so you know, the Canadian Food Inspection Agency ("CFIA") has concerns about the term "naturally raised" being used on meat, poultry or fish here in Canada. In its [Guidelines](#) on this term, CFIA says it considers both "natural" or "naturally raised" to be appropriate only, "on products that were raised with minimal human intervention, for example, wild turkey or wild fish." It says that, "to raise animals so that their products can be labelled as 'natural' would be very difficult as most animals receive vaccination or medication and the feed given usually contains vitamins, minerals, additives, medication and direct fed microbials; none of which are considered to be minimal human interventions. . . . "naturally raised" would be even more difficult, as raising a farm animal or fish is an expression of human intervention."

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As regulators often love precise, narrow claims and cringe at broader, less clear claims, CFIA would like marketers to use specific claims like “grain fed”, “raised without the use of antibiotics” or, “raised without the use of hormones.” Note that CFIA’s guidelines were put out for public comment in 2011, and we’re still waiting for any changes. For our prior, more fulsome article on this issue, see Heenan Blaikie’s [2011 Green Marketing & Advertising Law Update](#).

**Green Claim Tip:** Good guys have to be as careful – or more so - than anyone, to stay on the side of the angels.

## ELECTRIC CARS – EMISSION NUMBERS AND RANGE CLAIMS

### UK: General Motors UK Ltd. t/a Vauxhall (ASA, [January 11, 2012](#) and [August 22, 2012](#))

General Motors UK Ltd. (“GM”) found itself before ASA twice this year (it probably enjoyed the first time more than the second), on ads for the European version of the Chevy Volt – namely, the Vauxhall Ampera. The first Ampera ad dealt with mileage and emissions claims; the second with how far the car could go – a key point of competition for electric cars.

**Ad #1:** This said, “*Under normal driving conditions where 80% of daily journeys are less than 30 miles, the combination of battery power and extended range technology deliver up to 175 miles per gallon of fuel whilst emitting less than 40 g/km of CO<sub>2</sub>.*” (emphasis is ours). The complainant wanted to see how GM supported both its mileage and carbon emissions claims. In particular, the complainant raised a question that piqued our interest in respect of the emissions claim. He submitted that the number given in the ad was misleading because it didn’t take into account emissions created when the electricity from the grid was

created that was used to power the car. Sounds farfetched but you never know how far this life cycle business will be taken nowadays. (See the BMW, Renault and Vectrix cases on page 21.)

**What was the verdict?** ASA found both claims to be adequately qualified and supported. The claims had been calculated in accordance with applicable regulations – where standards existed. On the emissions front, **ASA accepted that it was very difficult to work back and quantify the emissions that had been created when the electricity itself was generated.** There simply weren’t any standards for that. ASA was satisfied that the amount stated (40 g/km of CO<sub>2</sub>) was calculated in accordance with applicable regulations, such as they were, which measured the emissions of the vehicle in use.

On the ‘good example’ front, GM had placed both claims in context by specifying the type of driving conditions that would achieve the claimed results: “normal driving conditions, where 80% of daily journeys are less than 30 miles.” GM also made it clear that it was a combination of battery power and extended range technology that achieved these results.

**Ad #2:** The Ampera didn’t fare so well the second time around, when ASA felt the ad suggested – through the visuals and other elements in the ad - that its could drive up to 360 km without using a gas engine in any way.

The ad began by showing the car charging up at an electricity source, then driving away. Shots of athletes in training were cut in, with a super saying, “*Comparison based on electric vehicles and extended-range electric vehicles driven electrically at all times, even when an additional power source is generating electricity.*”



The Ampera didn’t fare so well the second time around, when ASA felt the ad suggested – through the visuals and other elements in the ad - that its could drive up to 360 km without using a gas engine in any way.

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Significant achievements of the athletes were shown, supplemented by a voice-over saying that, *“Only true pioneers go further than others. Vauxhall Ampera, driving electricity further.”* To quantify what it meant by *“going further”*, on-screen text said, *“Ampera, up to 360-mile range.”*

**So what was the background?** The advertiser explained that the Ampera could go up to 50 miles on a fully charged battery, but then its “range extender” mode took over. That consisted of an internal combustion engine, fuelled by gas, which served as a generator for the electric motor.

ASA found the ad misleading. The visuals and statements in the body of the ad, ASA found, focused on electricity, distance and longevity. The qualifier only came in a super, which ASA found difficult to understand and **ambiguous as to what that the “additional power source” was.** That was particularly so, according to ASA, given the average viewer’s unfamiliarity with this new type of car and the fact that it used a gas engine to generate power for the extended trip.

The difference between the two ads? The first clearly revealed that the results stated (terrific gas mileage and emissions) were achieved by a combination of electric and “extended range” technologies. The second didn’t refer to extended range technology right in the body of the ad. It only included that concept in a super, and one that ASA found to use somewhat mysterious language.

**Green Claim Tip:** When dealing with new or complicated technology, regulators and self-regulators will consider what they think consumers will likely understand (or not). You may thus have to work harder to ensure you explain material elements clearly.

## VEHICLES - “LOW EMISSIONS” AND “ZERO EMISSIONS” CLAIMS

### UK: FirstGroup plc t/a First Bus (ASA, January 25, 2012)

First Bus ran a TV ad showing a bus with a poster on its rear end saying, **“We ♥ low emissions.”** At the same time the poster appeared in the commercial, on-screen text was added saying, *“Our buses produce 4.97% less carbon than conventional diesel buses.”* While this may not sound too exciting, the back story here resulted in some pretty interesting questions.

**What are “Low Emissions?”** First, was it okay to suggest that a bus that produced only 4.97% less carbon had “low emissions?” Isn’t 4.97% a pretty small amount? Although ...they were pretty open in disclosing what they thought were “low” emissions, so did that make it okay?

The added twist here was that the Department for Transport (“DfT”) had an **internal standard for “low emission” buses, requiring them to produce 30% less carbon** than conventional buses. Why did the DfT have such a standard? It was used for its own emission target purposes. Not exactly an advertising regulation, like those requiring “low fat” foods to have no more than x% fat. So - should First Bus have been effectively bound by that internal standard or free to provide and explain its own meaning of low emissions? And **would members of the public really know about the DfT’s internal standard anyway?**

ASA apparently had no trouble deciding the case. It was quite happy accepting that the public would be aware of the DfT’s 30% standard - even more so, ASA felt, given that DfT had just announced that it would be putting 542 new low emission buses on the road, which would produce 30% less CO<sub>2</sub> than conventional buses. (ASA clearly gives the British public high marks for being aware of internal government policy and paying careful attention to announcements of this nature.) In these circumstances, ASA felt, it wasn’t okay for First Bus to set up its own definition for low emissions.

**Green Claim Tip:** You never know for sure how a regulator is going to reason its way through an issue. Your best plan then? Be careful enough in framing your ad that you won’t end up in front of one.

### UK: Nissan Motor (GB) Ltd (ASA, February 22, 2012)

Following other electric car advertisers that came before it, in February it was Nissan’s turn to be scrutinized for claiming that its LEAF electric car was emission-free. While driving it did not produce emissions, as with any electric car, the process of generating the electricity used to power the vehicle did.

**What did the advertising say?** The focus here was Nissan’s website for the LEAF. It had a vertical hyperlink that said, **“Zero emission by Nissan”**. The website also gave an option for consumers to, **“Download e-brochure”**. On the last page of the brochure, in the ‘Specifications’ section, a statement appeared saying, *“The new air. No tailpipe, no emissions. The all-electric Nissan LEAF doesn’t produce one gram of CO<sub>2</sub> whilst driving”* (emphasis added).

**The result:** ASA concluded that **the advertising, taken as a whole, did not mislead.** ASA considered that consumers would be likely to download and view the brochure, which specified that no emissions were produced “whilst driving.” Based on that assumption, ASA felt consumers would understand the claim to refer to the vehicle while in use, not while being charged.

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**But be careful:** Although ASA approved Nissan's "zero emission" claim in this context, it hasn't always been as cooperative. Consider the following **three previous adjudications** in which ASA held that similar "no emissions" claims could only be used if no emissions were created during **the car's whole life cycle:** manufacture, use (including charging) and disposal.

**BMW (UK) Ltd. (ASA, July 28, 2010):** As we summarized in our October 2010 Green Marketing and Advertising Law Update, BMW's ad included the following statements:

- "100% JOY. 0% EMISSIONS"
- "The BMW Concept ActiveE is the first BMW to be powered purely by electricity... Thanks to its electrifying performance and zero CO2 emissions when driving, the ActiveE redefines BMW EfficientDynamics" (emphasis added).

Like Nissan's ad, BMW's zero-emissions claim included a qualifier: "when driving." In fact, BMW's qualifier was arguably more closely connected to the claim, being right in the body copy of the print ad, than was the case with Nissan's hyperlinked explanation coming in a product e-brochure. But unlike with Nissan, ASA found BMW's earlier claim misleading. ASA stated that the inclusion of "when driving" didn't clarify but instead contradicted the zero-emission claim.

**Renault UK Ltd. (ASA, March 31, 2010):** Renault claimed that it was launching a range of "zero emission" vehicles. Here, it didn't include a qualifier at all – and further, it contained a statement that suggested Renault WAS talking about the whole life cycle – that being, "For us, global warming goes beyond the emissions coming out of the exhaust. It's an issue we address before, during and after manufacture." ASA found the claim misleading because the vehicles were likely to be charged with electricity from the national grid (powered mainly by non-renewable sources), which would create emissions.

As winter closes in, whose thoughts aren't turning to mittens, ice skates and heating bills? That means that energy and money savings claims are about to proliferate, and the FTC has launched a warning shot across all our bows as to how they should be supported.

**Vectrix (UK) Ltd. (ASA, May 7, 2008):** Vectrix advertised its petrol scooter as "zero emissions". Like Renault, Vectrix didn't qualify its claim. ASA stated that "without immediate qualification to explain that it referred to emissions produced by the vehicle while it was being driven" (emphasis added), the claim was misleading, because the scooter would emit CO2 emissions while charging.

## FUEL SAVING AND EMISSION REDUCTION CLAIMS

**UK: Sonic Reflex, trading as Waterboost System (ASA, January 4, 2012)**

This case represents a typical performance claim case, where the ad asserts many wondrous results but the support consists of just a one-off test or is conducted with poor methodology, sometimes presenting theory as fact without any real-world testing.

The flag for both legal counsel and consumers is to not be overly impressed with detailed and extremely scientific-sounding claims as to how the product works and the results that are achieved. Here, Waterboost claimed that:

*"The Waterboost System uses spare electricity from your cars [sic] alternator to generate Hydrogen and Oxygen gas from water. The Hydrogen and Oxygen is fed into the manifold of your vehicle ...";*

*"The enhanced air/fuel/hydrogen mix burns up to 10 times faster however this rapid burn is so fast that the resulting power stroke and exhaust stroke will be much cooler, resulting in significantly less nitrous oxides (NOx)";*

*"...In brief, noxious gas is almost eliminated and greenhouse gas is decreased in proportion to the reduction in fuel consumption ..."; and the device increased the miles per gallon (MPG) achieved by a Ford KA from "38 - 43mpg" to "72 - 80mpg".*

While there were evident shortcomings in its support – e.g., it admitted that the results were based on its own research and did not guarantee similar results for everyone – Waterboost had another defence: others were making claims just like this for inferior products! One can commiserate. But none of this went very far with ASA and the ad had to be withdrawn.

**Green Claim Tip:** Courts aren't much more inclined to accept the "but everyone else is doing it" defence than you are with your kids (or your parents were with you).

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## ENERGY/MONEY SAVINGS CLAIMS – “UP TO”

**US: Gorell Enterprises, Inc.; Long Fence & Home, LLP; Serious Energy, Inc.; THV Holdings LLC; and Winchester Industries (FTC, Press release February 22, 2012)**

As winter closes in, whose thoughts aren't turning to mittens, ice skates and heating bills? That means that energy and money savings claims are about to proliferate, and the FTC has launched a warning shot across all our bows as to how they should be supported.

The five companies list above advertised, variously, that their replacement windows would save between 35% and 55%, that heating and cooling costs would be cut “up to \_\_\_%” or that they would be cut “right in half”. Each company offered a variation of an **“energy savings pledge” or “guarantee”** to pay consumers the difference if the savings claims didn't pan out.

The FTC pursued the companies, alleging that they didn't have a reasonable basis for their claims and ultimately settled with them all in February. What has had everyone buzzing was the FTC's requirement that where claims represent savings of “up to \_\_\_%” there should be competent and reliable scientific evidence to substantiate that consumers are **likely** to achieve the **maximum results** promised under normal circumstances – or, in other words, that **“all or almost all consumers” are likely to achieve the maximum savings claimed.**

The FTC's stringent “all or almost all” requirement arose out of a [study](#) it commissioned in connection with the investigations. The FTC's study revealed, essentially, that many consumers don't really register the “up to” part of a claim. In the test ad, stating that the windows were, “PROVEN TO SAVE UP TO 47% ON YOUR HEATING AND COOLING BILLS”, between about a third and a half of the respondents (36% - 45.6%) read the ad to say that they would save 47% (not “up to 47%”, which was also an option) on their heating and cooling bills. That was the same proportion (statistically) as gave that answer on seeing the same ad but without the words “up to.” On a closed question, 28% said that all or almost all of the window users could expect to save about 47% – which was apparently enough to lead to the FTC's “all or almost all” position. Another 20% thought it meant that about half or most would save that much.

#### **And just in case companies weren't listening during the first wave of enforcement ...**

On August 28, 2012, the FTC put out a release indicating that it had issued warning letters against 14 more replacement window marketers making claims similar to those made by the five earlier companies.

**Green Claim Tip:** Copy testing can be full of surprises. As in other cases, it's best to be specific and define your own claims rather than having an adjudicator do it for you. You may be able to say “up to” if you want, but the prudence of doing so and the additional information you may need will depend on how your results are disbursed and the context of the claim.

#### ENERGY EFFICIENCY AND SAVINGS CLAIMS – KITCHEN HOT WATER DISPENSER

**UK: Quooker UK Ltd. (ASA, January 4, 2012)**

This case involved a kitchen instant hot water dispenser. If you aren't familiar with this device, it is God's gift to tea lovers – allowing one to simply pull a lever or turn a knob and pour perfectly heated water right into one's mug. For those who feel guilty that the water is continuously heated and on standby, claims such as Quooker's would be of intense appeal: *“Eco-Friendly: Delivers exactly the amount of water you need, when you need it”; “Energy Efficient: Energy use only 3p a day, a saving of up to 55% against a kettle.”*

**Was this too good to be true? Most sadly, yes (at least in this case).** *“Eco-Friendly”* and *“Energy Efficient”*: Quooker proffered a number of points to support these claims. It explained that its product had **standby consumption of just 10W**, it had patented **tank technology** that resulted in less heat loss than other hot water storage products and it was **more recyclable than competitive dispensers**. That sounded pretty good, although it didn't get Quooker too far as it only spoke to other instant hot water dispensers and not other types of water heaters, like kettles, for example.

Quooker also relied on two reports to support its energy efficiency claim: i) an independent Energy Analysis Report (**“EAR”**), **assessing the efficiency of various water boiling methods**; and ii) a 2006 Report on kettle trends and energy consumption. Right off the bat, the latter report was discounted as it had numerous methodological problems, including the fact that it **was from 2006 and models had changed since then**. That report would fall into the “throw everything in but the kitchen sink” approach to evidence submission, which is not generally recommended.

#### **Damn Detail**

The EAR did show that Quooker used less energy than the other products when boiling water. Quooker's undoing here was that its product embodied more energy than a conventional electric kettle on a total life-cycle basis – Quooker water filters had to be replaced every three years or so.

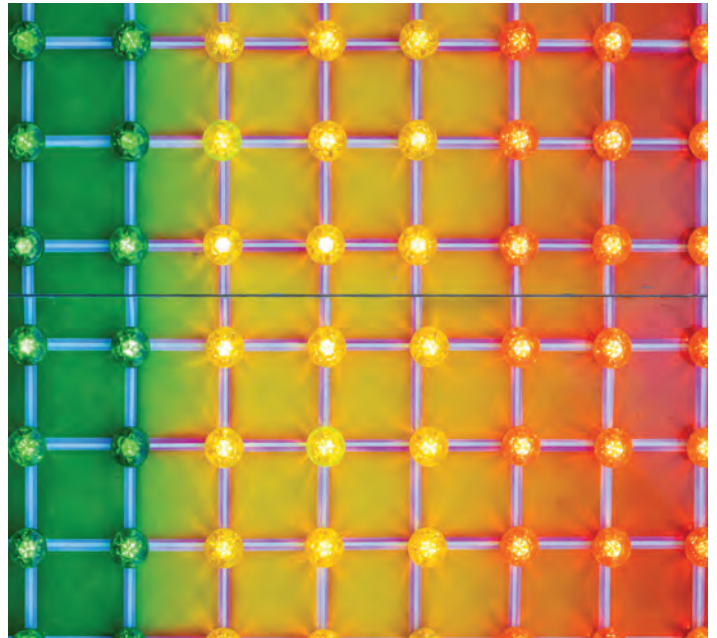
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As for the **“energy efficient”** claim, the EAR concluded that Quooker’s energy efficiency was equivalent to its electric alternatives, but the claim, *“Energy use only 3p a day, a saving of up to 55% against a kettle”*, implied that the Quooker was more energy efficient than a kettle.

With respect to the **specific savings** represented – *“...only 3p a day, a saving of up to 55% against a kettle”* – Quooker **had based this calculation on a typical kettle use of eight times a day**, for which it had no specific support. In fact, there was a **report that pegged typical kettle use at only 4.22 times per day**, which would throw Quooker’s numbers substantially off. Quooker accordingly agreed to withdraw that claim.

**Green Claim Tips:** While the following points may seem self-evident, it is surprising just how often they are ignored. First, if you make an eco-friendly claim against a broad range of competitors, your eco-friendliness has to be supported against them all – not just some of them. Second, life cycle is extremely important – and don’t forget to include all essential parts of your system when conducting the analysis. Third, make sure your test methodology doesn’t have holes in it. Testing against current competitors as opposed to outdated models is generally recommended. (Read with sarcasm)

**Green Claim Tip:** Make sure you’re relying on the right measures to back up your claims. According to the UK, ASA a brighter bulb = a higher lumens reading, unless you have robust proof that other measures are also relevant.



### LED BULB – BRIGHTNESS CLAIMS

**UK: Burton & Sons Trading Ltd. t/a SimplyLED (ASA, October 31, 2012)**  
SimplyLED’s ad claimed that its LED lightbulbs were **“brighter than a 50W Halogen”**. In support of the claim, SimplyLED provided a comparative photometric test report conducted by an independent testing house. The report compared SimplyLED’s LED lightbulb with 50W halogen lightbulbs from four different brands – GE, Sunbeam, Hyundai and Homebase.

ASA held that the brightness of lightbulbs is best compared in lumens. The report provided by SimplyLED indicated that in a stabilized state, SimplyLED’s bulb had a lumen reading of 411.1, which was higher than the readings of Sunbeam (389.8), Hyundai (352.8) and Homebase (275.3), but failed to beat that of GE (451.5).

SimplyLED protested that ASA should also consider other factors such as beam angle and colour temperature, for which its product beat GE’s. ASA held, however, that these factors did not relate to the brightness claim and that SimplyLED had failed to provide sufficient evidence to suggest otherwise.

### BIOFUELS

**UK: Shell International Ltd. (ASA, December 14, 2011)**

Shell fared well here with an ad that promoted its involvement in bio-fuels. This one claimed that, *“This renewable energy is one of the most effective ways of reducing CO2 from cars and trucks today.”*

The challenger, ActionAid UK, believed that biofuels did not reduce CO2 emissions from vehicles **when the full life cycle** of the fuel was taken into account.

In this relatively complicated decision, the discussion inevitably examined the **various part of a biofuel’s life cycle**, including direct and indirect land use change factors, with a review of the data that underlay Shell’s position. This included data from sources in the EU, UK, US EPA and California Air Resources Board to support Shell’s position that life cycle had been appropriately considered.

**Uh Oh – How to Measure the CO2 Effect of Indirect Land Use Change?**

Much of the discussion centred around the trickiest part of the life cycle, which was indirect land use change (**“iLUC”**). What’s that about? The



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thing is that **before lands were planted with the crops to be used to make biofuel, the lands would have been occupied by forests or peatlands, which would have been absorbing CO<sub>2</sub>.** When those forests, etc. were cut down to plant the biofuel crops, all the CO<sub>2</sub> they stored would have been released. So right there, you would be starting with a big CO<sub>2</sub> bill on your life cycle tab. But how do you calculate that?

#### What ASA Said it Needed

As ASA acknowledged, iLUC data wasn't always available for all biofuels. It wasn't prepared, however, to say, "Well, let's just forget about it then." What ASA said was that to make a CO<sub>2</sub> savings claim for a biofuel, you should have taken reasonable steps to show **either that the previous land use had been taken into account or that the biofuels had been sustainably sourced** – e.g., in compliance with criteria under the EU Renewable Energy Directive, which are designed to protect against the destruction of dense CO<sub>2</sub>-holding areas like forests and peatlands.

Shell apparently **satisfied ASA on those counts.** ASA found that the majority of specific biofuels Shell distributed (90.31% in 2010) were accounted for within data published by the California Air Resources Board and EPA (which included iLUC and dLUC). It found that the remaining biofuels had been sustainably sourced in line with the EU Renewable Energy Directive and also met, or exceeded, the non-mandatory targets on GHG savings set by the UK Renewable Fuel Transport Obligation.

Ultimately, then, and after they all probably had a big headache, Shell convinced ASA that the claim was sufficiently well-founded.

Note that ExxonMobil hadn't done so well when its biofuel was adjudicated by ASA nine months earlier (March 2011). As covered in our last Green Marketing & Advertising Law Update, ExxonMobil's TV ad claimed that algae biofuel could help "solve the greenhouse gas problem." ASA found the ad as a whole to overstate the technology's total environmental impact.

**Green Claim Tip:** Biofuel claims can still be contentious, so proceed with particular caution. If you are interested, see this [article](#) about a recent study done in Switzerland taking a look at the eco-balance of various biofuels versus petroleum. <http://bit.ly/R2DaSd>. You can also check out the TLC article (The Learning Centre) in this Update on, "Biofuels Heating Up: Are They Greener?"

EnergieKontor's statement that the project "will" generate the cited amount of electricity, as opposed to using more conditional language, was found to be misleading. Further, the footnote used in one of the ads to disclose that an average capacity factor had been used was found insufficiently clear or prominent to qualify (and indeed was considered contradictory to) the claim in the body copy.

#### WIND ENERGY

**UK: The Banks Group Ltd, trading as Banks Renewables (ASA, June 20, 2012) and Energiekontor UK Ltd., (ASA, May 30, 2012).**

#### How to Make Claims About Wind Farm Power

Generally speaking, wind developers have been beating back challenges pretty well in the UK, although the steady stream of cases is probably helping to keep them careful and honest. In two recent and robust challenges, Banks Renewables ("**Banks**") successfully met all six points of complaint, while EnergieKontor won on four out of five.

What sorts of wind issues were put under the microscope? They will probably be more riveting for you if you are, or are counsel to, players in the wind arena. They ranged, however, from allegedly inaccurate decibel comparisons, to allegedly deceptive photos of the height of the proposed turbines, to the effect the development would have on habitats and species in the areas or, in *EnergieKontor*, how much CO<sub>2</sub> would be saved each year. For some general learning, we focus below on how ASA treated the claims of: a) energy output; b) how many households that energy would serve; and c) the "energy payback period."

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### i. Energy Output

**This was the claim in Banks: “The Windy Bank Wind Farm will provide, on average, enough electricity to meet the domestic needs of around 7,400 households. This represents approximately 70% of households within the Teesdale district.”**

(emphasis added, partly to show you all the qualifications they cushioned in)

**This was the claim in EnergieKontor: “The electricity generated as a result of the project will, on average, be enough to power 3,670 Craven District households.\*”**

Aren't those claims similar! In Banks, however, both the claim and the support were found acceptable, while in EnergieKontor they were not.

**The difference?** Rather than relying strictly on theoretical numbers, Banks used on-site wind speed data collected during a 12-month period from a height of 60m above ground level. It then also took into account the energy that would be lost due to scheduled maintenance and turbulence.



By contrast, EnergieKontor used an *average capacity factor* taken from the Department for Energy and Climate Change (“DECC”) website without any onsite data. That was not fatal in itself, as ASA has accepted average capacity factors before. ASA said, however, that, “...if marketers were basing claims on estimated figures and not historical or site-specific data, this must be made clear to consumers.”

EnergieKontor’s statement that the project “will” generate the cited amount of electricity, as opposed to using more conditional language, was found to be misleading. Further, the footnote used in one of the ads to disclose that an average capacity factor had been used was found insufficiently clear or prominent to qualify (and indeed was considered contradictory to) the claim in the body copy.

A similar result, indicating that a definite claim was reached in the very recent ASA case of [Druim Ba Sustainable Energy Ltd.](#), reported on October 31, 2012. The claim there, “The total installed capacity will be up to 69 MW producing enough clean energy to supply over 38,000 homes” was found misleading as it was definitive “will be” but was not based on site-specific data.

### ii. Households Served

Both Banks and EnergieKontor used the most recent government statistics for average UK household electricity consumption and number of households in the pertinent regions (Teesdale and Craven respectively). Banks had rounded the number of households served down to be more conservative – never a bad idea and an approach recommended by RenewableUK, formerly the British Wind Energy Association.

Note that EnergieKontor thought it was actually being more conservative than it needed to, by not following the “standard industry practice” of using a standard figure for the number of homes powered per 1 MW of installed capacity. Instead, it used the more recent, and more conservative, government statistics for energy consumption and number of households. That was all well and good. It just didn’t help much, given that EnergieKontor forgot to also say that energy output was “estimated” or “potential.”

### iii. Payback Period

**Banks’ Claim: “In approximately 7-8 months (depending on wind resource and other factors) a wind farm will pay back the energy used to construct it....”** (emphasis added)

In support, Banks offered up: a) two brochures from a wind turbine manufacturer, putting the energy payback time for a 2 MW onshore turbine at 7.7 months and for a 3 MW at 6.6 months; b) the life cycle assessment (“LCA”) reports underpinning those figures (using ISO 14044); and c) an additional LCA report for an onshore wind farm in Denmark with eight 2 MW turbines, based on methodology reviewed by an external consultancy (though not using ISO 14044). The latter LCA also showed energy payback at 7.7 months.

As Banks was going to use turbines ranging from 2 MW to 3 MW, it rounded the figure to “7-8 months” for the claim. It also threw in the qualification – in the big print - that energy payback was dependent on wind resource and other factors. To boot, Banks reduced the reach of its representation, claiming a 7 to 8-month energy payback for energy used in “constructing the turbine”, when the LCAs had calculated that payback for energy used in the total life cycle of the turbine – not just the construction phase. Again, ASA smiled on this as conservative and understated.

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**UK: Livos Energy Ltd. (ASA, October 10, 2012)**

ASA gave the nod of approval to both of the following claims that wind farm developer Livos included on its website:

- “a well-designed modern wind turbine is remarkably quiet in operation” and
- “the vast majority (93-99%) of those who had seen a wind farm suggested that the experience would not have any effect on their intentions to return to an area.”

The first claim, about being remarkably quiet, was supported by further information on the website about planning regulations to limit noise levels as well as data from peer-reviewed academic research and publicly referenced studies that other reputable organizations had also referenced.

The second claim, about visitor intentions, was derived from a report by the Scottish Government. Given that the claim was “clearly referenced and accurately reported”, ASA found the claim unlikely to mislead.

**Green Claim Tip:** It’s just like those history papers you had to write for school. Identify the source of your claim. Ensure that sources are reputable.

**UK: British Wind (ASA, September 19, 2012)**

Advertisers love scary claims that make their products look indispensable. Cases do proffer a rough equation, however. The scarier and more sensational the claim, the better your backup better be.

The advertiser here, British Wind, is an informal consortium of eight major renewable energy companies. In case you thought that the fossil fuel folks got all the negative media coverage, wind gets its share too. Because of that, British Wind launched a campaign to counter the bad PR and stimulate discussion about wind’s role in the UK energy mix.

Targeting natural gas, the ads sought to show that wind will be significantly cheaper and will lessen the UK’s reliance on foreign suppliers of gas. Its ads included the following claims (in addition to others that were also adjudicated but not covered here):

- i. “Gas prices have trebled in the last decade and have driven up electricity bills”
- ii. “70% of gas will be imported by 2020”
- iii. “Wind ... can keep bills down in the face of rising gas prices”

Guess which claim was upheld and which two weren’t. Here’s a hint: Talking about what will be in the future, as the second and third claims do, is hard at the best of times – never mind in this complex area.

**i. Found OK – Claim based on the past: “Gas prices have trebled in the last decade and have driven up electricity bills”.**

It was interesting here that British Wind *meant to say that consumer gas prices had trebled* and it happily presented support for that. **ASA, however, read the claim to represent that wholesale prices** had trebled because of the reference to electricity bills, since consumer gas prices wouldn’t ‘drive up’ electricity bills. Fortunately, British Wind was able to substantiate that wholesale prices had trebled as well. Yet another reminder that it is good to have someone independent look at your ads to make sure others don’t read them differently than you do.

**ii. Found Misleading: “70% of gas will be imported by 2020”.**

ASA found this claim to exaggerate both the certainty of the 70% number AND the appropriateness of the number itself.

To support the claim, British Wind put forward data published by an international electricity and gas company. (Evidence from the gas folks themselves!) The data did suggest that the proportion of imported natural gas would continue to increase and estimated that imports could be either 69% or 73%, based on two different scenarios. Here came another smoking gun, however. The report itself explicitly said that it was looking at scenarios, not forecasts, and that unforeseen events like recessions or new government initiatives made it very difficult to forecast a number of years into the future. Circumstances might also occur that would DECREASE the amount of gas being imported. These qualifications contrasted strongly with the categorical claims that appeared in the ads at issue.

**iii. Found Misleading: “Wind ... can keep bills down in the face of rising gas prices”**

ASA’s finding on this claim illustrates how complicated price-related claims can get – particularly when: i) they compare prices to another form of energy; ii) they talk about what prices will be in the future; and iii) the supporting studies refer to experience in other countries.

Unfortunately for British Wind, ASA dismissed the consortium’s evidence based on wind energy pricing in Ireland and other European countries. The studies didn’t examine the UK market, which was different in a number of respects, including the mix of electricity sources and subsidy levels and models. As well, the studies looked at the impact of wind energy on **wholesale electricity prices** elsewhere. **Did that necessarily translate into what would happen with consumer prices**, which the ad was addressing? ASA pointed out that consumer prices were set in a competitive open market, which meant there was no guarantee – even if there were a reduction in wholesale prices – that higher wholesale prices would be passed on to consumers. That was an important kicker.

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Further, although British Wind showed how rising wholesale gas prices could surpass wind costs, these **calculations were rejected** as irrelevant as they **weren't based on costs for consumers – they were based on returns to those who generate electricity**. There's that distinction – and those troublesome assumptions – again.

In addition, the evidence did not adequately figure in subsidies. ASA acknowledged that British Wind's evidence demonstrated that rising gas prices could make wind power more competitive, but said the evidence didn't prove that wind energy can "keep bills down."



**Green Claim Tips:** #1: If talking about the future, avoid four-letter words like "will". Try three-letter words like "may" or five-letter words like "could." In other words, qualify your claims as estimates or projections and indicate what they're based on. #2: If your evidence is based on what will affect wholesale costs, are you sure consumer prices will respond concomitantly in your jurisdiction? They may be subject to a slew of their own factors and may not rise or fall with wholesale prices. #3: Trite but important general principle: Confident claims sound great but they can be ad killers if qualifications are necessary.

### SOLAR ENERGY

**UK: Sunsolar (ASA, August 8, 2012)**

**"EARN UP TO £1,500 A YEAR TAX FREE, AND FEEL GOOD ABOUT THE DIFFERENCE YOU'LL BE MAKING TO THE ENVIRONMENT AS WELL AS YOUR BANK BALANCE."**

Sunsolar's claim was definitely attention-grabbing! Unfortunately, ASA ultimately found its promise of big bucks misleading.

By way of background, the UK, like Ontario and some other jurisdictions, has a system whereby if you install solar panels, the government will pay YOU for the electricity you generate through those panels and put onto the grid. It's called a Feed-in-Tariff ("**FIT**") system and it can earn home owners some real money (although it's dropping, but let's not go there).

What was the problem here? To make a claim about achievable earnings, you obviously need to know how much electricity the system will typically generate. Here, the calculations underlying Sunsolar's ad were based on a 4 kW retrofit system. Sunsolar happily came forward with details showing that the 4 kW retrofit scheme generated 3434 kWh based on a "perfect install" with the "maximum Photovoltaic system." What it didn't have, and what it needed, was evidence (including from existing customers who had used their 4 kW systems) to show that their systems *typically* generated 3434 kWh per year. ASA also wasn't satisfied that the savings numbers worked out as represented even if 3434 kWh per annum could be regularly achieved.

But there was more. The ad, published in April, hadn't mentioned the relatively important fact that the **price the government would pay for electricity was going down** from 21p to 16p for newer systems – i.e. with an eligibility date on or after August 1, 2012. That would obviously lower the amount of attainable earnings. ASA concluded that the ad was also misleading in not disclosing that material information.

**Green Claim Tip:** We know you've heard it before... Your substantiation has to be tight and based on appropriate testing and experience. Relevant zingers – like facts that will soon fundamentally change the numbers in your story – also need to be disclosed.

**UK: Green Sun Ltd. (ASA, February 22, 2012)**

Oh look – another "up to" case.

Here, Green Sun's press ad included a number of claims, many clearly unsubstantiated. We draw your attention to the following claim, which ASA found misleading: **"BEAT SPIRALLING ENERGY PRICES, SAVE UP TO 50% ON YOUR ENERGY BILLS ... "and "Earn up to £36,000 tax-free from the F.I.T. and export tariff scheme"**.

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**What proportion of consumers had to be able to reach the maximum £36,000 earnings, when it was qualified by “up to”? All or almost all of them? 10% of them?** ASA held that readers would expect – and so would ASA – that the **average householder** could achieve the maximum claimed. Because Green Sun did not have evidence to support that, the claim failed.

As for **“up to” in the savings claim** (“save up to 50% on your energy bills”), ASA didn’t really focus on that as Green Sun said it was included by mistake and wouldn’t be repeated.

**UK: A Shade Greener Ltd. (ASA, April 11, 2012)**

Here’s an example of a **money/energy savings claim done right**. A Shade Greener’s website for its solar panel system stated:

*“We recently surveyed 100 of our customers who’d had our systems for over 1 year. The average reduction in their annual electric bill was 37%, with 25% of those questioned enjoying savings of 50% and over.”*

ASA found that the “37% average savings” claim was adequately substantiated.

A Shade Greener provided **data** about customer savings that, in most cases, was **drawn directly from the clients’ electricity bills**. In a small number of cases, the data was sourced from figures quoted by the customers. ASA noted that the best evidence would be taken directly from the clients’ bills, which was the case in most instances.

ASA also noted that the **reductions were mostly evenly distributed, with few outliers**; given the relative lack of deviations, ASA concluded that the “average” claim was statistically sound.

The client survey data provided by A Shade Greener also revealed that most of their clients agreed that since having the solar panel system installed, they had tried to limit their energy consumption. Under the savings claim, the website stated: *“If you manage your electricity wisely. . . you will notice a big difference, as have all our customers”*. In ASA’s view, this made it sufficiently clear that the clients’ savings resulted not only from the mere installation of solar panels but also the clients’ deliberate intention to manage their electricity wisely.

**Green Claim Tip:** This ad demonstrated the combo “safe and impactful” approach – i.e., stating an average savings and then punching it up with the percentage who saved way more. The appropriate claim for you may depend on how your results are disbursed, so look at that first and then decide how to frame your best claim.

## CLAIMS RELATING TO NEW CARBON PRICE

## AUSTRALIA

On July 1, 2012, Australia dove in where the federal governments of Canada and the US have feared to tread (so far), kicking off a mechanism to fix prices on greenhouse gas (“GHG”) emissions. Anticipating that some advertisers might want to take advantage of the move to scare consumers into buying their lower-carbon products or to blame all price increases on the carbon scheme, the ad regulator jumped in to say, “Don’t Even Think About it!” It created [new guidelines](#) for carbon price claims and went after non-compliers without delay.

## WHAT’S THE CARBON PRICE ABOUT?

In a nutshell, the mechanism sets an amount that Australia’s larger GHG spewers (e.g., those generating electricity, supplying natural gas, operating landfills, etc.) have to pay for each tonne of CO2 equivalent they emit.



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### HIGHER PRICES, RIGHT DOWN TO CONSUMER PRODUCTS

The new carbon mechanism means that because covered emitters will have to pay for their emissions, many may charge more for their carbon-spewing products – e.g., electricity, natural gas, etc. In turn, manufacturers, distributors, retailers and other businesses paying those higher prices will likely pass the extra costs onto consumers. If the policy works as intended, **consumers will ultimately buy fewer high carbon products, businesses will try to reduce their own electricity**, natural gas, etc., so they can lower their costs and grab more business with lower prices, big emitters will introduce new technology to lower their emissions and the amount they pay, and GHG will go down.

### SO WHERE DOES ADVERTISING COME IN?

Not having been born yesterday, the Australian Competition and Consumer Commission (“ACCC”) anticipated some dicey price claims that might roll out based on this scenario. Like what? **Like businesses not really knowing how much of their price** increases flowed from the carbon price specifically (there could be other factors) but nonetheless claiming that the whole increase they are passing on is due to the carbon price. Wouldn't that make the government even less popular than it already is for instituting the scheme! And what about those suppliers of lower carbon products – like solar panels, for example. Might they not have a hayday exaggerating the impact the carbon price will have

(e.g., how high electricity prices will go up), making lower carbon alternatives look that much better.

So the ACCC pointed its warning finger at advertisers and brought in **“Carbon Price Claims – Guide for Business”** to head off these practices. Originally introduced on November 15, 2011, the [Guide has already been updated](#) (May 2012).

### FIRST TWO CASES OUT OF THE GATE

Our friend Peter LeGuay, advertising law counsel in Sydney, was kind enough to alert us that the ACCC quickly landed its first transgressors.

Polaris Solar and ACT Renewable Energy Solar, both solar panel suppliers, sent out leaflets to households claiming that electricity prices would increase by 20% due to the introduction of the carbon price alone, and that if this continued, **electricity prices would increase by over 400% by 2019**. Those were very impactful numbers – and what wonderful reasons to buy solar panels! Unfortunately, the numbers were simply based on unverified claims in a newspaper ad as opposed to the detailed, documented evidence the ACCC – and the Guide – wanted to see. Both suppliers entered into informal undertakings with the ACCC, [as reported on July 5, 2012](#). ACCC warned that it would be investigating any alleged misleading claims about the impact of the carbon price that came to its attention. Which it did. If you have the e-version of this Update, see ACCC's [report about its first 100 days here](#). ■



## NEW RISKS

## Corporate Responsibility Campaigns Up-Ended by Audacious Environmental Groups

**Bottom Line:** Do you remember the days when multinationals could steadily control their PR agendas? Big Tobacco was able to portray smoking as suave and sophisticated, not to mention the leisure choice of doctors, for years, until their opponents' message of addiction and death finally took hold. Contrast that with today, where corporate PR campaigns can be thoroughly routed and turned against the companies almost the instant they begin – if not before. What happened? You guessed it. Social media – and activists who REALLY know how to use it.

### CASES IN POINT

It's no secret that the oil industry, particularly in the oil sands, has been living in PR hell. Greenhouse gas emissions. Oil spills. Pipeline leaks. Tailings ponds and tar-soaked ducks. These were the stories of oil, with little else being said. Not surprisingly, the industry finally decided they had better step up to the mike.

Disseminated through their industry association, the Canadian Association of Petroleum Producers, as well as individually, image ads began to appear to highlight the industry's "good news" stories, such as its contributions to essential energy supplies and the economy, new reclamation technologies and biofuel and natural gas initiatives.

But this wasn't going to be a walk in the park. Let's look at some counter-campaigns these companies have been hit with.

#### a. Shell's 2012 "Let's Go" campaign

Shell began a campaign in the summer of 2012 called "Let's Go." Its focus was, among other things, on the importance of energy for the future and the company's development of ethanol and natural gas. (e.g., "Let's broaden the world's energy mix. Let's go.")

The activist group, the Yes Men ([www.theyesmen.org](http://www.theyesmen.org)), however, had other ideas as to what Shell-related news should take centre stage that summer. They preferred to focus on the new drilling Shell was about to commence in the Arctic.

#### Spoofs that don't look like spoofs – and get way more attention than the real thing

As soon as Shell's "Let's Go" campaign began, it was swiftly overshadowed (on June 7) by hoopla over a [video](#) on YouTube that appeared to be shot by a guest at a party held by Shell to celebrate the launch of the northern rigs. The smartphone video shows guests watching the first ceremonial drink to be poured from a fountain shaped like an oil derrick. As an elderly lady holds her glass out for filling, however, a malfunction occurs, with black liquid spurting out instead, spraying her as she squeals in shock. Someone says, "I can't turn it off!", presumably meant to conjure thoughts of oil spills. The video was a viral sensation, as it appeared to be a legitimate embarrassment for the company. Even traditional media picked it up until, ultimately, it was admitted to be a spoof produced by Greenpeace and the Yes Men.

How many had watched Shell's official "Let's Go" video by early July? Reportedly, about 3,200. How many watched the fake video the first day it was online? About half a million. (Taking it further, when Shell eventually disavowed the video, Greenpeace also issued a fake press release indicating that Shell was going to take legal action against Greenpeace, all the more to endear the company to youngsters who don't take kindly to big corporations squishing freedom of speech.

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NEW RISKS

But that wasn't all. A fake [Shell Facebook page](#) and Twitter account were set up, along with a website, [ArcticReady.com](#), looking extremely similar to the legitimate [Shell in the Arctic website](#) and headed **"Let's Go! Shell in the Arctic."** Complete with Shell's logo, it talks about hundreds of thousands of people who perish in climate change annually, among other "incredibly dire consequences" to be expected. The webpage then says, "That's why we at Shell are committed to not only recognize the challenges that climate change brings, but to take advantage of its tremendous opportunities. And what's the biggest opportunity we've got today? The melting Arctic." It even has a [section just for kids](#) with a game called "Angry Bergs."

"Let's Go" ads to bolster Shell's campaign, prepared courtesy of the Yes Men, show, for example (see ad below), a polar bear swimming in polar waters with copy reading:

**IN ORDER TO SURVIVE, WE ALL HAVE TO PUSH OUR LIMITS. LET'S GO.**

With Arctic ice dwindling away, polar bears today can swim hundreds of miles in search of food. We're betting they can go even further. And so can we. At Shell, we're also going the distance to provide for the future, betting on precious resources formerly trapped beneath an impenetrable layer of ice, now freed for the good of humanity. Polar bears were made to swim, and Shell was made to power our way of life. We can all go further.



Another one shows a little boy coming hand-to-paw with a gentle polar bear, with copying reading:

**HARD CHOICES – WE'RE MAKING THEM. LET'S GO.**

In the high-stakes hunt for natural resources we are bringing humanity closer than ever to nature's most vulnerable inhabitants. But high-stakes also bring high risk. At Shell, we are balancing our needs

to power our way of life with our responsibility to the planet, working harder than ever to minimize the damage when disaster strikes, so even if we lose some of our friends up north we don't lose them all. Thinking ahead makes all the difference.



But why should the Yes Men have all the fun? The website invited consumers to get creative too, providing Shell's "Let's Go" design elements to help them make their own ads and enter an Ad Contest. This again began to catch on with the enthusiasm one could only dream about for a legitimate campaign. Triplepundict.com reported on July 25, 2012 that over 12,000 people participated, the winning entry being a picture of a little polar bear cub snuggling into his mother with the slogan, **"You can't run your SUV on 'cute.' Let's go."**

Notching the ruse up further, after the spoof contest launched, Greenpeace and its cohorts created a purported Shell "social media response team" Twitter account to make ads generated by their spoof website REALLY go viral. How did it do that? As reported on forbes.com on July 18, 2012, by pretending to be desperately trying to LIMIT the dissemination of ads created on the fake site. "Our team is working overtime to remove inappropriate ads. Please stop sharing them," came the repeated tweets from the phony [@ShellisPrepared account](#). Well. What could be a more irresistible invitation to re-tweet than that?

**DIDN'T SHELL SUE?**

It was reported by Huffington Post Canada on July 16, 2012 that Shell had elected not to pursue legal action. Why not? It said, "Our focus is on safely executing our operations." This is not to say you shouldn't be looking at legal action. Companies are taking that step carefully these days, however, considering the PR implications as well as the legal ones.



## NEW RISKS

**b. Chevron – “We Agree” Campaign**

This wasn't the first time the Yes Men had struck oil. Going back to 2010, Chevron launched a campaign focusing on its investments in local communities and research into alternative energy. It was called “We Agree.” Ad executions included, “We need to start building again. I agree”, “Shale gas should be good for everyone. I agree”, “The world needs more than oil. I agree”, etc.

Before Chevron could even blink, however, its “We Agree” campaign was hijacked by a strikingly similar, but fake campaign. The ads here were, “Oil companies should clean up their messes. We agree.”, “Oil companies should fix the problems they create. We agree.”, etc. (See below.)



The ads were supplemented by a fake press release, the spoof headline being, “*Radical Chevron Ad Campaign Highlights Victims*,” and the real one being, “*Chevron Launches New Global Advertising Campaign: ‘We Agree.’*”

**HOW DOES THIS EVEN HAPPEN?**

The timing here was pretty stunning, as Chevron's campaign hadn't even got out of the gate. As it happened, Lady Luck shone twice on the Yes Men as there were TWO freak leaks. Chevron had apparently been looking for environmentalist bloggers to appear in one of the campaign's commercials. When such a blogger was invited in for a casting call, she accepted the invite to learn what the advertising would entail. She decided not to appear, but to instead pass the intelligence on to Amazon Watch, the Rainforest Action Network and the Yes Men.

The activists got even luckier, though. A particular street artist had been asked if he could wheat-paste posters for Chevron's campaign. As it happened, he was a political activist. What he did instead, then, was send the files for the ads to the Rainforest Action Network. One can only imagine the ecstasy in their faces when they got their hands on actual creative for the planned campaign. Rainforest Action Network, of course, got busy making its own ads so the public would have difficulty telling which were real and which were bogus. The incredible backstory is recounted in all its glory in a [YouTube video](#) made by said street artist.

**COULD IT GET MORE OUTRAGEOUS THAN THAT?****c. “Shell: We are sorry”**

Yes, it can get more outrageous than that. On March 28, 2010, a [YouTube video](#) premiered titled, “Shell: We are sorry”.

It featured a fake Vice-President of the Ethical Affairs Committee at Royal Dutch Shell, giving a fake press conference. In a four-minute speech, he uncomfortably apologized to the people of the Niger Delta on behalf of the company for environmental havoc wreaked on their land, water, and communities. The spokesman promised that in a new spirit of goodwill and corporate transparency, changes were ahead and the company would be extensively reviewing its operations and fully disclosing its problems and abuses. You really just have to see it to believe it which, if you're looking at the e-version of this Update (you can sign up for e-Updates at [www.MarketingLawUpdate.ca](http://www.MarketingLawUpdate.ca)), you can do [here](#).

**SO WHERE DOES THAT LEAVE YOU?**

Presumably sobered and forewarned. At the end of the day, a few things are becoming clear. First, concern about environmental issues may go up and down in the public's relative hit list, but most consumers do think the issues are serious, they're worried about their kids' future and they're not in the mood to have that concern abused. That's amplified by the second factor, which is that public skepticism is painfully high when it comes to corporate credibility, having been routed by the tobacco industry, Enron, Wall Street and numerous other disheartening events. That gives rise to the third principle, which is both the logical extension of the foregoing and the key to the way out: Honesty and humility are the new “black.” Lee Iacocca, Tylenol, McDonalds setting up a website with Q&As about its food (is it real or what?)... It's been coming in fits and starts, but both brown AND “greener” industries are going to have to feel their way down this new path of openness and transparency, looking for just the right balance in this newly evolving world. ■

## CERTIFICATIONS

# Did You Know?

## IT'S NOT JUST ABOUT LEED

Certification is a great way to go – the short form way to say a LOT about your product or, in this case, a building.

Leadership in Energy and Environmental Design, more commonly known as LEED, has done an incredible job of getting the word out about its program. But it's not the only "green" building certification system out there. In case you're interested, here are some of the other prevalent ones, as discussed in the summer 2012 issue of the *Grand Valley Construction Association E-Journal*.

### FOR COMMERCIAL AND INDUSTRIAL BUILDINGS

#### 1) Building Research Environmental Assessment Method (BREEAM)

a) BREEAM is the gold standard in Europe, certifying the sustainability of new non-residential buildings. To date, over 200,000 buildings around the world have received BREEAM ratings.

#### b) Advantages:

- i) It is easy to understand, score and is backed by evidence-based science.
- ii) It contributes to sustainable design, construction and management of a building.
- iii) Like LEED, the program includes training for construction and design professionals.

#### c) Disadvantages:

- i) It is relatively unknown and unproven in North America.
- ii) Despite its adaptability, only six European countries have developed BREEAM schemes.
- iii) The process is very rigorous and expensive to implement and comply with.

#### 2) BOMA Building Environmental Standards (BES)

a) This program of the Building Owners and Managers Association ("BOMA") is the only one of its kind in Canada. It's a single system that independently assesses environmental performance in six categories for five types of buildings: offices, shopping centres, open air retail plazas, light industrial buildings and multi-unit residential units.

#### b) Advantages:

- i) It has been growing in popularity since its 2005 debut. Managers and owners of over 2900 buildings across Canada have applied or reapplied for BES certification.

- ii) It has been shown to be useful in improving sustainability and conservation in building operations and maintenance.

#### c) Disadvantages:

- i) It is still relatively unknown.
- ii) It may be difficult to find assessors who are well trained in the certification, which often leads to lengthier certification times.

### FOR HOMES

#### 3) BuiltGreen

a) This third-party certification program is for more environmentally responsible homes. Membership is open to all members of participating homebuilders associations.

#### b) Advantages:

- i) It is an important market differentiator in the tough residential market.
- ii) It is a draw for environmentally conscious new home owners who want to reduce their carbon footprint as much as possible.

#### c) Disadvantages:

- i) Rarely used outside Alberta and British Columbia.
- ii) There is mandatory training before a company can build a BuiltGreen home (This could also be an advantage, depending on your perspective!).

#### 4) R-2000

a) This is an energy efficiency program created by the Office of Energy Efficiency of Natural Resources Canada. It is targeted at new home construction, with high standards for indoor air quality, environmental responsibility and energy use.

#### b) Advantages:

- i) The bar is set high. Homes must pass tough quality assurance tests at every stage of the building process.
- ii) Builders are trained to the R-2000 standard.

#### c) Disadvantages:

- i) The rigorous technical requirements sometimes have undesirable after-effects. For example, critics have found that even though a home sealed too tightly will be less expensive to maintain, it can lead to indoor air quality issues such as mould. ■

## WASTE DIVERSION

## Stewardship Enforcement Ramping Up

**Bottom Line: Stewardship programs have made their mark across Canada and will continue to expand, specialize and become more complex. As brand owners, you should have a thorough understanding of product supply chains and agreements with suppliers to ensure that you comply with your obligations. While most stewardship programs are still focusing on educating brand owners and consumers about the various programs, watch out. A subtle shift is taking place, with some agencies aggressively pursuing non-compliant businesses and threatening enforcement proceedings.**

### STEWARDSHIP PROGRAMS INCREASE IN QUANTITY AND SPECIALIZATION

Stewardship programs have had significant success in achieving their objectives – diverting an enormous amount of waste, shifting the cost and responsibility of waste management to producers and encouraging producers to design products in a more eco-friendly manner. For example, British Columbia alone diverted more than 40 million kilograms of electronic waste from landfills as a result of its stewardship program, a 20% increase in collection from the previous year. Brand owners are responsibly collecting and remitting eco fees as well, which provides a significant cost benefit to government and tax payers.

With the success of the initial stewardship programs, many provinces are rolling out new initiatives or expanding the scope of existing programs. Over a three-month period, from July to October 2012, stewardship programs were introduced for many new products including lamps, ballasts, outdoor power equipment, exercise equipment, sewing machines and leisure devices. Another trend is specialized, complementary programs for general product categories – like British Columbia's stewardship programs for electronics, including unique programs for electronic toys, batteries, office and computer electronics, small appliances, and electrical mowers and garden equipment.

### BE PREPARED – ENFORCEMENT IS NEXT!

Originally, regulators and agencies were primarily concerned with educating consumers and brand owners about the various stewardship programs and accompanying obligations. Regulators are starting to shift gears and conduct spot audits of registered brand owners to ensure proper remittance and record keeping and pursue obligated businesses that are not registering. Brand owners may face ministry compliance proceedings if they aren't proactively ascertaining their obligations and

following through. It is always recommended that businesses seek legal advice to confirm their obligations, including whether they fall under the definition of brand owner, if they are required to register and remit, and if the remitter agreements they have entered into with suppliers comply with the legislation, stewardship agency requirements and industry practice.

### DO YOU KNOW THE ANSWERS TO THESE QUESTIONS?

- Are your distributors complying with their obligations and registering? Who is ultimately responsible?
- What is the supply chain of the product? Who is bringing the product into the province? Is it being shipped from a distribution centre in a different province?
- Is your business legally defined as a resident in particular provinces? (Some provinces look at residency as the determinative factor, while some are instead concerned with introduction of products to marketplace.)
- Does the particular stewardship program or industry association require remitter agreements?
- Can the eco fee be passed onto consumers?
- Can the eco fees be disclosed on customer receipts?
- How should eco fees be displayed in marketing materials to comply with consumer protection and environmental legislation?

### WHAT'S THE TAKEAWAY?

The stewardship programs and accompanying eco fees are growing and complex. Each province is unique and it is important to remain organized and consult with experts to ensure that your business is not subject to compliance proceedings or administrative fines. ■

How should eco fees be displayed in marketing materials to comply with consumer protection and environmental legislation?

## Biofuels Heating Up: But Are They Greener?

**Bottom Line: Biofuels are all about making fuel out of things that grow rather than using limited, greenhouse gas-emitting fossil fuels. Corn, sugar cane, algae, waste from wood chips and corn husks – these are some of the many renewable bases for biofuels. There can be a complex set of trade-offs with some biofuels, however. They may help solve CO2 problems but raise other concerns. They are also at a relatively early stage in development, so the long term implications of some of them may not yet be understood. If you want to make claims about their virtues, then, you should tiptoe carefully, ensuring that your substantiation is tight, authoritative and on point, that your claims don't overstate your products' benefits and that material disclosures are made as appropriate.**

### INTRODUCTION

Moving toward sustainability does not happen with easy, straightforward steps. It repeatedly feels like a 'one step forward, two steps back' journey as we stride and stumble towards solutions to our challenges. One such example is biofuels. These fuels demonstrate a complicated product set where the devil is always in the details – some may present a better eco-balance than others and some are criticized as simply greenwash.

What will the real impact be of changing lands for food production to lands for fuel production? Does the growth, processing and use of biofuels really result in lower greenhouse-gas (“GHG”) emissions than fossil alternatives? Are government regulations moving the development of biofuels in the right direction? Many vital questions are being raised – and the answers will vary depending on which of the many sources of biofuels are being used and how efficiently they are processed. What seems clear for marketers, at the least, and as we canvassed in our [2011 Green Marketing & Advertising Law Update](#), is that environmental organizations have their eye on this issue and are on alert for what they perceive as greenwashing attempts by those promoting biofuels.

### WHO IS USING AND DEVELOPING BIOFUELS?

Currently in the **automotive industry**, gasoline can comprise up to 10% of ethanol in **North America**. This results in the use of about 15 billion gallons of ethanol annually in the US alone. However, recently, the US Environmental Protection Agency (“EPA”) approved

the use of “E-15,” a 15% ethanol-gasoline blend, which will increase the amount used. Many targets have ambitious goals of increasing ethanol use in vehicles to much higher levels.

Biofuels are also being actively adopted by the **airline industry**. One of the first robins in this biofuel spring has been **Boeing**, which is reportedly planning to generate at least 1% of its fuel from biofuel sources by 2015. This “minuscule” amount adds up to about 600 billion gallons of fuel annually. **Lufthansa** is preparing to build an algae aviation fuel production plant and also plans to buy at least half of the produced fuel. **British Airways** is going to open a biofuel producing plant and plans to start using biofuels in 2014. **Virgin** is working on a project of recycling waste gases from steel production into aviation fuel and routinely testing other new technologies.

This is only the tip of the iceberg. In terms of airlines testing biofuels, Biofuels Digest published an article on June 5, 2012 chronicling airlines doing this around the world. This included **Porter Airlines** which, in April 2012, reported the first biofuel-powered revenue flight in Canada, from Billy Bishop Toronto City Airport to Ottawa. It used a 50/50 blend of biofuel and Jet A1 fuel in one of its engines. Air Canada followed in June with its first biofuel flight (from Toronto to Mexico City) using biofuels made from recycled cooking oil.



## TLC (THE LEARNING CENTRE)

Following the trend, **oil and gas companies** are actively directing R&D and production resources to biofuels. For some examples, **BP** is investing in research to extract biofuels from sugar cane. **Exxon Mobil** is working on a project to turn algae into biofuel. **Shell** is purchasing sugar-producing facilities to convert beet and organic waste into biofuel. Some skeptics consider this activity **constructing a green smoke-screen**, to divert attention from extensive oil explorations. The effort – and debate – surges on, however.

## WHAT'S THE POLITICAL LANDSCAPE?

Some governments address the environment by ignoring the issue altogether and some by solving it with the full power of their bureaucratic fist. The EU, for example, imposes emission limits on GHG, forcing the replacement of fossil fuels with lower carbon alternatives. Other jurisdictions may use **carrot and stick approaches, such as incentives, taxes and limitations** to regulate the fuel producing and fuel consuming industries. In the US, for example, there are renewable fuel standards **to ensure that transportation fuel sold in the US contains a minimum volume of renewable fuel/biofuel** consumed each year. On top of that, the US, Canada and EU governments provide grants and loans to ethanol producers. This practice, however, **can negatively affect the food supply for consumers and livestock**, who become direct competitors for the crop.

In any event, it is clear to most that the development of alternatives to fossil fuels is an important initiative. Besides the obvious environmental aspects, the development of biofuel addresses concerns of, “What will power our engines when the price of oil reaches economy-shaking levels?” and, eventually, “What will replace depleting oil supplies altogether?”

## GETTING TO THE PUNCH LINE: ARE BIOFUELS ACTUALLY “GREENER” THAN FOSSIL FUELS?

Several studies have been published on the eco-efficiency of biofuels. On the good news front, some studies have found that **CO2 savings with the present biofuel technologies can be significant**, estimating them to be between 20% and 80% compared with using conventional petrol. **This may increase to 90% – and higher – for second-generation biofuel** such as cellulosic ethanol or syn-diesel. Why is that not unqualified good news? Because biofuels may still lead to other envi-

ronmental problems. Some of the adverse effects can include soil pollution due to over-fertilization, water pollution in the lakes and rivers, deforestation to vacate more land to grow crops for biofuels, and others. Unfortunately, the biofuel production processes currently utilized are not perfect and more research in the area has to be done to close the gap.

**Here's what is reasonably clear:** There is an urgent need for cleaner and more cost-efficient biofuels to replace depleting and costly hydrocarbons.

**Here's what is less clear:** How we can eliminate the environmental impact of biofuel production instead of deflecting it into other areas, and when will the industry start addressing it as a primary goal and not simply, according to some, as high school projects.

## WHAT TO WISH FOR WHEN YOU BLOW OUT THE CANDLES

As in so many areas, the best scenarios and solutions may come from a closer collaboration between government, industry, and agricultural and environmental groups. Hopefully, that collaboration will ensure that at the end of the day we all will have food on our plate and planes in the air, while keeping clean rivers and air to breathe. It is hard, it is expensive, but many believe it is achievable. ■

These fuels demonstrate a complicated product set where the devil is always in the details – some may present a better eco-balance than others and some are criticized as simply greenwash.

## What You May Not Know About Ethanol and are Afraid to Ask

**We hear about ethanol all the time – particularly when we buy gas. In case you were wondering what it's all about and where it comes from, here is some basic information.**

### WHAT EXACTLY IS ETHANOL?

Ethanol is an alcohol (the same stuff you get in alcoholic beverages) that is mainly used to blend with gasoline so our cars aren't entirely driven by fossil fuel-derived fuel.

Did you know that some ethanol actually comes from petroleum products? It's true. The **ethanol that comes from agricultural stocks is properly called "bio-ethanol"** although many now mean bio-ethanol when they mention ethanol, and that's what we mean here.

### WHAT IS ETHANOL MADE FROM?

**Ethanol can be made from various agricultural sources**, including [sugar cane](#), various woody shrubs and grasses, [sugar beets](#), [sorghum](#), grain, [barley](#), [hemp](#), [potatoes](#), [sweet potatoes](#), [sunflowers](#), [fruit](#), [molasses](#), [wheat](#), [straw](#), [cotton](#), other [biomass](#), as well as many types of cellulose waste and harvestings. It's made by fermenting the sugar and starch in these plant materials by using yeast.

**In the US, ethanol is mainly made from corn**, which makes corn producers very happy – especially as and when governments begin requiring higher ethanol levels in gas. In Brazil, massive amounts are made from sugar cane and in Australia it's mainly made from sugar cane and waste from starch production and red sorghum.

### WHAT'S EXCITING IN THE ETHANOL WORLD?

Because we worry about cutting into food crops to "grow fuel", the most exciting developments are in "**cellulosic ethanol**". That is made from **plant waste products** – which are simply the by-products of what we are already growing and using for other purposes. Here, the cellulose part of the plant is broken down to sugars and then

converted to ethanol. Different means of producing ethanol are also being developed – all in search of getting the biggest bang for our energy buck with the smallest environmental footprint.

For example, traditionally algae has been grown and then harvested and fermented. With a new process, the algae grow in sunlight and produce ethanol directly. The ethanol is thus removed without killing the algae. How big is that? According to the company pioneering this, the **process can produce 6,000 US gallons per acre per year compared to 400 US gallons per acre for corn.**

### WHAT'S ETHANOL'S ENERGY KICK AND PRICE COMPARED TO GAS?

Ethanol doesn't have as much of a kick (embedded energy) as gasoline. It takes about 1.5 gallons of ethanol to produce the same amount of energy as one gallon of gas.

As to how much energy it takes to produce ethanol, that of course, will differ depending on what is used to make the ethanol and how energy efficient the process is. **Corn, for example, is a very energy-intensive crop**; requiring the use of one unit of fossil-fuel energy to create about 1.3 energy units of ethanol. **Cellulose, on the other hand, yields roughly twice as much ethanol** (about 2.6 units) as corn per unit of fossil fuel. Clearly, part of the excitement about cellulosic ethanol is that since it's made from stuff already lying around, it doesn't take additional energy to "grow" it – just energy to process it. ■



## PROFESSIONAL NEWS AND PRACTICE OVERVIEW

## Professional News

### RECOGNITIONS:

**Wendy Reed** and **Catherine Bate**, co-chairs of the Heenan Blaikie Marketing and Advertising Law Group, were both listed again in *The Expert®/American Lawyer Guide* to the *Leading 500 Lawyers in Canada* in the Advertising & Marketing Law category. **Wendy Reed**, **Catherine Bate**, **Adam Kardash** and **John Salloum** were among the 85 lawyers from Heenan Blaikie listed in *The Best Lawyers in Canada® 2013*. All four were listed in the Advertising & Marketing category.

**Wendy Reed** spoke in Toronto on **Green Advertising** at the Canadian Institute's Forum on **Commercializing Cleantech** on January 23-24 and at the Business Information Group's **Carbon Economy Summit** on June 6. Moving to **New York**, she spoke on **Canadian Promotion Law** at the American Conference Institute's conference on Digital Advertising Compliance: Sweepstakes, Promotions and Social Media on September 11-12. Moving on again to Chicago, she will speak on "**Successful Environmental Marketing with the New Rules**" at the Promotion Marketing Association's 34th Annual Law Conference on November 13-14. She also chaired Heenan Blaikie's **4th Annual Earth Week Event** on April 21.

On November 28, Wendy will address Green Advertising at a **Sustainability Boot Camp for C-Suite Executives**, organized by Leapfrog Sustainability Inc. and hosted by Globe Foundation, HermanMiller and Southbrook Vineyards.

On a chilly February 29, **Catherine Bate** addressed, "**Hot Legal Issues in Social Media Marketing**" in an American Bar Association webinar on social media. On the food front, she was "**Addressing Food & Beverage Marketing Regulatory Changes in the EU & Canada**" at the Advanced Legal & Regulatory Summit on Food & Beverage, Marketing & Advertising Conference, American Conference Institute in Washington, D.C. on March 19-20. On June 19, Cathy was co-presenter on a "**Truth in Advertising 101**" teleconference of the **Canadian Bar Association's** ("CBA") National Competition Law Section Corporate Counsel Committee. Cathy chaired an **Ontario Bar Association** ("OBA") Consumer Law Essentials session on October 17 in her continuing role as chair of the Consumer Law Subcommittee of the OBA's Business Law section. This year, Cathy is also chairing the **Marketing Practices Committee** of the CBA's Competition Law Section.

**Catherine Bate** joined with **Sara Perry** to explain "**Everything You Need to Know for Lawyers Practising Today**" at the 18th Annual Advertising & Marketing Law Conference of the Canadian Institute in Toronto on January 24-26. Cathy and Sara have also co-authored the "Marketing & Advertising Law Update from Heenan Blaikie" in the **Ad Women of Toronto's Monthly Topics & Trends** newsletter.



Erin O'Toole developed and writes for a new legal column for *Marketing Magazine* called "Rules of Engagement". This year, he's covered such topics as "Protecting the Sound of your Brand", "Everything's Gone Green" (green marketing) and "ZMOT" (Zero Moment of Truth). Erin also spoke at the Food & Consumer Products of Canada's "Art of Executive Leadership" on February 22 on "Legal & Strategic Considerations for Leaders".

Sara Perry spoke about "Changes in Marketing & Advertising Law" at Heenan Blaikie's "8 Minute Updates: Changes in the Law II", Continuing Professional Development Series, on September 27. She has also assisted Erin O'Toole in several articles for his "Rules of Engagement" column in *Marketing Magazine*. Additionally, Sara is a regular contributor to Heenan Blaikie's Entertainment Law Blog entitled, the **Entertainment & Media Law Signal**.

John Salloum spoke about "Online Advertising Guidelines" at the 2012 Information Technology Law Spring Forum of the Canadian IT Law Association and Law Society of Upper Canada on June 18. He also presented "A Complete Guide to Running Promotions on Facebook & Twitter" in The Canadian Institute's conference on Managing Legal Risks in Running Online Contests on June 21-22.

Julie Larouche and Cindy Belanger lectured on the **Future of Comparative Advertising in Canada** on January 24 and **Online Contests** on March 27, both in Montreal.

Among other engagements, Adam Kardash presented on "Best Practices in Global Privacy Compliance" at the Canadian Corporate Counsel Association's 2012 World Summit, in Montreal on April 14. He spoke on "Meaningful Privacy Governance without Consent? The Viability of the Statutory Consent Requirement" at the International Association of Privacy Professionals Canada Privacy Symposium 2012 in Toronto on May 11. Travelling to Paris, Adam spoke on "Global Trade Secret Protection and Drafting Global Policies" at an ABA meeting on May 15. Back in Toronto, he covered "Emerging Issues in Privacy, Anti-Spam and E-Commerce Law" at the 2nd Annual Business Law Summit of the Law Society of Upper Canada on May 16, and co-chaired Heenan Blaikie's "2012 AccessPrivacy Annual Privacy Conference" on June 7. Adam appeared as an expert witness before the **House of Commons Standing Committee** on Access to Information, Privacy and Ethics in relation to its study on Privacy and Social Media in Ottawa on June 19. Adam also co-authored "Social Networking and the Global Workforce in International Labor and Employment Laws", Volume I, 2012 Cumulative Supplement, the Canadian chapters in both the ABA's *Consumer Data Security Handbook* and "Data Protection & Privacy" in *Getting The Deal Through*.

Bridget McIlveen wrote on "The Safeguarding Canadians' Personal Information Act" in the Canadian Privacy Law Review, Volume 9, No. 2, January 2012, as well as co-authored "Social Networking and the Global Workforce in International Labor and Employment Laws", Volume I, 2012 Cumulative Supplement. On the speaking circuit, Bridget helped the audience "Understand How New Anti-Spam Legislation Could Impact You and Your Client" at The Six-Minute Business Lawyer 2012 hosted by The Law Society of Upper Canada on June 7 and on "Canada's Anti-Spam Legislation" at Heenan Blaikie's 8 Minute Updates : Changes in the Law I, Continuing Professional Development Series, on June 13. ■





## Marketing, Advertising & Regulatory Group

Heenan Blaikie has provided expert and practical service in Marketing, Advertising & Regulatory Law for over 20 years. We advise Canadian and international manufacturers, retailers, importers, exporters, marketers and their agencies on a full range of marketing, advertising, promotion, packaging and regulatory issues. These include:

- **Social and New Media Programs**

One of our particular strengths, we act for major social media clients and multi-national marketers who use new media extensively – from social networking and viral campaigns to text messaging and everything in-between. In addition to navigating the privacy, intellectual property, advertising and other legal implications, we understand the technology formats and the practical issues that can arise.

- **General Advertising Review and Challenges**

Misleading or puffery? Substantiated or not? Comparative ad just over the line? We help you assess risks and suggest ways to reduce them with minimal pain. If you find yourself in hot water, we help you defend advertising or promotional challenges – in self-regulatory forums, tribunals or court.

- **Contests, Games, Sweepstakes and other Promotions**

We review innumerable rules, releases, associated ads and terms and conditions for a full array of promotions, including contests, gift cards, reward programs and rebates.

- **Regulated Consumer Products and Consumer Product Safety**

These are subject to a panoply of special rules for marketing, labelling, safety standards and importation. We cover hazardous products, electronics, food, alcoholic beverages, natural health products, cosmetics and others, including recall issues and safety-related litigation. Want to know how the *Canada Consumer Product Safety Act* will impact your business? We can help.

- **Consumer Protection**

How does provincial consumer protection impact your consumer agreements, programs and warranties? We can assist you to figure it out.

- **Quebec's Unique Issues**

We advise on French language issues, restrictions on advertising to children, Quebec contest registration requirements and consumer protection legislation, including the extensive recent amendments to Quebec's *Consumer Protection Act*.

- **Agreements**

All kinds – including agency, talent, confidentiality, distribution, licensing, co-promotional, supply and sponsorship agreements.

- **Green**

As a key part of our practice, we focus on evolving environmental claim guidelines and cases, not only in Canada, but around the world. We are an active part of the firm's Climate, Cleantech & Sustainability Group, which offers an integrated service for "green" issues and projects of all kinds, from eco-advertising to extended producer responsibilities, patenting new technologies and acquiring, financing or setting up renewable energy, recycling and other facilities.

- **Global Campaigns and Programs**

We are the sole Canadian firm in the Global Advertising Lawyers Alliance ([gala-marketlaw.com](http://gala-marketlaw.com)), a network of marketing and advertising lawyers in over 50 countries. As part of this group, we help coordinate and obtain advice abroad for multi-national promotional programs and ad campaigns.

- **Branded Entertainment**

We help clients integrate marketing and advertising campaigns into various entertainment vehicles such as product placement and sponsorship agreements and corporately produced film, television, and Internet series.

## Heenan Blaikie

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## About Heenan Blaikie

Heenan Blaikie is recognized as one of Canada's leading law firms. We focus on six practice areas: business law, labour and employment, taxation, litigation, intellectual property and entertainment law. We deliver comprehensive legal advice and innovative business solutions to clients across Canada and abroad from our nine offices in Quebec, Ontario, Alberta and British Columbia, and our Paris office and Singapore representative office.

Today, the firm is over 575 lawyers and professionals strong and still growing. We strive to become partners in our clients' businesses, ensuring that our legal advice addresses their preoccupations and priorities. We seek to constantly adjust the scope of our services to better serve our clients' legal needs.

Our clients range in size and sophistication from start-ups to the largest public companies, as well as health care and social services institutions, schools and universities, and numerous government entities. We also represent international clients seeking to protect and expand their interests in Canada.

[heenanblaikie.com](http://heenanblaikie.com)

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