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The Canadian Competition Bureau's Draft Guidance for Going Green

Draft Guidelines and Public Consultation on Environmental Claims - What Businesses Need to Know

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In June 2024, amendments to the Canadian *Competition Act* (Act) garnered significant attention (and criticism) from both business and legal communities in Canada for the introduction of new "greenwashing" provisions. The new provisions explicitly require businesses to substantiate claims made to Canadian consumers relating to the benefits of a business, business activity, product or service for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change.

Shortly following the passage of these amendments, the Competition Bureau (Bureau) reported that it had received "a large number of requests for guidance" on the greenwashing provisions. The Bureau quickly launched an initial public consultation to inform its development of enforcement guidance relating to environmental claims. It also released a bulletin setting out its perspective on the enforcement of environmental claims under the Act prior to the recent amendments. The bulletin largely restated high-level principles that are relevant to assessing any claim under the misleading representation provisions of the Act.

In the closing days of 2024, the Bureau released for public consultation new draft guidance on its approach to assessing environmental claims under the Act, including the new greenwashing provisions. The Bureau's consultation is open until February 28, 2025.

Below we unpack key points from the Bureau's guidance on environmental claims, including its recent draft guidance.

Bill C-59 and the Greenwashing Amendments

With the passage of Bill C-59 on June 20, 2024, two new provisions aimed at cracking down on "greenwashing" were added to the civil misleading representation provisions in the Act:

1. The first provision applies to product-specific claims (which, by definition, include claims about services). It prohibits representations to the public in the form of statements, warranties or guarantees of a product or service's "benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change" that are not based on an "adequate and proper test." An "adequate and proper test" was already required under the Act to substantiate product performance claims.
2. The second provision applies to claims about businesses and their business activities more broadly, prohibiting representations to the public relating to the "benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change" unless such representations are based on "adequate and proper substantiation in accordance with internationally recognized methodology." Unfortunately, "internationally recognized methodology" is not used elsewhere in the Act. Nor was the concept clearly articulated in legislative discussions regarding the amendments. As a result, this provision has generated significant uncertainty for businesses operating in Canada.

Related Amendments

Beginning on June 20, 2025, private parties will be able to seek leave from the Competition Tribunal (Tribunal) to commence actions under the Act's civil misleading representation provisions, including the new greenwashing provisions. Until June 20, 2025, only the Bureau can enforce these provisions.

If the Bureau (or, beginning in June 2025, a private party) brings a successful action under the misleading representation provisions, the Tribunal may order the business to:

1. cease the impugned conduct;
2. pay a penalty of up to the greater of: (i) $10 million (or $15 million for a subsequent offence); and (ii) three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be determined, 3 percent of the business' global gross annual revenues;
3. pay restitution to affected customers; and
4. publish a notice correcting the misrepresentation.

Given the potentially significant penalties available for contraventions of the greenwashing provisions, it is important that businesses carefully assess their environmental claims. In the remainder of this bulletin, we highlight key points from the Bureau's guidance to-date that can help inform that assessment.

Initial Public Consultation and Guidance

On July 22, 2024, the Bureau launched an initial public consultation on the new greenwashing provisions. In parallel, the Bureau released the seventh volume of its semi-regular *Deceptive Marketing Practices Digest* series (Digest). This volume focuses on the Bureau's general approach to environmental claims under the Act.

The initial public consultation was intended to inform future Bureau enforcement guidance about environmental claims generally, and the new greenwashing provisions in particular. The questions posed for discussion were high-level and gave little indication of how the Bureau was likely to interpret the provisions. However, a few key points from the Digest are worth highlighting as "foundational" guidance on making environmental claims in Canada:

1. The Digest sets out the most common categories of environmental claims that are the subject of complaints to the Bureau, namely:
    a. claims about the composition of products or packaging (e.g., made from 100% recycled paper);
    b. claims about the steps or resources involved in a production process (e.g., carbon neutral production process);
    c. claims about disposal of products after use (e.g., recyclable);
    d. comparison claims (e.g., uses 25% less water);
    e. vague claims (e.g., eco-friendly); and
    f. claims about the future (e.g., the company will be carbon neutral by a certain date or highlighting certain positive environmental projects that "pale in comparison" to the impact from the business' total operations).

Claims falling within these categories warrant particular caution, as they appear to be the subject of heightened scrutiny from the public, including environmental advocacy groups.

2. The Digest offers high-level guidance for environmental claims, including recommendations to:
    a. ensure any "key information necessary for consumers not to be deceived is included" such that it will factor into the general impression of the claim;

b. for performance claims, ensure there is adequate and proper testing in support of the claim that is completed before the claim is made;

c. be specific about any comparisons;

d. avoid exaggeration ("While even small changes can add up when it comes to the environment, that doesn't mean that small changes should be marketed as big ones");

e. avoid vague environmental claims in favour of clear specific ones; and

f. exercise caution when making future-looking claims to ensure they are factual rather than aspirational.

While this guidance sets out high-level principles that could apply to any type of representations to the public, it is helpful to keep them in mind when assessing potential environmental claims to Canadian consumers.

Current Public Consultation on Draft Guidance

On December 23, 2024, the Bureau released draft guidance on environmental claims for public consultation. This draft guidance (unlike the initial guidance released earlier in the year) addresses how the Bureau will approach the new greenwashing provisions, as well as the application of the general false and misleading representation provisions to environmental claims.

As a threshold matter, the draft guidance clarifies that the Bureau's enforcement focus with respect to the greenwashing provisions is on marketing and promotional representations "rather than representations made exclusively for a different purpose, such as to investors and shareholders in the context of securities filings." The draft guidance adds that if representations made in securities filings are repeated in promotional materials, they will be considered marketing representations. Nonetheless, the clarification may provide some comfort to businesses that raised concerns that the expansion of the greenwashing provisions to explicitly include claims about businesses and business activities could capture disclosure in securities filings.

Additionally, the draft guidance states that:

1. The Bureau will interpret "adequate and proper testing" with reference to the existing body of case law that has defined this requirement under the more general misleading representation provisions of the Act. In other words, the testing must be "fit, apt, suitable or as required by the circumstances." This is a flexible standard and will require a context-specific assessment of the claim and appropriate testing procedures.

2. The Bureau "will likely consider a methodology to be internationally recognized if it is recognized in two or more countries." Importantly, the guidance acknowledges that the Act does not require recognition of the methodology by governments in two or more countries and further acknowledges that a methodology developed by an industry and recognized in two or more countries may meet this requirement. (The substantiation in accordance with such methodology would still have to be adequate and proper.)

3. Testing and third-party verification will not necessarily be required to meet the requirement of substantiation in accordance with an internationally recognized methodology, unless the methodology requires such testing or verification. However, the guidance notes that third-party verification may nonetheless be helpful to support the credibility of claims.

4. The Bureau "starts with the assumption that methodologies required or recommended by government programs in Canada for the substantiation of environmental claims are consistent with internationally recognized methodologies". However, the Bureau adds that businesses will still need to confirm that such methodologies are internationally recognized and provide adequate and proper substantiation suitable for the claim. A Senate Committee report on the amendments expressed a clearer intention to recognize methodologies endorsed by Canadian governments. According to that report, "the Committee believes that the analysis [of what is considered an internationally recognized methodology] should also include federal and other Canadian best practices, such as those set out by Environment and Climate Change Canada." However, if endorsements of Environment and

Climate Change Canada are "recognized" in at least one other country for the purposes of the Act's greenwashing provision, that may suffice under the Bureau's draft guidance. It will be interesting to see if this point is clarified following the public consultation.

While these positions are generally helpful, it is disappointing that the Bureau has not provided more specific or detailed guidance, particularly in light of indications from businesses in Canada that the provisions have created significant uncertainty. By contrast, previous Bureau guidance in the now-archived Environmental Claims guide provided detailed (and helpful) direction on the use of particular types of claims and phrases. Since the Bureau's Environmental Claims guide was archived in 2021, the Bureau has said that the guide no longer represents the Bureau's views. As a result, businesses advertising in Canada are left with much less clarity on how the Bureau now approaches these types of claims.

Also notable is that, prior to the introduction of the new greenwashing provisions, detailed guidance was being developed by Environment and Climate Change Canada in connection with regulations that were to be promulgated under the *Canadian Environmental Protection Act*, 1999 (CEPA) to address the labelling of recyclable, compostable and recycled content. In 2023, Environment and Climate Change Canada issued a framework paper that includes a detailed discussion of how Canadian businesses should approach such recyclability and compostability labelling and claims. However, the Bureau's proposed guidance does not refer to this detailed work, nor indicate whether Canadian businesses can take comfort that complying with the labelling rules proposed therein would avoid challenge from the Bureau.

The Bureau is accepting submissions to its public consultation until February 28, 2025.

Implications

For several years, the Bureau has indicated that misleading environmental claims are an enforcement priority. This focus has been bolstered by advocacy from environmental groups, which have frequently brought complaints to the Bureau and triggered investigations into alleged greenwashing by businesses advertising in Canada.

With the forthcoming extension of private rights of action to the Act's civil misleading representation provisions, including the greenwashing provisions, we expect to see even greater scrutiny of environmental claims. While the Bureau's draft guidance provides some welcome clarification, it does not provide detailed guidance on how businesses should approach specific types of environmental claims. It is also worth noting that this guidance is not binding on the Competition Tribunal or private plaintiffs. Accordingly, businesses operating in Canada should consider applying a rigorous vetting and substantiation process before making environmental claims, particularly those within the scope of the recent greenwashing amendments.

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